

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

ISRAEL HAM,
STEVEN GORDON,
PHILLIP HOOKS,
HOLLYE MERTON,
and TOLAR POWELL,

PLAINTIFFS,

v.

CASE NO.1:20-cv-00111-MW-GRJ

ALACHUA COUNTY BOARD
OF COUNTY COMMISSIONERS,
and THE ALACHUA COUNTY MANAGER,

DEFENDANTS.

MOTION FOR EMERGENCY INJUNCTIVE RELIEF
AND MEMORANDUM

Plaintiffs pursuant to Rule 65 of the Federal Rules of Civil Procedure move this Court for entry of a Preliminary Injunction enjoining the Defendants Alachua County Board of County Commissioners and the County Manager from enforcing the “Face Mask Ordinance” provision enumerated in 8(c) of the May 4th, 2020 Alachua County Emergency Order, and 4(c) of the May 17th, 2020 Alachua County Emergency Order. (Exhibits A and B.) This motion is based on the following grounds:

1. On May 11th, 2020, Plaintiffs filed a Complaint alleging violations of their procedural due process and substantive due process rights pursuant to the Fifth Amendment to the Constitution as applied to the states under the Fourteenth Amendment; and violations of their equal protection constitutional rights pursuant to the Fourteenth Amendment. (ECF No. 1.)

2. Unless enjoined by this Court, Defendants will continue to enforce the Face Mask Ordinance in violation of the Constitution and perpetuate the suppression of Plaintiffs' due process, the rights to travel, and the rights to privacy.

3. Pursuant to Rule 65(a)(1) of the Federal Rules of Procedure, undersigned counsel for the Plaintiff respectfully certifies to the Court that on May 6th, 2020, the undersigned attorney sent a demand letter to the Alachua County Board of County Commissioners asking them to rescind the Face Mask Ordinance and cease further damages caused to the Alachua County citizens. On May 11th, 2020, Plaintiffs filed the Complaint in this matter. On May 13th, Plaintiffs filed a Notice of Constitutional Challenge to Alachua County Ordinance. (ECF No. 5.) A copy of that Notice along with a copy of the Complaint were served to the Alachua County Attorney via email. Also on May 13th summonses issued and were promptly provided to a process server. (ECF No. 4.) At the time of filing this motion, the Defendants have not engaged in any communications with the undersigned. The Face Mask Ordinance remains in force and Plaintiffs remain deprived of their constitutionally protected liberty.

4. There is a substantial likelihood that Plaintiffs will establish at trial that Defendants have violated the Due Process Clause of the Fifth Amendment as applied to the states under the Fourteenth Amendment, and Equal Protection of the Law enumerated in the Fourteenth Amendment, discussed at length in the embedded memorandum.

5. A preliminary injunction is necessary to preserve the status quo, to prevent the irreparable injury to the Plaintiffs that would result from the continued violation of their fundamental rights, and to mitigate the costs incurred by the County if Plaintiffs prevail at trial and are awarded compensatory damages.

6. Any harm to Defendants from enjoining the enforcement of an unconstitutional law is outweighed by the actual infringement on Plaintiffs rights, as they live under threat of civil liability daily because they cannot safely wear a face mask.

7. Granting the requested preliminary relief will serve the public interest because there is no scientific consensus that wearing a face mask will prevent the spread of Coronavirus. No national or statewide scheme exists for face masks because the Centers for Disease Control only recommends the use of face masks. The public will be served by preserving due process, the right to travel, and the right to privacy. Other measures in the May 4th, 2020 Alachua County Emergency Order, and in the May 17th Alachua County Emergency Order, provide nationally and statewide utilized standards for slowing the spread of Coronavirus.

8. This emergency motion is supported by an embedded memorandum in support of entry of a preliminary injunction.

WHEREFORE the Plaintiffs pray that Defendants be enjoined from enforcing the Face Mask Ordinance pending a hearing or trial on the merits, and any other relief this Court deems just and proper.

