Filing # 110595440 E-Filed 07/22/2020 08:42:32 AM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA20-0724
DIVISION: 55

JEFFREY D. NAGER,

Plaintiff,

vs.

CITY OF ST. AUGUSTINE, a political Subdivision of the State of Florida,

Defendant.

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CITY OF ST. AUGUSTINE'S RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY INJUNTIVE RELIEF

Defendant, CITY OF ST. AUGUSTINE ("the City"), by and through its undersigned counsel and pursuant to the Court's Order Directing the City of St. Augustine to Respond to Plaintiff's Verified Emergency Motion for Temporary Injunction ("Ver. Emer. Mot.") and states as follows:

Introduction

Plaintiff's filed his Verified Complaint for Emergency Injunctive Relief and Declaratory Judgment July 2, 2020. The Court entered its Order Directing the City of St. Augustine to Respond the same date. Plaintiff's Motion argues the City's Administrative Order 20-11 ("AO 20-11") is unconstitutional as violative of Privacy Clause of Article 1 § 23, Florida Constitution; Due Process Clause of Article 1 § 9, Florida Constitution; Void for Vagueness in violation of the Due Process Clause of Article 1 § 9, Florida Constitution; Equal Protection Clause of Article 1 § 2, Florida Constitution. Additionally, Plaintiff asserts the City lacks authority within its Charter to issue the AO or provide for its enforcement. Ver. Emer. Mot. ¶¶13, 14, 15, 16, 17. Plaintiff seeks an emergency temporary injunction.

Although nowhere does Plaintiff identify the applicable rule or statute, temporary injunctions are governed by Fl. R. Civ. P. 1.610. A temporary injunction may only be entered where the party seeking the injunction satisfies the four-part test under Florida law: 1) a substantial likelihood of success on the merits; 2) lack of an adequate remedy at law; 3) irreparable harm absent the entry of an injunction; and 4) that injunctive relief will serve the public interest. *Dickerson v. Senior Home Care, Inc.*, 181 So. 3d 1228, 1229 (Fla. 5th DCA 2015).

Background Facts

The Nation, the State of Florida, and the City of St. Augustine 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 a respiratory illness caused by a virus that spreads rapidly from person to person when an infected person coughs, sneezes, or talks. There is currently no vaccine and contracting this virus may result in serious injury or death. *See* **Ex. A**[1]. Indeed, as of the date of this response, President Trump and his administration now support wearing face mask when social distancing is not possible. *See* **Ex. B**[2]. Plaintiff seeks to enjoin the City from action it deems necessary to protect the public health and welfare of its constituents during this unprecedented public health care crisis, the global pandemic of the novel coronavirus known as COVID-19.

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[1] Available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html. <last visited 7/12/2020>

[2] See David R. Baker and Margaret Newkirk, "Trump Reverses Course on Masks, Calling Them 'Patriotic' After Allies Split With Him," Bloomberg.com-Politics, July 20, 2020, updated July 21, 2020. Available at https://www.bloomberg.com/news/articles/2020-07-21/trump-s-sudden-push-for-mask-wearing-follows-allies-defections. <last visited 7/21/2020>

Several measures—at the federal, state, and local level—have been taken to slow the spread of COVID-19. On March 1, 2020, Governor DeSantis issued Executive Order Number 20-51 establishing COVID-19 response protocol and directing a Public Health Emergency. *See* **Ex. C**. On March 9, 2020, Governor DeSantis issued Executive Order Number 20-52 declaring a State of Emergency exists in the State of Florida. *See* **Ex. D**. This order was subsequently extended by Executive Order Number 20-114 and again on July 7, 2020 by Executive Order Number 20-166. *See* **Ex. E, Ex. F**. On March 11, 2020, the World Health Organization declared the spread of novel virus COVID-19 to be a global pandemic. *See* **Ex. G**[3]. On March 13, 2020, President Trump issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. *See* **Ex. H**. All Federal and State declarations of emergency continue in effect to date.

