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

EVAN J. POWER,

Plaintiff,

CASE NO.: 2020-CA-001200

vs.

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

Defendant.

_____/

LEON COUNTY'S MOTION TO DISMISS

The Defendant, Leon County, Florida (the "County"), a political subdivision of the State of Florida, pursuant to Rule 1.140, Florida Rules of Civil Procedure, moves to dismiss Plaintiff's Verified Complaint ("Complaint") and states as follows:

BACKGROUND

We currently face a global pandemic in the form of COVID-19. Chief Justice Roberts recently described COVID-19 as "a novel severe acute respiratory illness that has killed . . . more than 100,000 nationwide" and noted that "at this time, there is no known cure, no effective treatment, and no vaccine" and "[b]ecause people may be infected but asymptomatic, they may unwittingly infect others." *See S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

COVID-19 is an unusual virus in that it can be spread by asymptomatic individuals. The main method of transmission is via airborne particles caused by people coughing, sneezing, and even talking. Merely exhaling can cause particles to become airborne. Facial coverings, as well

as social distancing, are important for minimizing the transmission of this highly contagious and sometimes lethal virus.[1]

Several measures—at the federal, state, and local level—have been taken to slow the spread of COVID-19. On March 13, 2020, the President of the United States declared a national state of emergency. *See* **Ex. A** to Motion for Judicial Notice. In Florida, Governor DeSantis declared a state of emergency via Executive Order 20-52 on March 9, 2020. *See* **Ex. B** to Motion for Judicial Notice.[2] And in Leon County, the Leon County Board of County Commissioners (the "Board") has issued at least weekly Emergency Orders ("Proclamations") each week since March 16, 2020. *See* **Ex. C** to Motion for Judicial Notice.

On April 1, 2020, Governor DeSantis issued Executive Order 20-91, putting in place a statewide "safer at home" order, directing the closure of "non-essential services and activities" and limiting the movement of persons. *See* **Ex. D** to Motion for Judicial Notice. Then, on May 4, 2020, Governor DeSantis issued Executive Order 20-112 to begin Phase 1 of re-opening of the state. Executive Order 20-112 rolled back many of the restrictions found in Executive Order 20-91 and permitted more retail business and restaurants to open. *See* **Ex. E** to Motion for Judicial Notice. The re-opening of the state has led to more contact between individuals and the potential for increased community spread.

Despite efforts to mitigate the spread of COVID-19, the number of cases continues to rise in Florida—and specifically in Leon County. On June 19, 2020, the Florida Department of Health reported 51 new positive cases of COVID-19 in Leon County. *See* **Ex. G** to Motion for Judicial

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[1] *See* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html

[2] The state of emergency was extended in Executive Order 20-114 issued on May 8, 2020. *See* **Ex. F** to Motion for Judicial Notice.

Notice. On June 22, 2020, Florida reported more than 4,000 new cases of COVID-19 in a single day. *See Id.* To further slow the rate of new cases, on June 23, 2020, the Board held a special meeting for the single purpose of discussing the recent increase in COVID-19 cases in Leon County and to consider additional mitigation efforts. Prior to and during the meeting, the Board was provided information regarding mandatory face covering requirements adopted in other parts of the State along with information from the Florida Department of Health confirming a spike in local positive COVID-19 cases. *Id.* The Board unanimously adopted face covering requirements through Emergency Ordinance 20-15 ("Emergency Ordinance" or "Ordinance"). *See Id.* The Emergency Ordinance requires an individual in a business establishment to wear a face covering while in that business establishment. *Id.* §3.(i). "Business establishment" is defined by the Emergency Ordinance to mean:

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

Id. §2. (ii). Notably, the requirement to wear a face covering does not apply in the following circumstances:

> 1. A child under the age of 6;
>
> 2. Persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medical problem;
>
> 3. Public safety, fire, and other life safety and health care personnel, as their personal protective equipment requirements will be governed by their respective agencies;
>
> 4. Persons exercising while observing at least 6 feet of distancing from another person;

5. Restaurant and bar patrons while eating or drinking;

6. Business owners, managers, and employees who are in an area of a business establishment that is not open to customers, patrons, or the public, provided that 6 feet of distance exists between persons;

7. An individual in a lodging establishment who is inside of the lodging unit.

Id. §3.(ii). The Emergency Ordinance does not impose criminal penalties for a violation. Instead, a first offense of the Emergency Ordinance results in a fine of $50; a second offense results in a fine of $125; and a third and each subsequent offense results in a fine of $250. *Id.* §4(ii).

Plaintiff now brings this case to enjoin an action the County deemed necessary to protect the public health and welfare of visitors and residents of Leon County during an unprecedented public health crisis. Because Plaintiff failed to properly plead ultimate facts upon which relief may be granted, failed to perform all conditions precedent to bringing this action, and failed to state a cause of action for either injunctive or declaratory relief, Plaintiff's Complaint should be dismissed.

ARGUMENT

Standard for Motion to Dismiss

"On a motion to dismiss, a trial court must accept the facts alleged in the complaint as true and must draw all reasonable inferences in favor of the pleader." *Cocco v. Pritcher,* 1 So. 3d 1246, 1248 (Fla. 4th DCA 2009) (citing *Taylor v. City of Riviera Beach,* 801 So. 2d 259, 262 (Fla. 4th DCA 2001)). However, the court is not required to accept legal conclusions as true. *First Nat'l Bank in St. Petersburg v. Ferris,* 156 So. 2d 421, 424 (Fla. 2d DCA 1963); *Esposito v. Horning,* 416 So. 2d 896, 898 (Fla. 4th DCA 1982) (citations omitted) ("In testing the complaint to see if it can withstand a motion to dismiss . . . the well-pleaded facts are admitted, but not conclusions of law or the opinions of the pleader.").