Memorandum

I. Introduction

Plaintiffs are Alachua County residents who challenge the constitutionality of the Alachua County “Face Mask Ordinance”. Defendants Alachua County Board of County Commissioners and the County Manager enacted and began to enforce “FIRST AMENDMENT TO EMERGENCY ORDER NO. 2020-21 PHASE ONE STEP BY STEP RECOVERY ORDER” on May 4th, 2020. (Exhibit A.) That order was supplemented by “EMERGENCY ORDER NO. 2020-25 FULL PHASE ONE STEP BY STEP RECOVERY ORDER on May 17th, 2020, which states: “This Order supersedes and replaces any conflicting provisions of prior orders.” (Exhibit B: provision number 14 at page 7.) The former order embedded the Face Mask Ordinance provision at paragraph number 8. (Exhibit A.) The latter order embedded the Face Mask Ordinance at paragraph number 4. (Exhibit B.) The specific provision of the Face Mask Ordinance that is the subject of this cause of action is found in provision 8(c) of the May 4th Order and in provision 4(c) of the May 17th Order. The

specific language challenged by the Plaintiffs is identical in both orders: **“A facial covering shall not be required for ... persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medical problem.”**

The Plaintiffs seek emergency relief from the Court to maintain the status quo and to halt the infringement of their rights secured by the United States Constitution. Plaintiffs are unable to safely enter the community because they have medical conditions that prevent them from wearing masks. (ECF No. 1-1(Exhibit A: “Declarations”).) They have been denied access to food, public transportation, and medical appointments. The Face Mask Ordinance fails to provide notice of the behavior required by Plaintiffs and is arbitrarily enforced throughout the community. The Face Mask Ordinance provides no standards or administrative process to be exempted from wearing a face mask. The Plaintiffs remain under continued threat of civil liability because they cannot wear face masks. Plaintiffs’ Fourteenth Amendment liberty interests in the right to travel and the right to privacy are implicated by the Face Mask Ordinance and they continue to be subjected to unequal treatment under the law for their medical conditions.

II. Legal Standard

Plaintiffs seek entry of a preliminary injunction and bear the burden of persuasion to establish: 1) a substantial likelihood of success on the merits; 2) a

substantial threat of irreparable injury if the preliminary injunction is not granted; 3) that the threatened injury to the Plaintiffs outweighs the threatened harm the injunction may cause the Defendants; and 4) that granting preliminary injunctive relief is not adverse to the public interest.¹

III. Likelihood of Success on the Merits

A. State Emergency Powers

The Eleventh Circuit has articulated limits on the state of Alabama's emergency powers during the Covid-19 pandemic.² The Middle District of Alabama entered a preliminary injunction against the state enjoining the enforcement of a public health order issued during the pandemic. The health order mandated postponement of all surgical procedures other than those necessary to treat emergency medical conditions or those "necessary to avoid serious harm".³ The purpose of the emergency health order was to free up hospital capacity, preserve personal protective equipment for medical workers, and slow the spread of the virus by reducing social interactions.⁴ The state argued it was granted sweeping emergency powers under the seminal case *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In that case a mandatory polio vaccination did

¹ *Cate v. Oldham*, 707 F.2d 1176, 1185 (11th Cir. 1983).

² *Yashica Robinson v. Planned Parenthood Southeast Inc.*, No. 20-11401-B (11th Cir. 2020) (Unpublished opinion).

³ *Id.* at 2.

⁴ *Yashica Robinson v. Planned Parenthood Southeast Inc.*, No. 20-11401-B (11th Cir. 2020) at page 14.

not violate Mr. Jacobson's Fourteenth Amendment right to bodily integrity, or the right to make medical decisions. "But its ruling was not an absolute blank check for the exercise of governmental power. The Court explained that 'if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution.'" ⁵ The Eleventh Circuit denied the state's motion to stay the injunction. The liberty interest implicated in the *Yashica Robinson* case was a woman's fundamental right to privacy, or to make medical decisions, in determining whether to terminate her pregnancy.