In April 2020, the City began a pilot project in collaboration with Kinsa, Inc. to provide real-time temperature data by distributing 600 Kinsa thermometers to households within the City. These one of kind internet-connected thermometers allowed for the anonymous collection and aggregation of real-time fever data to provide surveillance and potentially predict increased spread of the novel virus COVID-19 in order to inform public health and government officials and allow for further mitigation efforts such as deploying testing, quarantine, and other health measures where and when most needed. *See* **Ex. I**.

Despite efforts to mitigate the spread of COVID-19, the numbers in Florida, including St. Johns County, are continuing to rise according the Florida Department of Health. *See* **Ex. J**.[4] While the data changes rapidly, as of the drafting of this response, the number of single-day

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[3] Available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020. <last visited 7/20/2020>

[4] This data is current as of July 12, 2020 as verified by the Florida Department of Health, COVID-19: Summary for Florida, available at http://ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/county_reports_latest.pdf. <last visited 7/21/2020>

increases in new COVID-19 cases surpassed that of New York at its peak with a record-breaking 15,283 new cases and St. Johns County is experiencing a 7% positivity rate. *See* **Id.** At the June 26, 2020 Emergency Meeting of the City Commission, city manager John Regan informed the City Commission of the most recent data received from the pilot project which indicated the temperature data was trending upward and showing that St. Johns (City) data for the most recent period "was showing some of the highest illness levels in the United States. *See* **Ex. K, Ex. L at 8:4-23.** [5]

In his executive summary, city manager John Regan, presented to the City Commission data on the state of COVID-19. Specifically, the City Commission was presented the following facts:

1. Dr. Fauci's remarks in Sacramento, California emphasizing the importance of following face mask requirements. *See* **Ex. M, Ex. L at 9:11-16**.
2. Florida Surgeon General Dr. Scott Rivkees issued a Public Health Advisory on June 22, 2020 advising that "[a]ll individuals in Florida should wear face coverings in any setting where social distancing is not possible." *See* **Ex. N; Ex. L** at **9:17-24**.[6]
3. Florida Medical Association President Ronald L. Giffler, MD, JD, MBA issued a position statement on June 19, 2020 urging local governments to issue orders to mandate face coverings. *See* **Ex. O, Ex. L at 10:1-5**.[7]

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[5] The City has attached as evidence an abridged transcript of the Emergency City Commission Meeting of June 26, 2020 as Ex. K. Citations will also reference this Exhibit followed by page: line numbers throughout this response.

[6] That advisory list several exclusions where such face coverings would not be applicable which are the genesis for the exceptions in the City's Resolution 2020-22 and Administrative Oder 20-11.

[7] That statement further indicated "The science is clear. **Asymptomatic infected individuals can release infectious aerosol particles while breathing and speaking. Not wearing a mask or face covering increases exposure, whereas universal masking greatly reduces the spread of viral particles**. The message is simple: For the sake of your health and the health of everyone around you, Florida doctors want you to wear a mask."

4. The substance of the city manager's conversation with local medical professionals including: Dr. Dudley Baringer; George Pierce (PJ) Jones, P.A; Jason Barrett, CEO Flagler Hospital; and Dr. Dawn Allicock, Director and Health Officer for Florida Department of Health for St. Johns County. These local medical professionals all represented that they highly urge and recommend the use of face coverings in public to impede the spread of the novel virus COVID-19. *See* **Ex. L at 10:6-18; 11:1-17**.
5. Additionally, the City Manager informed the City Commission that the number of new positive cases in Florida for the date of the meeting was "just a few short of 9,000" representing a new high for the state at that time.[8] *See* **Ex. L at 27:16-19**.
6. As the City Commission met in emergency session on June 26, 2020, the Department of Business and Professional Regulation issued Emergency Order 20-09 ordering bars and restaurants back to Phase 1 due to "noncompliance by bars and other vendors" of alcohol and recent spikes in the number of positive test results for the novel virus COVID-19. *See* **Ex. P**.

Based upon the facts presented and over two (2) hours of public comment and discussion, the City Commission unanimously determined COVID-19 constitutes a clear and present threat to the lives, health, welfare, and safety of the citizens, residents, and business owners' interest of the City of St. Augustine constituting an emergency requiring urgent action. *See* **Ex. L at 25:6-8; 26:11-15; 27:4-7**.