Standard of Review for Constitutional Challenges

The Complaint fails to indicate whether Plaintiff's challenge is a facial challenge or an as-applied challenge. An as-applied challenge is an argument that a particular piece of legislation is constitutional on its face, yet is unconstitutional as applied to a particular case or party because of its discriminatory effects. *Miles v. City of Edgewater Police Dept./Preferred Governmental Claims Solutions*, 190 So. 3d 171, 178 (Fla. 1st DCA 2016). In contrast, a facial challenge asserts that a statute always operates unconstitutionally. *Id.* Because Plaintiff does not claim that the Emergency Ordinance is unconstitutional with respect to a certain set of facts which leads to a discriminatory effect, it would appear that his claim is that the Emergency Ordinance is facially unconstitutional.

"To succeed on a facial challenge, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally valid." *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018). Showing a challenged law "might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face." *Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008) (quoting *Cashatt v. State*, 783 So. 2d 430, 434 (Fla. 1st DCA 2004)). Therefore, a facial challenge is more difficult than an as-applied challenge as a general matter. *Id.*

Moreover, courts should not overturn legislative enactments lightly because "statutes come clothed with a presumption of constitutionality" and "must be construed whenever possible to effect a constitutional outcome." *Brinkmann v. Francois*, 184 So. 3d 504, 507-508 (Fla. 2016) (citations omitted). This presumption of constitutionality can only be overcome by a showing of invalidity "beyond a reasonable doubt," meaning the presumption applies unless the legislative

enactment is "clearly erroneous, arbitrary, or wholly unwarranted." *State v. Hodges*, 506 So. 2d 437, 439 (Fla. 1st DCA 1987) (citing *State v. State Bd. of Educ. of Fla.*, 467 So. 2d 294 (Fla. 1985). "All doubts as to validity must be resolved in favor of constitutionality, . . . and if a constitutional interpretation is available, the courts must adopt that construction." *Hodges*, 506 So. 2d at 439 (internal citation omitted).

Against this backdrop, this Court should weigh Plaintiff's constitutional claims.

I. The Complaint is Defectively Pleaded

The Complaint is defectively pleaded because it fails to set forth a short plain statement of the ultimate facts upon which Plaintiff is entitled to relief as required by Rule 1.110, Florida Rules of Civil Procedure. To be sufficient, a complaint must adequately allege ultimate facts which, if established by competent evidence, would establish a cause of action upon which relief may be given. *See Barrett v. City of Margate,* 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999) ("It is a cardinal rule of pleading that a complaint be stated simply, in short plain language."); *Maiden v. Carter*, 234 So. 2d 168, 170 (Fla. 1st DCA 1970); *Naples Builders Supply Co. v. Clutter Construction Corp.*, 152 So. 2d 478, 479 (Fla. 3d DCA 1963). Additionally, a complaint must set out elements and the facts that support them. *Barrett,* 732 So. 2d at 1162. Plaintiff's Complaint is anything but a short plain statement of facts. Instead of pleading ultimate facts upon which this Court may grant relief, Plaintiff pleaded his opinion, legal theories, and his conclusions in an attempt to have this Court declare the Emergency Ordinance unconstitutional. Mere legal conclusions, without supporting facts, are insufficient to state a cause of action. *Barrett*, 743 So. 2d at 1163 (Fla. 4th DCA 1999) ("It is insufficient to plead opinions, theories, legal conclusions, or argument."); *Doyle v. Flex*, 210 So. 2d 493, 494 (Fla. 4th DCA 1968). Plaintiff, however, has done just that, and only that.

Plaintiff's Complaint is replete with claims that the Emergency Ordinance is unconstitutional, yet the Complaint fails to set out facts explaining *how* it is unconstitutional. For example, in paragraph 12 of the Complaint, Plaintiff alleges "Emergency Ordinance 20-15 is a radical infringement of the reasonable and legitimate expectation of privacy that most Floridians expect to have over their own bodily and facial autonomy in addition to their medical privacy." The Complaint, however, fails to allege facts as to *how* the Emergency Ordinance radically infringes upon Floridians' expectation of privacy in any way when individuals are in business establishments. Such allegations are not facts upon which the County may admit or deny, and as such, is not appropriately included as a factual allegation in the Complaint. This Court, therefore, should dismiss the Complaint for noncompliance with Rule 1.110, Florida Rules of Civil Procedure.

II. Plaintiff Failed to Comply with Section 86.091 and Rule 1.071

Plaintiff's Complaint should also be dismissed for failing to comply with section 86.091, Florida Statutes, and Rule 1.071, Florida Rules of Civil Procedure. Section 86.091, Florida Statutes, provides, in pertinent part, that when an ordinance is alleged to be unconstitutional, "the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard." § 86.091, Fla. Stat. (2019). The purpose of the statute is "to ensure that the state . . . is aware of any litigation in which a plaintiff seeks a declaratory judgment that any of the enumerated forms of legislation is unconstitutional, and afforded an opportunity to present the state's position." *See Martin Mem'l Med. Ctr., Inc. v. Tenet Healthsystem Hosps., Inc.*, 875 So. 2d 797, 800 (Fla. 1st DCA 2004). Similarly, Rule 1.071, Florida Rules of Civil Procedure, was adopted in 2010 to clarify the requirements of section 86.091, Florida Statutes, and provides that a party that files a pleading or document challenging

the constitutionality of an ordinance must promptly: (1) file a notice of constitutional question stating the question and identifying the document that raises it; and (2) serve the notice and the pleading, written motion, or other document drawing into question the constitutionality of the ordinance on the Attorney General or the state attorney of the judicial circuit in which the action is pending by either certified or registered mail. *See* Fla. R. Civ. P. 1.071; *see also Shelton v. Bank of New York Melon*, 203 So. 3d 1003, 1005 (Fla. 2d DCA 2016).