The state of Alabama in *Yashica Robinson* also relied on the Eleventh Circuit case that arose from the aftermath of Hurricane Andrew. In *Smith v. Alvino*, 91 F.3d 105 (11th Cir. 1996), the court considered the emergency authority of the state to enact and enforce temporary curfews. State emergency authority to enact curfews had been upheld after Hurricane Hugo, during civil unrest after a racial incident, and during the LA riots .⁶

⁵ *Yashica Robinson* at page 10 (quoting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)).

⁶ *Smith v. Alvino*, 91 F.3d 105 (11th Cir. 1996) (citing *Moorhead v. Farrelly*, 727 F. Supp. 193 (D.V.I.1989) (Hurricane Hugo); *United States v. Chalk*, 441 F.2d 1277 (4th Cir.1971) (civil unrest); (*In re Juan C.*, 28 Cal. App. 4th 1093, 33 Cal. Rptr. 2d 919 (1994) (LA Riots)).

The *Smith v. Alvino* court wrote, “From prior decisions involving natural disasters, both of the judges in the district court gleaned the proper approach in such matters: when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality ‘is limited to a determination whether the [executive's] actions were taken in good faith and whether there is some factual basis for the decision that the restrictions ... imposed were necessary to maintain order.’”⁷ So the *Smith* court ruling was in the context of a hurricane and specific to the government’s implementation of a curfew to maintain order.

Fundamental rights not expressly enumerated in the Constitution and the Bill of Rights are found in substantive due process jurisprudence that has defined the meaning of the Fourteenth Amendment protection of “life, liberty, and property” rights. In *Yashica Robinson* the court reviewed government action that infringed upon the fundamental right to privacy during the Covid-19 pandemic. In *Smith* the court reviewed government action that infringed upon the fundamental right to travel in the immediate aftermath of a hurricane. It is a function of the courts to review government actions that infringe upon liberty. “So, while states and the federal government have wide latitude in issuing emergency orders to protect public safety

⁷ *Smith v. Alvino* at para. 13. (quoting *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir.1971))

or health, they do not have *carte blanche* to impose any measure without justification or judicial review.”⁸

B. Municipal Liability

The Board of County Commissioners and the County Manager are liable in their official capacities and subject to suit under U.S.C. § 1983. Municipal liability may be based upon an express municipal policy such as an ordinance, regulation, or policy statement.⁹ A “municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.”¹⁰ Even if the municipality is enforcing a state law, the municipality is liable if the state law was adopted into a municipal ordinance.¹¹

The Defendants are Alachua County Board of County Commissioners (“Board”) in their official capacities and County Manager Michele L. Lieberman (“Manager”) in her official capacity. Pursuant to the Alachua County Home Rule Charter Article II Section 2.1, Alachua County operates under an elected county commission and appointed county manger form of government with separation of legislative and executive functions. Pursuant to the language in the Alachua County

⁸ *Yashica Robinson* at page 11.

⁹ *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

¹⁰ *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

¹¹ *Cooper v. Dillon*, 403 F.3d 1208, 1222 (11th Cir. 2005).

Home Rule Charter, it is the Manager's role to serve as the executive to the legislative function of the Board.

Defendant Board established or enacted "FIRST AMENDMENT TO EMERGENCY ORDER NO. 2020-21 PHASE ONE STEP BY STEP RECOVERY ORDER" ("Alachua Emergency Order") on May 4th, 2020, which was supplemented with a subsequent amendment on May 17th, 2020. (Exhibits A and B.) The Alachua Emergency Orders are "express municipal policy".¹²

The Alachua Emergency Orders state "the CDC, the Florida Department of Health and the University of Florida recommends the use of face coverings...to slow the spread of the disease", and the "Centers for Disease Control have recommended the use of facial coverings to reduce the spread of the virus since many individuals with no symptoms can spread the virus." (Exhibits A and B). While the Board and Manager appear to be acting in good faith with their intentions for enacting and enforcing the Mask Ordinance, their good faith does not render them immune from suit under U.S.C. § 1983, nor are they immune from judicial review.¹³ The "good faith" test articulated in *Smith v. Alvino* was specific to the context of "natural disasters" and "necessary to maintain order". The type of natural disasters referred to in that case were hurricanes and instances of civil unrest and violence. To apply

¹² See *City of St. Louis*, 485 U.S. 112 at 127.