Resolution 2020-22 and the subsequent AO 20-11 require "[e]very person working, living, visiting, or doing business in the City of St. Augustine shall wear a face covering ***in any indoor location, other than their home or residence, when not maintaining social distancing from other***

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[8] In fact the number of new cases according to the Florida Department of Health COVID-19 dashboard for 6/26/2020 was 9,573. Available at https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429. <last visited 7/8.2020>

person(s), excluding family members or companions." *See* **Ex. Q, Ex. R** (emphasis added). Resolution 2020-22 and AO 20-11 provide definitions of face coverings to mean "a uniform piece of material that securely covers a person's nose and mouth and remains affixed in place without the use of one's hands." The definition of face coverings goes on to provide examples of different types of acceptable coverings to include "homemade mask, or other covering, such as a scarf, bandana, handkerchief, or other similar cloth covering ***or shields***." *See* **Ex. Q, Ex. R** (emphasis added).

Resolution 2020-22 and AO 20-11 only apply when ***indoors*** in public, not private homes and ***only when social distancing is not possible***. Further, AO 20-11 does provide for certain exceptions. As noted in footnote 3 of this Response, these exceptions were derived from the State of Florida, Department of Health, Public Health Advisory issued June 22, 2020 including exclusions for children under the age of two; ***individuals with existing medical conditions***; individuals working in professions where use of face coverings prevent the performance of their duties. *See* **Ex. N** (emphasis added). The full list of exclusion includes:

a. Persons under the age of two years; and

b. Persons observing social distancing in accordance with CDC guidelines; and

c. Persons for whom a face covering would cause impairment ***due to an existing health condition;*** and

d. Persons working in a business or profession who do not have interactions with other persons; and

e. Persons working in a business or profession who maintain social distancing from another person; and

f. Persons working in a business or profession where use of a face covering would prevent them from performing the duties of the business or profession; and

g. Persons exercising, while maintaining social distancing; and

h. Persons eating or drinking; and

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

j. The requirement shall not apply when a person who is hearing impaired needs to see the mouth of someone wearing a face covering in order to communicate; and

k. The requirement does not apply to any outdoor activity permitted under City, County, or State order, but face coverings should be readily available when coming within six (6) feet of an individual not part of a person's immediate family or cohabitating living unit.

See **Ex. Q, Ex. R**. AO 20-11 does not impose criminal penalties for a violation. Instead the City relies on its code enforcement powers as provided by Florida Statute, Chapter 162, Part II as adopted under Chapter 2, Article VI of the City Code to impose a civil infraction with penalties ***up to*** $500.

Plaintiff now brings this case to enjoin the legislative action the City Commission deemed necessary to protect the public health and welfare of residents, visitors, and business owners' interest of the City of St. Augustine during an unprecedented public health crisis.

Importantly, it should be noted in these background facts that Plaintiff has alleged "he has an asthmatic medical condition." Ver. Em. Mot. ¶ 11. Therefore, on the face of the complaint and by the terms of Resolution 2020-22 and AO 20-11. This Plaintiff is exempt from the requirements of AO 20-11 and lacks requisite standing to bring a constitutional challenge to Resolution 2020-22 or AO 20-11. Further, these facts preclude an ability to show a prima facia, clear legal right to the injunctive relief requested.

Further, Plaintiff fails to allege substantial competent evidence establishing (1) a substantial likelihood of success on the merits, (2) a lack of an adequate remedy at law, (3) the likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest. For these reasons, Plaintiff's prayer for an emergency temporary injunction should be denied.

ARGUMENT

Legal Standard

Standard of Review for Injunctive Relief

"The issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly." *Yardley v. Albu*, 826 So. 2d 467, 470 (Fla. 5th DCA 2002). "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) that injunctive relief will serve the public interest." *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).