In the present case, Plaintiff raises no issue besides the constitutionality of the County's Emergency Ordinance, yet Plaintiff failed to allege performance of all conditions precedent to maintain this action. *See* Compl. Additionally, Plaintiff failed to file the notice of constitutional question with this Court as required by Rule 1.071(a), Florida Rules of Civil Procedure. As a result, this Court cannot consider the constitutional issues raised by Plaintiff. *See Shelton*, 203 So. 3d at 1005 ("In this case, Mr. Shelton's objection to the notice of sale does not state that the Attorney General or state attorney was served. As a result, we cannot consider the constitutional issue.") (citations omitted); *see also Hudder v. City of Plant City,* Case No. 8:14-ccv-01686-T-EAK-EAJ, 2014 WL 7005904, at *1 (M.D. Fla. Dec. 10, 2014) (dismissing the complaint for plaintiff's failure to serve the Attorney General or state attorney with a copy of the complaint). Because the specific procedural prerequisites to maintaining a constitutional challenge have not been met in this case, this Court should dismiss Plaintiff's Complaint.

III. Plaintiff Failed to State a Cause of Action for Injunctive Relief

Plaintiff fails to state a cause of action for entry of a temporary injunction. The purpose of a temporary injunction is to preserve the status quo while final injunctive relief is sought. *Dep't of Health v. Bayfront HMA Med. Ctr., LLC,* 236 So. 3d 446, 471 (Fla. 1st DCA 2018 (citation omitted). A temporary injunction is considered an extraordinary remedy and should only be

granted sparingly. *Id.* (citation omitted). To obtain a temporary injunction, the movant must establish: (1) a substantial likelihood of success on the merits; (2) a lack of an adequate remedy at law; (3) the likelihood of irreparable harm absent the entry of an injunction; and (4) the injunctive relief will serve the public interest. *Id.* at 472.

Further, it is well settled that pleadings must demonstrate a right to a temporary and permanent injunction. *Smith v. Bateman Graham, P.A.*, 680 So. 2d 497, 499 (Fla. 1st DCA 1996). A complaint for injunctive relief must allege every necessary fact clearly, definitely, and unequivocally and should state something more than conclusions and opinions of the plaintiff. *See Central & S. Fla Flood Control Dist. v. Scott*, 169 So. 2d 368, 370 (Fla. 2d DCA 1964). Simply put, Plaintiff has not alleged facts demonstrating a clear right to the temporary injunction Plaintiff seeks.

A. Plaintiff Cannot Show 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.* Here, Plaintiff has failed to show a substantial likelihood of success on the merits.

1. The Board's Emergency Powers

It is important to view the actions of the Board in the context in which they were taken. The COVID-19 pandemic has continued for several months and has, as of July 2, 2020, killed approximately 112,700 persons in the United States. *See* Centers for Disease Control and Prevention, *Daily Updates of Totals by Week and State; Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)* (July 2, 2020), https://cdc.gov/nchs/nvss/vsrr/covid19/index.htm. In Florida, the cases are continuing to rise. As of July 2, 2020, the Florida Department of Health has

reported a total of 169,106 positive cases within the state, including 1,377 positive cases in Leon County. Florida Department of Health, *Florida COVID-19 Response,* (July 2, 2020), https://floridahealthcovid19.gov./ To date, there have been a total of 3,617 deaths in Florida. *Id.* There can be no question that an emergency exists. *See Dodero, et al., v. Walton Cty.,* Case No. 3:20-cv05358-RV/HTC (N.D. Fla. Apr. 17, 2020) ("We are in the midst of a national health emergency, and it seems highly likely at this stage of the case that the county has the authority to take the measure that it has in order to address that emergency.").[3]

It has long been recognized that when, as here, there is an emergency, the police power gives governmental authorities power to act for the public welfare that they might not otherwise have. This line of cases extends back to the 1905 United States Supreme Court case of *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11 (1905):

> The 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.

Courts have subsequently, and recently, applied the standard set forth in *Jacobson* to assess the constitutionality of a state or local official's exercise of emergency police powers. *See, e.g., Best Supplement Guide, LLC v. Newsom,* Case No. 2:20-cv-00965-JAM-CKD, 2020 WL 2615022 (E.D. Cal. May 22, 2020); *Henry v. DeSantis,* Case No. 20-cv-80729-SINGHAL, 2020 WL 2479447 (S.D. Fla. May 14, 2020).

[3] The court in *Dodero, et al.,* denied a motion for temporary injunction seeking to enjoin a local ordinance closing down local beaches in light of COVID-19.

In *Jacobson,* the U.S. Supreme Court addressed a claim that the state's compulsory vaccination law, which was enacted during a growing smallpox epidemic, violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." *Jacobson,* 197 U.S. at 26. In rejecting the claim, the Supreme Court explained:

> The liberty secured by the Constitution . . . 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.

Id. at 26. Instead, a "community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. Thus, in explaining a state's police power to combat an epidemic, the Supreme Court explained:

> [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29.

Importantly, it is "no part of the function of a court to decide which measures are likely to be the most effective for the protection of the public against disease." *In re Abbott,* 954 F. 3d 772, 778 (5th Cir. 2020) (quoting *Jacobson,* 197 U.S. at 29). When, as here, a court is faced with a society-threatening epidemic, "a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Id.* at 784 (quoting *Jacobson,* 197 U.S. at 31).

2. The Emergency Ordinance Bears a Real and Substantial Relationship to the COVID-19 Pandemic

The novel COVID-19 virus is extremely infectious and can "easily spread through droplets generated when an infected person coughs or sneezes, or through droplets of saliva or discharge from the nose." *See Best Supplement Guide, LLC,* 2020 WL 2615022, at *3. Indeed, this fact was considered by the Board during its June 23, 2020, meeting. *See* **Ex. E** (noting that the Florida Medical Association President explained that asymptomatic individuals "can release aerosol particles while breathing and speaking" and that "[n]ot wearing a mask or face covering increases exposure, whereas universal masking greatly reduces the spread of viral particles"). Additionally, the Centers for Disease Control recommends the use of cloth face coverings in public settings when other social distancing measures are difficult to maintain. *Id.*