¹³ *Owen*, 445 U.S. 622, 638

the “good faith” test in all cases that challenge government emergency authority would contradict the municipal liability standard set by the Supreme Court: a “municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.”¹⁴

Finally in regards to municipal liability, the Defendants cannot shield themselves by claiming they are merely enacting Florida Governor DeSantis’s Covid-19 Emergency Executive Orders. Defendants have expressly embodied specific aspects of the Governor Emergency Order into the Alachua Emergency Orders and have added their own provisions that supersede the Governor Emergency Order.

C. Vagueness

Plaintiffs specifically challenge the lawfulness of section 8(c) of the May 4th Order, and section 4(c) of the May 17th Order, which are identical: “A face covering shall not be required for children under six, **persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medial problem.**” (Exhibits A and B) (Bold typeface added for emphasis.)

The Due Process clause of the Fifth Amendment as applied to the states pursuant to the Fourteenth Amendment protects Plaintiffs from unconstitutionally

¹⁴ *Id.* at 638

vague laws. A law is vague when it fails to provide notice, or to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly.”¹⁵ A vague law is also arbitrary, in that it leaves government actors “free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.”¹⁶ “Vague laws allow for arbitrary enforcement because they do not meaningfully limit who the police can arrest, who prosecutors can prosecute, and who judges and juries can convict.”¹⁷

The Face Mask Ordinance of the May 4th Alachua Emergency Order provision 8 (c), and of the May 17th Order provision 4 (c) states: “A face covering shall not be required for...**persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medical problem.**”

The wording of the Face Mask Ordinance has left Plaintiffs in a perpetual state of confusion as to whether they are permitted to go into the community without a mask.

Plaintiff Israel Ham has “severe allergies” that restrict his breathing”. Wearing a mask causes his “nose to run with blood and mucus.” He is also diagnosed with PTSD, Depression, and Severe Anxiety resulting from his military service. Wearing a mask causes his anxiety to spike, and causes his “breathing to be disrupted and [his] heart rate to go up.” Israel Ham does not know from the wording of the Face

¹⁵ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹⁶ *Giaccio v Pennsylvania*, 382 U.S. 399, 402-03 (1966)

¹⁷ *United States v. Calvin Marchett*, 14-10396 (11th circuit 2016) (Unpublished opinion) (citing *Kolender v Lawson*, 461 U.S. 352, 358-60 (1983) and *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

Mask Ordinance whether his allergies or his diagnosed mental health conditions exempt him from wearing a mask. (ECF No. 1-1(Exhibit A: “Declaration of Israel Ham”)) He does not know what information he is required to provide in order to ride the public bus.

Plaintiff Steven Gordon has asthma. He was denied access to his doctor’s appointment when a police officer told him he could not enter the doctor’s office without a mask. He is prescribed an inhaler. Steven Gordon has “trouble breathing due to a chronic pre-existing condition” but he was unable to access his doctor when he told the police officer that he has a medical condition that exempted him from wearing a mask. (ECF No. 1-1(Exhibit A: “Declaration of Steven Gordon”)) Steven Gordon does not know whether his asthma exempts him from the Face Mask Ordinance.

Plaintiff Phillip Hooks has diagnosed PTSD and Anxiety Disorder resulting from his military service. Wearing a mask causes him to “hyperventilate and panic like [he’s] suffocating. He has been unable to access retail stores without wearing a mask (ECF No. 1-1(Exhibit A: “Declaration of Phillip Hooks”)) Mr. Hooks does not know whether his medical conditions exempt him from wearing a mask.

Plaintiff Hollye Merton has skin cancer on the side of her face and cannot wear a mask because that area on her face becomes irritated when the strap of a face mask rubs against it. She has not accessed any businesses for services since the Face

Mask Ordinance was enacted. (ECF No. 1-1(Exhibit A: “Declaration of Hollye Merton”.) She does not know whether the ordinance exempts her from wearing a mask.