Before a temporary injunction may issue, "a trial court must be certain that the petition or other pleadings demonstrate ***a prima facie, clear legal right*** to the relief requested." *Colonial Bank, N.A. v. Taylor Morrison Servs., Inc.*, 10 So. 3d 653, 656 (Fla. 5th DCA 2009) (emphasis added) (citing *Naegele Outdoor Adver. Co. v. City of Jacksonville*, 659 So.2d 1046, 1048 (Fla.1995). The party moving for a temporary injunction has "the burden of adducing substantial competent evidence satisfying each of the conditions necessary to obtain a temporary injunction." *Zupnik v. All Fla. Paper, Inc.*, 997 So. 2d 1234, 1238 (Fla. 3d DCA 2008) "If the party seeking the temporary injunction fails to prove one of the requirements, the motion for injunction must be denied." *Bayfront HMA Med. Ctr., LLC*, 236 So. 3d at 472; see also *City of Miami v. Santos*, 278 So. 3d 822, 825 (Fla. 3d DCA 2019).

Standard of Review of Emergency Police Powers

The United States Supreme Court established the standard for review of emergency police powers in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). 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. (emphasis added). Instead, a "community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Id. at 27. 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 (emphasis added)(quoting *Jacobson,* 197 U.S. at 31).

I. <u>Substantial Likelihood of Success on the Merits</u>

"A substantial likelihood of success on the merits is shown if good reasons for anticipating that result are demonstrated. It is not enough that a merely colorable claim is advanced." *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So. 2d 750, 753 (Fla. 1st DCA 1994). For the reasons below and the fact that Plaintiff, by his own pleadings and the facial terms of AO 20-11, is exempt from the requirements of Resolution 2020-22 and AO 20-11, Plaintiff has failed to show a substantial likelihood of success on the merits or irreparable harm.

1. Right to Privacy

Plaintiff claims AO 20-11 unconstitutionally violates his right of privacy over his "bodily and facial autonomy" as well as "medical privacy." Ver. Em. Mot. ¶ 13. For this reason, he asserts he has a likelihood of success on the merits and that AO 20-11 is "presumptively invalid." Ver. Em. Mot. ¶19.

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.* Most 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).

Many laws provide proper analogy to the current case in regards the courts standard regarding the police powers of government to legislate for the health, safety, and welfare of their communities at large. These include mandatory seat belt laws;[9] mandatory vaccination laws;[10] and mandatory helmet laws.[11]

No-smoking regulations and indoor smoking bans provide further comparison. Even in the absence of a public health emergency, state and local governments have ample authority to protect the health of the public in indoor spaces. Smoking bans, for example, are designed to protect the health of ***employees and patrons, not the smoker***, and such regulations have been routinely upheld as within the police power of the state.[12] The Florida Supreme Court found that "the 'right to smoke' is not included within the penumbra of fundamental rights" specially protected by the U.S. Constitution. *City of North Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) reh'g denied (July 5, 1995).

Similar to the ability to protect employees and patrons in restaurants and bars from the dangers of second-hand smoke, the limited mandate to wear a facial covering while indoors in public spaces under conditions where social distancing is not possible is intended to protect the public at large from the communicable spread of a potentially deadly virus. Resolution 2020-22 and AO 20-11 are de minimis and temporary mandates for the purpose of slowing the spread of COVID-19 and such action is rationally related to the City's legitimate stated goal.

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[9] See e.g., *People v. Kohrig*, 498 N.E. 2d 1158 (1986), appeal dismissed, 107 S. Ct. 1264; *State v. Hartog*, 440 N.W. 2d 852 (1989), cert. denied, 110 S. Ct. 569 (1989), rehearing denied 110 S. Ct. 1174 (1990); and *State v. Fazekas*, 569 A. 2d 913 (1989)). All dismissing challenges based on privacy and due process.

[10] *See Jacobson v. Commonwealth of Massachusetts*, 25 S. Ct. 358 (1905) discussed above.

[11] *State v. Eite* 227 So. 2d 489 (Fla. 1969) (holding the requirement to wear a helmet a minor inconvenience that the legislature may impose, considering the protection a helmet provides against death or serious injury).

[12] See, e.g., *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995)(no protected right to smoke or a job); NYC *C.L.A.S.H., Inc v. City of New York*, 315 F. Supp. 2d 461 (S.D.N.Y. 2004)(regulations do not implicate free association, assembly, or free speech); *Giordano v. Connecticut Valley Hosp.*, 588 F.Supp.2d 306 (D. Conn. 2008).

In this case, 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 to enjoin 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).