As explained above, the numbers in Florida, including Leon County, are continuing to rise, and the Emergency Ordinance, which requires the use of face coverings in limited circumstances (*i.e.,* in business establishments), seeks to temper the rise of positive cases and slow down the rate of infection. Similar emergency actions taken by local governments have been determined to have a real and substantial relationship to public health during the current COVID-19 pandemic. *See, e.g., Prof'l Beauty Fed'n v. Newsom,* Case No. 2:20-cv-04275-RGK-AS, 2020 WL 3056126, at *6 (C.D. Cal. June 8, 2020) (finding the stay-at-home order which temporarily closed cosmetology businesses bears a real and substantial relationship to public health because spread of COVID-19 is more likely when people are in close contact, such as hair stylists and barbers); *Best Supplement Guide, LLC,* 2020 WL 2615022, at *3 (finding the state and county gym closures bear a real and substantial relationship to public health when workout facilities contain high density groups, breathing heavily, and sharing equipment); *Givens v. Newsom,* Case No. 2:20-cv-008520JAM-CKD, 2020 WL 2307224, at *4 (E.D. Cal. May 8, 2020) (finding a stay-at-home order bears a real

and substantial relationship to public health because it sought to slow the rate of transmission). Accordingly, the Emergency Ordinance bears a real and substantial relationship to the current public health crisis.

3. The Emergency Ordinance is Not Beyond All Question a Plain, Palpable Invasion of Fundamental Rights

The second question to be addressed under *Jacobson* is whether the Emergency Ordinance is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson,* 197 U.S. at 31. "Although courts have not yet defined the precise contours of this standard, it plainly puts a thumb on the scale in favor of upholding state and local officials' emergency public health responses." *Best Supplement Guide, LLC,* 2020 WL 2615022, at *4.

i. Right to Privacy

Plaintiff first asserts that the Emergency Ordinance violates the Privacy Clause of Article 1 § 23 of the Florida Constitution. Article 1 § 23 provides in relevant part:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.

As explained in *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Reg.,* 477 So. 2d 544, 547 (Fla. 1985), the "right of privacy is a fundamental right which . . . demands the compelling state interest standard." "The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Winfield,* 477 So. 2d at 547. However, the constitutional right to privacy does not confer an *absolute* guarantee against governmental intrusion into one's private life and the right will "yield to compelling government interests." *Id.* Importantly, "before the right of privacy is attached, and the delineated standard applied, a reasonable expectation of privacy must exist." *Id.* (emphasis added)*; see also Daniel v. Daniel,* 922 So. 2d 1041 (Fla. 4th DCA 2006) (explaining

that courts must first determine if the individual possesses a legitimate expectation of privacy in the information or subject at issue).

Here, there is not and cannot be a legitimate expectation of privacy. The Eight Judicial Circuit in Alachua County recently addressed a nearly identical claim in *Green v. Alachua Cty.,* Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020). In that case, the plaintiff sought an injunction enjoining Alachua County from enforcing a similar mask requirement. *Green,* Case No. 01-2020-CA-001249. Judge Keim 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 in original). Judge Keim then compared the mandate to wear masks in limited circumstances to the requirement to wear helmets or seatbelts. *Id.* "The stated purpose for the mask requirement is to limit the spread of this contagious, airborne virus. . . . Alachua County citizens' right to be let alone is no more precious than the corresponding right of his fellow citizens not to become infected by that person and potentially hospitalized." *Id.* (emphasis added).

No recognized right to a reasonable expectation of privacy exists in a public location. *See Picou v. Gillum,* 874 F.2d 1519, 1521 (11th Cir. 1989) (examining Florida's motorcycle helmet laws and holding that "[t]here is little that could be termed private in the decision whether to wear safety equipment on the open road"); *see also Pottinger v. City of Miami,* 810 F. Supp. 1551 (S.D. Fla. 1992) (noting an individual does not have a protected legitimate expectation of privacy in activities such as sleeping and eating in public). Nothing within the Emergency Ordinance requires the County's citizens to use a face covering in private. Instead, the Emergency Ordinance only requires the use of face coverings in limited public circumstances, and provides certain exceptions

to that requirement. Accordingly, Plaintiff cannot show that the Emergency Ordinance, beyond all question, is a plain, palpable invasion of Article 1, section 23 of the Florida Constitution.

ii. Substantive Due Process

Next, Plaintiff claims the Emergency Ordinance violates the substantive due process clause found in Article 1, section 9, of the Florida Constitution, which provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Specifically, Plaintiff asserts the Emergency Ordinance is "not backed by a compelling state interest or any facts proving such interest" particularly when, according to Plaintiff, the "curve has been successfully flattened" and hospitalizations in Leon County have decreased. Compl. ¶ 13.

"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) (quoting *Palko v. Conn.,* 302 U.S. 319, 325-26 (1937)). These special liberty interests usually include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Doe v. Moore,* 410 F. 3d 1337, 1343 (11th Cir. 2005) (citation omitted). Indeed, courts have been reluctant to expand substantive due process by recognizing new fundamental rights. *Id.* Thus, "[a]nalyzing a substantive due process claim begins with a 'careful description of the asserted right.'" *Jackson,* 191 So. 3d at 428 (quoting *Reno v. Flores,* 507 U.S. 292, 302 (1993)).

Here, Plaintiff attempts to implicate the right to privacy and freedom of religion. Both are recognized as fundamental rights.[4] *See State v. J.P.,* 907 So. 2d 1101, 1109 (Fla. 2004); *Joseph v.*

[4] It is questionable whether Plaintiff's claims truly implicate fundamental rights. The fact that a challenged law "may have an indirect effect on a fundamental right does not subject it to strict scrutiny." *See Jackson v. State,* 137 So. 3d 470, 475-46 (Fla. 4th DCA 2014) (citations omitted).