Plaintiff Tolar Powell is diagnosed with Asthma, Fibromyalgia, and PTSD as a result of being in a car accident with fatalities. He entered a Walgreens store in Gainesville, Alachua County, during a time the Face Mask Ordinance was in force. He entered the store to pick up a prescription, but was stopped three different times by three different employees in the store and told he needed to wear a mask. He was finally told by the pharmacist that he could not be in the store without a mask, and that he could only use the drive-thru window to pick up his prescription. He was unable to shop for other items in the store. (ECF No. 1-1(Exhibit A: “Declaration of Tolar Powell”.) He does not know whether the ordinance exempts him from wearing a mask.

Not only does the Face Mask Ordinance fail to provide notice, but it is also arbitrarily applied and enforced. Defendants have constructed a webpage with answers to “Frequently Asked Questions” about the Face Mask Ordinance and have provided a “3-1-1” telephone number for people to dial and ask questions. (Exhibit C.) Under the headline “Must Businesses enforce the Order?”, the response provided on that website reads: “Businesses are expected to make sure their employees are using appropriate facial coverings and other methods to protect the employees and

public. The business can restrict its customers to those who are following the Order, but the County does not expect them to enforce the requirements of the order. They may ask for the assistance of Law Enforcement or Codes Enforcement.” (Exhibit D.)

Businesses “can restrict its customers to those who are following the Order”, but the Plaintiffs do not know what is required to follow the Face Mask Ordinance. Although each Plaintiff has a medical condition that is exacerbated by using a face mask, they have been turned away from accessing basic services or have forgone even attempting to access those services.

Israel Ham cannot ride the bus without a mask, nor has he been able to enter a store without a mask. (ECF No. 1-1(Exhibit A: “Declaration of Israel Ham”)) Phillip Hooks was told by a Publix employee that even if he went into the store without a mask the police could be called and he could be fined. Mr. Hooks was informed by a Wal-Mart employee that he could not be exempted from wearing a mask unless he had a doctor’s note. A Dollar Store employee asked him whether he had asthma, and when he refused to answer the question he was denied entry into the store. (ECF No. 1-1(Exhibit A: “Declaration of Phillip Hooks”)) Steven Gordon was told by Officer Ellis of Gainesville Police Department that he could not enter his doctor’s appointment without a mask, even though Mr. Gordon informed him he has a medical condition that exempts him. (ECF No. 1-1(Exhibit A: “Declaration of

Steven Gordon.)) The County “Frequently Asked Questions” Website provides no enumerated standards for obtaining an exemption to wearing a mask. It is unknown what standard will be applied when calling the 3-1-1 telephone number when asking questions about exemptions.

The County “Frequently Asked Questions” Website under the heading “What questions can a business ask an individual who is not wearing a facial covering?” states:

“A business may ask the following 2 questions: 1) Are you unable to wear a facial covering due to a medical condition? 2) If yes, how does wearing facial covering exacerbate your medical condition? a) Examples of acceptable responses:

Anxiety; Breathing Problems; Sensory Issues; Skin Sensitivity

Businesses should train staff to ask only these 2 questions and to accept reasonable responses with no further inquiries about the individual’s medical condition. A doctor’s note is not required as the individual claiming the exemption should be able to give a general response as to why they feel they are not required to wear a mask under the order.” (Exhibit)

The County is placing the burden upon businesses owners to train employees about how to subjectively screen people for medical exemptions, and giving discretion to private citizen employees and business owners to selectively call law or code enforcement with threat of fine.

The Face Mask Ordinance must fail for vagueness because it provides patently insufficient notice to Plaintiffs about what medical conditions are exempt and what means suffice for seeking exemptions. The Face Mask Ordinance is arbitrary

because in effect it is being selectively, not uniformly, enforced by law enforcement, municipal employees, and business owners and employees. The Face Mask Ordinance is being enforced with no legally fixed standards. It is facially unclear what the standards are for enforcement. A simple website offered to the community leaves more questions than provides answers for enforcement.

D. Procedural Due Process

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ of ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”¹⁸

The Due Process clause requires “that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’”¹⁹

“A Section 1983 procedural due process claim requires a plaintiff to prove three elements: ‘(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process.’”²⁰

Plaintiffs have been deprived of their liberty interest in accessing their community for basic needs including food, transportation, and medical

¹⁸ *Mathews v. Eldridge*, 424 U.S. 319, 332.