Plaintiff cites to no law in support of a legally protected privacy right to not wear facial coverings in emergency situations such as the global pandemic this State and Nation currently face. However, the Florida Supreme Court has clarified that "The privacy amendment 'was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual.'" *Stall v. State*, 570 So. 2d 257, 262 (Fla. 1990) (citing *Florida Bd. of Bar Examiners re: Applicant*, 443 So. 2d 71, 74 (Fla. 1983)). Further, Plaintiff claims an underlying

asthmatic medical condition. Ver. Em. Mot. ¶¶ 5, 11. By the terms of Resolution 2020-22 and AO20-11 "[p]ersons for whom a face covering would cause impairment due to an existing health condition" are exempt from the requirements.

Plaintiff fails to establish he possesses a legitimate expectation of privacy or recognized fundamental right not to wear facial coverings in public spaces. Resolution 2020-22 and AO 20-11 bear a real and substantial relation to the public health emergency and therefore there is no violation of Plaintiff's right of privacy and injunctive relief should be denied.

2. Substantive Due Process

Next, Plaintiff claims AO 20-11 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 "original basis for the state of emergency in the City of St. Augustine…was to reach a goal of 'flattening the curve' of new hospitalizations" and AO 20-11 is "not backed by a compelling state interest or any facts proving such interest." Ver. Em. Comp. ¶ 14.

"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). 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)).

Contrary to Plaintiff's assertion, the City never adopted a state of emergency regarding COVID-19. The City relies solely on those State of Emergency declarations by Governor DeSantis. Based on the overwhelming evidence of rapidly increasing cases of COVID-19, the substantial recommendations for facial coverings in public by medical professionals and agencies as presented by the City Manager, and requests from the business community to protect against future shutdowns, the City Commission found that the situation presented an emergency to the health, safety, and welfare of its residents, visitors, and business owners' interest. The City Commission unanimously adopted Resolution 2020-22. *See* **Ex. L at 28:23-25; 29:1-8; 30:18-25; 31:1-2; 31:14-16; Ex. Q**.

Plaintiff attempts to implicate a fundamental right to privacy in support of this Due Process claim. As discussed more fully above, Plaintiff fails to establish a legitimate expectation of privacy or recognized fundamental right not to wear facial coverings in public spaces. Resolution 2020-22 and AO 20-11 bear a real and substantial relation to the public health emergency and therefore do not violate Plaintiff's substantive due process rights. Injunctive relief should be denied.

3. Void for Vagueness

Plaintiff also claims AO 20-11 violates Article 1, section 9, of the Florida Constitution, as void for vagueness because "Section 2 of Administrative Order 20-11 contains an exception for 'Persons for whom a face covering would cause impairment due to an existing health condition.'" Plaintiff further identified an exception for "Persons working in a business or profession where use of a face covering would prevent them from performing the duties of the business or profession." Ver. Em. Comp. ¶ 15. As an initial point, the exceptions of AO 20-11 are found in Section 3 not Section 2. *See* **Ex. R**. Plaintiff claims the language has "created immediate confusion" and is too vague for the average citizen to understand.

Plaintiff cites *Davis v. Gilchrist*, 280 So. 3d 524, 532 (Fla. 1st DCA 2019), for the proposition that AO 20-11 is void for vagueness. In *Davis*, the court upheld the constitutionality of RPO statute against a vagueness challenge. The court in *Davis* determined, however, that there was "nothing inherently vague" about the terms the appellant sought to scrutinize. *Id.* The court relied on standard dictionary synonyms and common usage for the definitional challenges. *Id.* Thus, the court upheld the constitutional integrity of the statute noting the statute was written "in response to the prevalence of public shootings, and the need to thwart the mayhem and carnage contemplated by would-be perpetrators" and that such interest "represent[s] an urgent and compelling state interest." *Id.* at 533. Similarly, the need to address the exponential increase in cases of COVID-19 due to communal spread of this potentially deadly virus, the City is addressing a compelling state interest.

However, to be clear there is no fundamental right to be free from a requirement of wearing a face mask. Plaintiff points to no case law in support of this contention. Plaintiff's own cases clearly articulate that only "[w]hen reviewing a statute or ordinance that ***impairs the exercise of a fundamental right,*** the court must apply a strict scrutiny test to determine whether the legislation is written to address a specific and compelling state interest." *Davis* at 531–32 (emphasis added) (citing *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004)).