State, 642 So. 2d 613, 614 (Fla. 4th DCA 1994). When a statute encroaches on fundamental constitutional rights, the strict scrutiny test applies. Under this test, "the statute . . . must be narrowly tailored to achieve the state's purpose." *State v. Robinson,* 873 So. 2d 1205, 1214 (Fla. 2004) (internal citations omitted). "[T]he State must prove that the legislation furthers a compelling state interest through the least intrusive means." *Silvio Membreno & Fla. Ass'n of Vendors, Inc. v. City of Hialeah,* 188 So. 3d 13, 22 (Fla. 3d DCA 2016); *see also Mitchell v. Moore,* 786 So. 2d 521, 527-238 (Fla. 2001). "Narrowly tailored" means that "the method for remedying the asserted malady must be strictly tailored to remedy the problem in the most effective way and must not restrict a person's rights more than absolutely necessary." *Mitchell,* 786 So. 2d at 527.

It is clear that the County's interest in minimizing the spread of COVID-19 is a compelling state interest. *See Murray v. Cuomo,* Case No. 1:20-cv-03571-MKV, 2020 WL 2521449, at *10 n. 12 (S.D.N.Y. May 18, 2020) ("Courts have held that the Government's interest in minimizing the spread of deadly infectious disease is a compelling state interest."); *SH3 Health Consulting, LLC v. Page,* Case No. 4:20-cv-00605 SRC, 2020 WL 2308444, at *8 (E.D. Mo. May 8, 2020) (finding the "City and County adopted the Orders in this case to serve a compelling state interest – their interest in maintaining the health and safety of the public during a global pandemic, and to slow the transmission of COVID-19"); *Gish v. Newsom,* No. EDCV20755JGBKKX, 2020 WL 1979970, at *6 (C.D. Cal. Apr. 23, 2020) (finding slowing the spread of COVID-19 is a "state interest that is not only legitimate but compelling"). Contrary to Plaintiff's assertion, the curve has

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Indeed, the root of Plaintiff's claim concerns the right to not wear a face covering in public, which the court in *Green,* Case No. 01-2020-CA-001249, determined was not a constitutional right. Further, the Emergency Ordinance, as it applies to religion, is neutral on its face. Under such circumstances, the rational basis test would apply. Further, the use of face masks is rationally related to the legitimate interest of slowing the spread of COVID-19. *See Henry v. DeSantis,* Case No. 20-cv-80729-SINGHAL, 2020 WL 2479447 (S.D. Fla. May 14, 2020). Nevertheless, the County will address the Emergency Ordinance under the strict-scrutiny test.

not been successfully flattened. As explained above, Florida, including Leon County, has recently experienced a surge of positive COVID-19 cases. The Emergency Ordinance seeks to temper this rise in positive cases and reduce the transmission of the potentially deadly virus among the County's citizens.

Furthermore, the Emergency Ordinance is narrowly tailored to achieve that interest. The Board considered evidence that the use of facial coverings assists to prevent and slow the spread of COVID-19. The Emergency Ordinance only applies in business establishments and includes a multitude of exceptions to wearing the face coverings. The court in *Calvary Chapel of Bangor v. Mills,* Case No. 1:20-cv-00156-NT, 2020 WL 2310913, at *9 (D. Me. May 9, 2020) addressed a similar claim. In that case, the court addressed claims that the Governor's orders issued in response to COVID-19 that limited the size of gatherings to ten people violated Calvary Chapel's constitutional and statutory rights. Finding the orders were neutral on their face, the court rejected Calvary Chapel's Free Exercise of Religion Clause. *Calvary Chapel of Bangor,* 2020 WL 23310913, at *7. The court further explained that even if the orders were subject to heightened scrutiny, the Governor would be able to show a compelling government interest in preventing the spread of COVID-19 and that the order is narrowly tailored to achieve that interest when drive-in or streamed religious services were not restricted. *Id.* at *9 n.17.

Thus, Plaintiff cannot establish the Emergency Ordinance is beyond all question a plain, palpable invasion of his substantive due process rights because the county has a compelling interest in slowing the spread of COVID-19 and the Emergency Ordinance is narrowly tailored to that interest. *See, e.g., Antietam Battlefield KOA v. Hogan,* Case No. CV CCB-20-1130, 2020 WL 2556496, at *13 (D. Md. May 20, 2020) (finding the plaintiffs have not demonstrated a likelihood of success that the order which allowed drive-in, virtual and small religious services and gatherings

would fail under strict scrutiny); *Legacy Church, Inc. v. Kunkel,* Case No. CIV 20-0327 JB/SCY, 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (finding that even if strict scrutiny applies, the church was not likely to succeed on the merits given the state's police powers to protect the public health and because the religious organizations could still broadcast their services to followers via the internet and over television).

iii. Void for Vagueness

Plaintiff also claims the Emergency Ordinance violates Article 1, section 9, of the Florida Constitution, because section 3(ii)(b) is void for vagueness. Section 3(ii)(b) of the Emergency Ordinance lists exceptions to the face covering requirement, and provides that the requirement does not apply to:

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

See **Ex. G** to Motion for Judicial Notice. Plaintiff claims this part of the Emergency Ordinance fails to define terms like "chronic pre-existing," "documented," "demonstrable medical problem," and "sensory," and that the exception is too vague for the average citizen to understand.

A statute or ordinance is considered void for vagueness when, because of its imprecision, it fails to give adequate notice of what conduct is prohibited and, therefore, invites arbitrary and discriminatory enforcement. *Wyche v. State,* 619 So. 2d 231, 236 (Fla. 1993). To test vagueness, the court must determine if the statute or ordinance "gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." *Kuvin v. City of Coral Gables,* 62 So. 3d 625, 639-40 (Fla. 3d DCA 2010) (quotation omitted). "The fact that several interpretations of an ordinance may be possible does not render a law void for vagueness." *City of Daytona Beach v. Del Percio,*

476 So. 2d 197, 200 (Fla. 1985). Indeed, "[w]ords 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." *Id.* (quotation marks and citation omitted). Moreover, a less stringent standard is applied when, as here, the court examines a noncriminal statute or ordinance. *Zerweck v. State Comm'n on Ethics,* 409 So. 2d 57, 60 (Fla. 4th DCA 1982).