¹⁹ *Catron v City of St Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950)).

²⁰ *Catron v City of St Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) (quoting *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)).

appointments. The Face Mask Ordinance as applied to Plaintiffs is an edict to “Stay home if you cannot wear a mask.” If Plaintiffs do go out into the community, they are forced to wear a face mask despite medical contraindications. A liberty interest to travel, or access the community, has been recognized in our jurisprudence. Justice Douglas wrote in *Kent v. Dulles* (1958) that “[F]reedom of movement is basic in our scheme of values.”²¹ Justice Douglas wrote again in 1964 about the liberty interest in freedom of movement: “Freedom of movement, at home and abroad, is important for job and business opportunities, for cultural, political, and societal activities, for all the commingling which gregarious man enjoys.”²²

A most recent Eleventh Circuit ruling acknowledged what is akin to a liberty interest in freedom of movement. “Plaintiffs have a constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally.”²³ An eloquent proclamation of the liberty interest in free movement is found in *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972):

“[T]hese activities (walking and strolling) are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the

²¹ *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

²² *Aptheker v. Sec’y of State*, 378 U.S. 500, 519-20 (1964) (Douglas, J., concurring).

²³ *Catron v City of St Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 1858, 144 L. Ed. 2d 67 (1999)).

right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.”

The Face Mask Ordinance offends Plaintiffs’ liberty interests in travelling within their community. Steven Gordon says the Face Mask Ordinance has affected his “ability to travel freely in the community to access medical care and food.” He says he feels “stigmatized for not wearing a mask in public, and anxiety about whether [he] will be able to access businesses without a mask. (ECF No. 1-1(Exhibit A: “Declaration of Steven Gordon”)) Tolar Powell has said he avoids “leaving his house to shop until it becomes absolutely necessary”, and that he feels “stigmatized, anxious, and angry.” (ECF No. 1-1(Exhibit A: “Declaration of Tolar Powell”)) Phillip Hooks has declared: “Travelling to access food causes [him] to feel intimidated, threatened, harassed, fearful, and [his] blood pressure rises.” (ECF No. 1-1(Exhibit A: “Declaration of Phillip Hooks”)) Hollye Merton says she has “not gone to any businesses for services because of the Ordinance.” (ECF No. 1-1(Exhibit A: “Declaration of Hollye Merton”)) Israel Ham has said that has “felt the Anxiety of going anywhere and it is causing [him] to stay home even when [he] needs to go to the store just for food.” (ECF No. 1-1(Exhibit A: “Declaration of Israel Ham”)) The looming threat of uncertainty, stigmatization, fines, and confrontations with employee-citizens a law enforcement has a palpable, chilling effect on the Plaintiffs’ liberty.

The Face Mask Ordinance enacted and enforced by Defendants deprives Plaintiffs of liberty without providing adequate process. No opportunity exists for a factual determination of medical exemption to the mask requirement. Medical exemptions are determined on a case-by-case, day-by-day basis by any number of individuals whether they be business owners, bus drivers, store employees, or law enforcement. The only potential opportunity for a fact-finding, evidentiary hearing is at some unknown time after a fine is assessed (Exhibit A: provision 16; Exhibit B: provision 13.) In the meantime, Plaintiffs are being denied free access into the community for basic needs.

E. Equal Protection Claims

The Face Mask Ordinance has placed a burden upon Plaintiffs liberty interests to travel and to make medical decisions. Plaintiffs cannot wear face masks because of their medical conditions. The Ordinance in effect punishes Plaintiffs for their medical conditions because of the requirement that they seek medical exemptions under an unlawful process. The process provided by the Ordinance is constitutionally insufficient. The Ordinance provides no notice as to the conditions that are exempt or how an exemption shall be sought. It is arbitrarily enforced with no enumerated process for granting exemptions, and subjectively applied on a case-by-case, day-by-day basis. The Ordinance provides no administrative process for redress of Plaintiffs' inability to access basic services.