Court review of the facial constitutionality of a statute is limited. *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014). Rather, the courts "consider only the text of the statute; not its specific application to a particular set of circumstances." *Id.* To succeed Plaintiff has a high burden and must demonstrate "no set of circumstances exists in which the statute can be considered constitutionally valid." *Id.* "Generally, legislative acts are afforded a presumption of constitutionality and we will construe the challenged legislation to effect a constitutional outcome

when possible." *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018); *Fla. Dep't of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005).

Like the terms challenged in *Davis*, the words in AO 20-11 with which Plaintiff takes issue are not inherently vague such that a person of common intelligence must guess as to their meaning. Indeed, Plaintiff identifies no specific terms but entire sentences in support of this proposition. Plaintiff has not, and cannot, show that these phrases cannot be understood by persons of common intelligence. There is no fundamental right to be free from the temporary and limited requirement of face coverings when indoors in public places to prevent the spread of disease during a global pandemic. AO 20-11 is substantially related to the public health emergency and rationally related to a legitimate government interest. Strict scrutiny does not apply. To the extent the Court would apply such a test, the compelling state interest can be found in the need to prevent the spread of highly communicable and potential deadly virus during the pendency of a State of Emergency as declared by the State of Florida.

4. Equal Protection

Plaintiff claims AO 20-11 violates the Equal Protection Clause in Article 1, section 2, of the Florida Constitution because it has "created an environment of vagueness, confusion, and uncertainly(sic)" and claims Plaintiff "will likely be discriminated against and harassed for not wearing a mask." Ver. Em. Comp. ¶ 16. Further, Plaintiff claims an Equal Protection violation because it exempts certain government employees. Specifically, Plaintiff asserts AO 20-11 exempts "[p]ublic safety, fire, and other life safety and health care personnel…" and that AO 20-11 "suspends the mask-requirement" for government employees not only while on the job but indefinitely. *Id.*

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 points to no suspect class, rather, he complains only that the exemption in AO 20-11 at Section 3i. for "public safety, fire and other life safety and health care personnel" somehow violates equal protection. Plaintiff fails to give the full text of that exemption to the Court. As stated in AO 20-11 and Resolution 2020-22 the full text of the challenged exemption at Section 3. i. states:

> Public 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. R**. Plaintiff would have the Court believe that all "government employees" are exempt from the AO but that is simply not the fact. The full text of the exemption makes clear that it only relates to public safety, fire, and life safety personnel. Additionally, these personnel are not fully exempt from the limited face covering requirements, rather, the City has deferred to the requirements imposed by the agencies which employ them not all of which are government employers. The requirements of these agencies are more often more restrictive than the limited requirements of the City's AO and Resolution.

The exemption in AO 20-11 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 due to the nature of their professions.

Unless a suspect class or fundamental right protected by the Florida Constitution is implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge. *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49 (Fla. 2017). Plaintiff identifies no legally recognized suspect class and the classification for public safety, fire, and other life safety and health care personnel is based on a difference which has a reasonable relationship to the applicable classification on a reasonable and rational basis.

5. The City's Emergency Powers

Plaintiff alleges Resolution 2020-22 and AO 20-11 are "illegal and void" because the Charter and Code do not contain such an allowance. Ver. Em. Mot. ¶ 17. Plaintiff cites to Article 4, Division 4, Section 4.09 of the City Charter for the proposition that only the Mayor may "govern the city by proclamation during times of grave public danger or emergency." *Id.* Plaintiff is mistaken.

The City amended its charter provisions by Ordinance 2019-24 on December 9, 2019. *See* **Ex. S**. Section 4.09 was amended to strike the ability of the Mayor to "take command…and govern the city by proclamation during time of grave public danger or emergency." That Ordinance further amended Section 4.10 of the charter under "Appointment; qualifications; temporary manager during absence, etc." to include the following:

> The city manager shall take all reasonably necessary administrative action to preserve life. property. and the public welfare pursuant to a declared federal, state. or local state of emergency.

Id.