In *Davis v. Gilchrist Cty. Sheriff's Office,* 280 So. 3d 524 (Fla. 1st DCA 2019), the county sheriff's office filed a petition seeking a risk protection order and removal of a deputy sheriff's firearms pursuant to a "red flag" statute enacted in response to the shootings at Marjory Stoneman Douglas High School. The statute provided:

> Upon notice and a hearing on the matter, if the court finds by clear and convincing evidence that the respondent poses a significant danger of causing personal injury to himself or herself or others by having in his or her custody or control, or by purchasing, possessing, or receiving, a firearm or any ammunition, the court must issue a risk protection order for a period that it deems appropriate, up to and including but not to exceed 12 months.

Davis, 280 So 3d at 528 (citing § 790.401(3)(b), Fla. Stat.). The deputy sheriff challenged the statute's constitutionality, claiming it was void for vagueness because the terms "significant danger," "relevant evidence" and "mental illness" were not defined. *Id.* at 532. The court in *Davis* determined, however, that there was "nothing inherently vague" about the terms the appellant sought to scrutinize. *Id.* The court explained that the word "significant" in a manner consistent with standard dictionary synonyms means noteworthy, or worthy of attention and consequential. *Id.* Further, the term "relevant" is commonly used. *Id.* Thus, the court in *Davis* upheld the constitutional integrity of the statute. *Id.* at 533.

Like the terms challenged in *Davis,* the words in the Emergency Ordinance with which Plaintiff takes issue are not inherently vague such that a person of common intelligence must guess

as to their meaning. Indeed, the term "chronic" as in "chronic pre-existing" is synonymous with the terms long-lasting or enduring, while the term "pre-existing" is self-explanatory (*i.e.*, something that existed before). *See Sims v. State,* 510 So. 2d 1045, 1047 (Fla. 1st DCA 1987) (explaining that even if critical words are not statutorily defined, "they can be readily understood by reference to commonly accepted dictionary definitions") (citations omitted). Additionally, Plaintiff admits that the term "documented" means "described" or "recorded." Compl. ¶ 14. The term "demonstrable" as in "demonstrable medical problem" means evident or capable of being demonstrated. Lastly, the use of the terms "medical problem" and "sensory" are explained in the Ordinance as conditions that may make it difficult for the person to wear a face covering and function in public. *See* **Ex. G** to Motion for Judicial Notice. Plaintiff has not, and cannot, show that these phrases cannot be understood by persons of common intelligence. Therefore, Plaintiff has not shown that the Emergency Ordinance, beyond all question, is a plain, palpable invasion of his due process rights. *See Givens,* 2020 WL 2307224, at *9 (denying a motion for temporary injunction seeking to enjoin an ordinance postponing or cancelling all gatherings during COVID-19 on the grounds that the ordinance was void for vagueness).

iv. Equal Protection

Next, Plaintiff asserts that the Emergency Ordinance violates the Equal Protection Clause in Article 1, section 2, of the Florida Constitution. The Equal Protection Clause provides:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Here, Plaintiff claims the Emergency Ordinance violates this clause because it exempts certain government employees. Specifically, the Emergency Ordinance in section 3(ii)c. provides that the

face covering requirement does not apply to "[p]ublic safety, fire, and other life safety and health care personnel, as their personal protective equipment requirements will be governed by their respective agencies. *See* **Ex. G** to Motion for Judicial Notice (emphasis added).

Where, as here, the challenged provision does not involve a suspect class or fundamental right, the rational basis test will apply to evaluate an equal protection challenge. *Estate of McCall v. United States,* 134 So. 3d 894, 901 (Fla. 2014). "To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed." *Id.* (citation omitted). Stated otherwise, "the test for consideration of equal protection is whether individuals have been classified separately based on a difference which has a reasonable relationship to the applicable statute and the classification can never be made arbitrarily without a reasonable and rational basis." *Id.* In these circumstances, doubts must be resolved in favor of the statute's constitutionality. *Samples v. Fla. Birth-Related Neurological,* 40 So 3d 18, 23 (Fla. 5th DCA 2010).

Plaintiff appears to overlook that while public safety, fire, and other life safety and health care personnel are not subject to the Ordinance, they are nevertheless subject to whatever personal protective equipment ("PPE") requirements are mandated by their respective agencies. *See* **Ex. G** to Motion for Judicial Notice. This does not mean these persons will not be wearing masks. Instead, it likely means that these persons will be wearing *more* than just face coverings. Contrary to Plaintiff's contention, public safety, fire, and other life safety and health care personnel are likely to have a *higher* risk of exposure and infection than the general population of Leon County residents due to the nature of their professions. That, in and of itself, constitutes a legitimate reason

to draw a distinction between these persons and the average resident.[5] And, given the level of contact these public health and safety personnel have with the members of the public, requiring more specified PPE is reasonably related to the goal of slowing the rate of infection and decreasing the positive cases of COVID-19 in the County. Thus, Plaintiff cannot show that the Emergency Ordinance's designation between residents and those public health and safety individuals identified in section 3(ii)b is beyond all question a plain, palpable invasion of the right to equal protection. *See Prof'l Beauty Fed'n of Cal.,* 2020 WL 3056126, at *7 (addressing an equal protection claim related to the stay-at-home order which permitted the continuation of essential businesses); *Tallywhacker, Inc. v. Cooper,* Case No. 5:20-cv-218-FL, 2020 WL 3051207 (E.D. N.C. June 8, 2020) (finding a reasonable basis for distinguishing between plaintiff's entertainment and fitness facility and restaurants and holding that the plaintiff was unlikely to succeed on their equal protection claim).

v. Freedom of Religion

Lastly, Plaintiff claims the Emergency Ordinance violates the Religious Freedom Clause of Article 1, section 3, of the Florida Constitution, which provides that "[t]here shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof." Plaintiff claims that the inclusion of places of worship in the Emergency Ordinance's definition coupled with the possibility of civil fines is "tantamount to 'penalizing the free exercise' of religion" under Florida's Constitution. Compl. ¶ 16.