The only prospect for a court hearing is after assessment of a municipal code violation fine.

The Ordinance burdens the liberty interest in the right to travel. The right to travel has been recognized as a substantive due process guarantee protected by the Fourteenth Amendment, whereas “No state shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law...”²⁴

The right to make medical decisions is also a liberty interest protected by the Fourteenth Amendment. The most clearly establish fundamental right to make medical decisions articulated by the Supreme Court is the right of a woman to terminate her pregnancy.²⁵ Alachua County, the state of Florida, and the Nation are faced with novel questions posed by the novel Coronavirus. This case presents an issue of probable first impression: Can the government force individuals to wear a face covering for the alleged public purpose of slowing the spread of a virus? The Alachua County Face Mask Ordinance requires Plaintiffs to wear a face covering over their mouth and nose to access basic services throughout the community. This Ordinance requires Plaintiffs to share medical information with

²⁴U.S. Const. amend. XIV, § 1, and; Cases discussing the liberty interest in travel: *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Catron v City of St Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) ; *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972).

²⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

strangers who are not medical personnel. If Plaintiffs are granted an exemption to the Ordinance on a case-by-case, day-by-day, basis to enter a grocery store for example, they are immediately identifiable as a person with a medical condition. The Face Mask Ordinance forces Plaintiffs to be singled out. In the 1905 case *Jacobson v. Massachusetts* the Supreme Court decided the state's interest in a state-wide vaccination scheme to inoculate the entire population from polio was compelling enough to override individual liberty.²⁶ Today there are exemptions to mandatory vaccinations granted at least minimal due process and *privacy*. Seeking an exemption would be a matter discussed between patient and doctor, with perhaps the local school board having an interest in the administrative process.²⁷

Face masks to “stop the spread” of Coronavirus do not rise to the level of scientific certainty and national consensus of efficacy compared with mandatory vaccination schemes. Alachua County May 4th Order and May 17th Orders state in a WHEREAS clause that “the Centers for Disease Control have *recommended* the use of facial coverings to reduce the spread of the virus...”. (emphasis added). (Exhibit B: 2 of 7; Exhibit A: page 2 of 6). That clause embeds a hyperlink to a

²⁶ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

²⁷ American Bar Association website article: “Vaccination Law 101: A Guide for Children’s Lawyers”, July 2, 2019 (accessed on May 18th, 2020) <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/summer2019-vaccination-law-101-a-guide-for-childrens-lawyers/>

Centers for Disease Control website.²⁸ Following that link brings you to a webpage that states:

“CDC recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies), **especially** in areas of significant community-based transmission.”

(Exhibit F.)

The County also cites in its “Emergency Order” that researchers at the University of Florida *believe* it is too early to ease restrictions without enhanced testing in place and that such testing is not currently in place and that COVID-19 will be present in the population for a long time”. (emphasis added). (Exhibit A: page 2; Exhibit B: page 2.)

The word “believe” does not rise to the level of scientific proof. The word “believe” shows that researchers at the University of Florida may be studying a hypothesis. The scientific uncertainty about face masks stopping the spread of the virus contrasts with the scientific certainty and consensus about mandatory vaccines backed with congressional authority, as contemplated in *Jacobson v. Massachusetts*.

²⁸ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html> :accessed on May 16th, 2020)

Plaintiffs have a liberty interest in making decisions to decline medical care. The Supreme Court has ruled that medical privacy does not extend to the level of a right to die (assisted suicide).²⁹ But privacy is afforded to the individual who chooses to refuse medical treatment.³⁰ Plaintiffs are being forced by the local government to cover their nose and mouth, despite medical contraindications, to access basic services. This Face Mask Ordinance is a pariah. The majority of counties in Florida do not have a mandatory mask requirement. The CDC nor the Governor of Florida have not mandated face masks. Face Masks are not part of a public health regulatory scheme because there is no scientific consensus to back their efficacy. “[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution.” The Third Branch is called at this unprecedented time to check the legislative and executive powers of the Alachua County Board and Manager to protect Plaintiffs fundamental liberties.³¹

IV. Threat of injury to Plaintiff

²⁹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

³⁰ *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 270 (1990) (citing *In re Quinlan*, 70 N.J. 10, 335 A.2d 647, cert denied *sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976)).