The City Commission followed this legislation with the passage of Resolution 2020-10 specifically granting plenary authority to the city manager to take all necessary administrative action pursuant to a declared federal, state, or local state of emergency without the need to obtain further approvals from the City Commission during the pendency of a declared state of emergency. *See* **Ex. T**.

At all times, the city manager had plenary authority to issue AO 20-11 without further action of the City Commission. Despite this fact, the city manager took the important issue of a potential face covering mandate before the City Commission to gain consensus of the governing body before issuing AO 20-11. Based on the scientific data presented to the City Commission supporting the use of face coverings to mitigate the continued spread and increase in COVID-19 positive cases, the City Commission unanimously passed Resolution 2020-22. Enforcement of AO 20-11 and Resolution 2020-22 is provided for by Florida Statutes, Chapter 162, Part II as adopted in the existing City Code of Ordinances at Chapter 2, Article VI adopted by Ordinance 2002-03.[13] *See* **Ex. U**.

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

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[13] Enforcement under both Fl. Statute, Chapter 162, Part II and City Code Chapter 2 provide for notice and reasonable time to comply before any citation may issue.

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); *Henry v. DeSantis*, Case No. 20-cv-80729-SINGHAL, 2020 WL 2479447 (S.D. Fla. May 14, 2020)(upholding Governor's classification of bars and restaurants to be rationally related to legitimate government interest). Resolution 2020-22 and AO 20-11 bears a real and substantial relationship to the current public health crisis related to the global pandemic for the novel coronavirus COVID-19.

Because the Ordinance has a real and substantial relation to the public health and because Plaintiff cannot show that Resolution 2020-22 or AO 20-11, in any way, is an invasion of Plaintiff's right to privacy, substantive due process rights, equal protection rights, Plaintiff is unlikely to succeed on the merits of his claims. Injunctive relief should be denied.

II. 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." Ver. Em. Comp. ¶ 20. However, Plaintiff fails to assert how, if at all, the Emergency Ordinance impacts Plaintiff. See generally *id.* Plaintiff claims he is a resident of St. Johns County, and an employee in St. Augustine who has been "negatively impacted by an order that has been issued" by the City but declines to elaborate on how Plaintiff has been negatively impacted. See *Id.* ¶ 4. As noted above, Plaintiff also alleges an underlying medical condition of asthma which exempts him from the requirements of AO 20-11 altogether. See *Id.* ¶5.

Even assuming AO 20-11 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."

III. 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 in this Response, Plaintiff has no recognizable right to privacy as it relates to wearing a face covering while in public. AO 20-11 requires the face covering only in limited circumstances—*i.e.*, when indoors in business establishments while unable to socially distance—and provides for a multitude of exceptions one of which actually applies to Plaintiff (and the other residents or visitors of the City), including eating or drinking in a restaurant or bar, or exercising while observing social distancing guidelines, as well as underlying medical conditions. Plaintiff fails to establish irreparable harm and a temporary injunction is not warranted.

IV. Injunctive Relief will not 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 AO 20-11 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 the entry of an injunction; and (4) the injunctive relief will serve the public interest, this Court should deny Plaintiff's request for injunctive relief.

Conclusion

Plaintiff has failed to show irreparable harm suffered due to AO 20-11, has failed to show that there is not an adequate remedy at law, has failed to show that he has a substantial likelihood of success, and has failed to appropriately weigh the public interest in slowing the spread of a deadly, highly transmissible virus against the perceived inconvenience of temporarily wearing a facial covering in certain public situations. Plaintiff is unlikely to succeed on any of his claims. Even if Plaintiff were likely to succeed on his claims, the balance of the equities and the public interest disfavor preliminary injunctive relief. Plaintiff therefore fails to meet the requirements for preliminary injunctive relief on the constitutional basis claimed and, for the reasons outlined above, the City appropriately exercised its authority in issuing Resolution 2020-22 and

Administrative Order 20-11. This Court should deny Plaintiff's Verified Emergency Motion for Temporary Injunction.

CITY OF ST. AUGUSTINE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Court using Florida Court's E-Filing Portal, which will serve it on all counsel of record on this 22nd day of July, 2020.

/s/ *Denise C. May*