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[5] Admittedly, the Emergency Ordinance does not expressly limit this exception to public safety, fire and other life safety and health care personnel while they are only on the job. Plaintiff claims, therefore, that the mask requirement is suspended for these persons indefinitely, regardless of whether they are on the job. Compl. ¶ 15. However, under that reasoning, whatever separately instituted PPE requirements these persons must follow under their respective agencies, they must follow whether or not they are on the job. Ultimately, Plaintiff's argument fails to establish any equal protection violation.

In *Warner v. City of Boca Raton,* 887 So. 2d 1023, 1030 (Fla. 2004), the Florida Supreme Court noted that Florida courts have treated the protection of Florida's free exercise clause "as coequal to the federal [provision], and have measured government regulations against it accordingly." (citing *Toca v. State,* 834 So. 2d 204, 208 (Fla. 2d DCA 2002); *Allen v. Allen,* 622 So. 2d 1369 (Fla. 1st DCA 1993)). The United States Supreme Court has explained that the free exercise clause includes the freedom to believe and the freedom to act. *Malicki v. Doe,* 814 So. 2d 347, 354-55 (Fla. 2002) (citation omitted). The freedom to believe is absolute, but the freedom to act is not—conduct remains subject to regulation for the protection of society. *Id.* Before the right to free exercise of religion is implicated, "the threshold inquiry is whether the conduct sought to be regulated was 'rooted in religious belief.'" *Id.* (citations omitted). If it is shown that the conduct at issue was rooted in religious beliefs, then the court must determine if the law regulating the conduct is neutral on its face and in its purpose. *Id.* (citation omitted). The State may regulate conduct through neutral laws of general applicability. *Id.* As such, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.*

Several recent cases addressing COVID-19-related emergency orders and ordinances have addressed the implication of the free exercise clause. For example, in *South Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613 (2020), the United States Supreme Court denied an application for injunctive relief enjoining the enforcement of a portion of the governor's executive order which limited attendance at places of worship to 25% of building capacity or a maximum of 100 attendees, to limit the spread of COVID-19. Justice Roberts in his concurrence noted that similar or "more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people

gather in close proximity for extended periods of time." *Id.* (C.J. Roberts, concurring). Justice Roberts then explained 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," and that when elected officials "act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Id.* "When those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary.'" *Id.*

Similarly, the court in *Elim Romanian Pentecostal Church v. Pritzker,* No. 20-1811, 2020 WL 3249062 (7th Cir. June 16, 2020), affirmed the district court's holding that an executive order limiting the size of public assemblies, including religious services, to reduce transmission of COVID-19 was neutral with respect to religion and supported the compelling need to safeguard the public health during a pandemic. *See also Calvary Chapel Lone Mountain v. Sisolak,* Case No. 2:20-cv-00907-RFB-VCF, 2020 WL 3108716 (D. Nev. June 11, 2020) (finding an emergency directive which permitted communities of worship and faith-based organizations to conduct in-person services so that no more than fifty people are gathered while respecting social distancing requirements to be neutral and of general applicability); *Cross Culture Christian Ctr. v. Newsom,* Case No. 2:20-cv-00832-JAM-CKD, 2020 WL 212111 (E.D. Cal. May 5, 2020) (finding the orders, which directed all residents to stay home except as needed to maintain continuity of operations for certain designated sectors, were neutral and generally applicable and, therefore, the plaintiffs were not likely to succeed on their free exercise claim); *Cassell v. Snyders* Case No. 20 C 50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020) (finding the plaintiffs had less than a negligible chance of prevailing on a claim that a stay-at-home order violated the free exercise clause when the order proscribed secular and religious conduct alike).

Like the cases discussed above, the Emergency Ordinance here is neutral and is of general applicability. Indeed, the requirement to wear face coverings is not limited to places of worship, but applies to all business establishments, which is defined as "a location with a roof overhead under which any business is conducted, goods are made or stored or processed, or where services are rendered." *See* **Ex. G** to Motion for Judicial Notice, § 2(ii). Without more, the fact that the Emergency Ordinance refers to a religious activity (while at the same time applying to other types of activity) cannot be sufficient to show that its purpose is to target religious practices for harsher treatment. *See Cassell,* 2020 WL at *10. The inclusion of places of worship within the Emergency Ordinance's definition of business establishments is reasonably related to the legitimate interest of safeguarding the public during the COVID-19 pandemic. Nothing suggests that persons attending worship services are at any less risk of catching or transmitting COVID-19, such that the facial covering requirement would not further the objective to slow the spread of the virus. Accordingly, Plaintiff cannot show that that the Emergency Ordinance, beyond all question, constitutes a plain, palpable invasion of his right to freely exercise his religion.

Because the Ordinance has a real or substantial relation to the public health and because Plaintiff cannot show that the Ordinance, in any way, is a plain, palpable invasion of Plaintiff's right to privacy, substantive due process rights, equal protection rights, or free exercise of religion rights, Plaintiff is unlikely to prevail on the merits of his claims.

B. Plaintiff Has Not Shown Lack of an Adequate Remedy at Law

It is well-established that injunctive relief will not lie where there is an adequate remedy of law available. *Meritplan Ins. Co. v. Perez,* 963 So. 2d 771, 776 (Fla. 3d DCA 2007). Here, Plaintiff has failed to assert any actual damage which could not be remedied by law were the face covering requirement be held to be unconstitutional. At best, Plaintiff states, in a conclusory

manner, that the "deprivation of Plaintiff's rights cannot be remedied by money or any judgment other than an injunction." Compl. ¶ 19. However, Plaintiff fails to assert how, if at all, the Emergency Ordinance impacts Plaintiff. *See generally id.* Plaintiff claims he is a resident of Leon County and a business owner who has been "negatively impacted" by the Ordinance but declines to elaborate on how Plaintiff has been negatively impacted. *See id* ¶ 4. And, even assuming the Emergency Ordinance is unconstitutional, as the court in *Green,* No. 10-2020-CA-001249, explained, it is, at best, a "*de minimis* infringement on the "[P]laintiff's public interactions."

C. Plaintiff Has Not Shown Irreparable Harm Absent Entry of an Injunction

A temporary injunction will only be issued when the plaintiff "can clearly demonstrate that irreparable injury would follow the denial of the injunction." *Jacksonville Elec. Auth. v. Beemik Builders & Constructors, Inc.,* 487 So. 2d 372, 373 (Fla. 1st DCA 1986) (citation omitted). "Irreparable injury will never be found where the injury complained of is 'doubtful, eventual, or contingent.'" *Id.* (quotation omitted). Indeed, "[m]ere general allegations of irreparable injury are not sufficient." *Stoner v. Peninsula Zoning Comm'n,* 75 So. 2d 831, 832 (Fla. 1954). Moreover, "it must appear that there is a reasonable probability, not a bare possibility, that a real injury will occur." *Miller v. MacGill,* 297 So. 2d 573, 575 (Fla. 1st DCA 1974).

Plaintiff fails to assert a reasonable probability that a real injury will occur. As explained herein, Plaintiff has no recognizable right to privacy as it relates to wearing a face covering while in public. The Emergency Ordinance requires the face covering only in limited circumstances—*i.e.*, when a person is in a business establishment—and provides for a multitude of exceptions which may apply to Plaintiff (and the other residents of the County), including eating or drinking in a restaurant or bar, or exercising while observing social distancing guidelines. Further, Plaintiff's assertion that he could be arrested if he does not comply with the Emergency Ordinance

is entirely false[6], insufficient to establish irreparable harm,[7] and contrary to the language in the Ordinance itself. Therefore, a temporary injunction is not warranted.

D. Plaintiff Has Failed to Show Injunctive Relief Will Serve the Public Interest

Injunctive relief may be denied where the injury to the public outweighs any individual right to relief. *Knox v. Dist. Sch. Bd. of Brevard,* 821 So 2d. 311, 314 (Fla. 5th DCA 2002); *see also 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."). Here, the public interest is to keep the COVID-19 infection rate low so the disease does not spread. *See Ham v. Alachua Cty. Bd. of Cty. Comm's,* Case No 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020) (addressing Alachua County's mandatory face covering order). It is in the public interest to protect the most vulnerable from infection and to contain respiratory droplets which can carry the infection. *Id.* It is therefore not in the public interest to enjoin the enforcement of the Emergency Ordinance that requires face coverings in limited circumstances. As the court determined in *Green,* "[t]he County's need to take measures to control the spread of COVID-19 clearly outweighs the Plaintiff's private interest in not wearing a mask in the limited circumstances required by [the Emergency Order]; and an injunction in this situation would disserve the public interest." *Green,* Case No. 01-2020-CA-001249.

Because Plaintiff failed to allege facts to establish: (1) a substantial likelihood of success on the merits; (2) a lack of an adequate remedy at law; (3) the likelihood of irreparable harm absent

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[6] The Emergency Ordinance specifically provides, "A violation of this Emergency Ordinance does not authorize the search or arrest of an individual." *See* **Ex. G** to Motion for Judicial Notice, §4(i).

[7] In fact, the Emergency Ordinance provides a schedule of fines for violating the Ordinance and also permits "other remedies available at law or equity, including injunction." *See* **Ex. G** to Motion for Judicial Notice, § 4(ii)(d).

the entry of an injunction; and (4) the injunctive relief will serve the public interest, this Court should dismiss Plaintiff's Complaint.

IV. Plaintiff Failed to State a Cause of Action for Declaratory Relief

The Complaint fails to state a cause of action for declaratory judgment because, again, Plaintiff has failed to allege ultimate facts showing a bona fide, actual, present practical need for the declaration. The test for sufficiency of a complaint seeking a declaratory judgment is not whether Plaintiff will prevail in obtaining his desired outcome, but whether he is entitled to a declaration of rights at all. *See Fla. State Bd. of Dispensing Opticians v. Bayne*, 204 So. 2d 34, 36 (Fla. 1967). Plaintiff must show he is in doubt as to the existence or nonexistence of some right, status, immunity, power, or privilege and that they are entitled to have such doubt removed. *See Wilson v. County of Orange*, 881 So. 2d 625, 631 (Fla. 5th DCA 2004). Additionally, an aggrieved party must make some showing of a real threat of immediate injury, rather than a general, speculative fear of harm that may possibly occur at some time in the indefinite future. *See State of Fla., et al. v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002).

In this regard, to invoke jurisdiction under the Declaratory Judgments Act, a bona fide, actual dispute must exist between the contending parties as to a present justiciable question. *Askew v. City of Ocala*, 348 So. 2d 308 (Fla. 1977); *Okaloosa Island Leaseholders Ass'n, Inc. v. Okaloosa Island Auth.*, 308 So. 2d 120 (Fla. 1st DCA 1975). It is well-settled that a plaintiff who seeks declaratory judgment must show the following:

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests

> are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

May v. Holley, 59 So. 2d 636, 639 (Fla. 1952); *Santa Rosa Cty. v. Admin. Comm., Div. of Admin. Hrgs.*, 661 So. 2d 1190, 1192-93 (Fla. 1995). The Complaint fails to allege these elements and, thus, fails to provide any basis for this Court to exercise jurisdiction under Chapter 86, Florida Statutes.

Even if this Court were to find that Plaintiff has sufficiently alleged a cause of action for declaratory relief, Plaintiff is still not entitled to a declaration in his favor because of the foregoing reasons. This Court, therefore, should dismiss Plaintiff's Complaint.

CONCLUSION

Plaintiff has not been subject to any violation of his constitutional rights by Leon County, much less has Plaintiff even alleged a violation of his constitutional rights. For the foregoing reasons, this Court should dismiss Plaintiff's Complaint.

WHEREFORE, Leon County, Florida, respectfully requests this Court enter an order dismissing Plaintiff's Verified Complaint.

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically and E-Served by the Florida Court's E-Filing Portal to the following parties of record on this 2nd day of July, 2020.

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