³¹ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)

Plaintiffs must decide every day this Face Mask Ordinance remains in effect whether they will enter the community under threat of fine simply because they have a medical condition and cannot wear a face mask.

Besides living under constant threat of civil liability for having a medical condition, Plaintiffs must decide daily whether to access basic services under fear of stigmatization and violation of their medical privacy.

V. Balance of Hardships

The County's interest in protecting the health and safety of its constituents does not outweigh the infringement upon Plaintiffs constitutionally protected rights under the Fifth and Fourteenth Amendments. Face Masks are not mandated by the CDC or the Governor because there is no scientific consensus they serve the purpose purported by the County: stopping or slowing the spread of the virus. The County Board and Manager can rescind their Face Mask Ordinance and save resources from the need to enforce the Ordinance. To rescind the Ordinance will alleviate the hostile environment throughout the community causing damage to the good will and reputations of local businesses. The other aspects of the Alachua Emergency Orders of May 4th and May 17th that serve to protect the public through far less invasive means (like social distancing) can remain in force without the Mask Ordinance.

With no injunction in place, Plaintiffs cannot access basic services free from invasion into their privacy. The Face Mask Ordinance creates a chilling effect on

the right to travel throughout the community. Daily the Plaintiffs remain under threat of civil liability for having a medical conditions. The application of the Face Mask Ordinance operates as a punishment for having conditions like asthma, PTSD, and skin cancer. (ECF No. 1-1(Exhibit A: “Declarations.”))

V. Public Interest

The CDC recommends face masks especially in areas of significance. (Exhibit F.) CDC does not have a uniform definition of what an “area of significance” is. In the Governor’s emergency order he carved out specific and heightened control measures for three Florida counties: Dade, Palm Beach, and Broward. (Exhibit G: Section 2 (A)(2).) Those counties have the highest rates of Covid-19 infection, hospitalizations, and deaths. Comparing those statistics to Alachua County, it is clear that Alachua County would not fall into the category of “area of significance”. Florida’s Covid-19 Data and Surveillance Dashboard on May 16th, 2020 showed Alachua County at 315 Covid-19 positive residents, 64 hospitalizations, and 7 deaths. (Exhibit H.) Palm Beach County showed 4,357 positive residents, 809 hospitalizations, and 275 deaths. (Exhibit I.) Dade County showed 15, 190 positive residents, 2,376 hospitalizations, and 559 deaths. (Exhibit J.) Broward County showed 6,049 positive residents, 1,250 hospitalizations, and 278 deaths. (Exhibit K.)

When comparing Alachua County to Dade, Palm Beach, and Broward Counties, the data is widely disparate. Since the Governor did not carve out specific

emergency measures for Alachua County based on the infection and death statistics in Alachua County, Alachua County is not an area of “significant spread” that CDC contemplates the recommendation for wearing face masks.

The public interest will be served by enjoining the County from enforcing a unconstitutionally vague ordinance that provides no due process for exemptions and tramples on the liberty interest of travel and privacy. County’s efforts to combat Covid-19 do not outweigh the lasting harm suffered by Plaintiffs who are unable to travel freely to access basic services such as food, transportation, and medical care.

VI. Conclusion

Plaintiffs have shown a substantial likelihood of success on the merits. Defendants do not have blanket authority during an emergency to infringe constitutionally protected rights. Despite the good faith of Defendants, they are not immune from liability and judicial review of their police powers. Plaintiffs have shown: the County Face Mask Ordinance is unconstitutionally vague; they have been denied procedural due process; and their right to travel and right to privacy liberty interests have been infringed by the County Ordinance. Plaintiffs have shown they are subjected to injury daily because of the Face Mask Ordinance. They are unable to access basic services because they have medical conditions that prevent them from wearing masks. They suffer the imminent threat of civil penalty for not

wearing a mask in public. Defendants will not suffer from entry of a preliminary injunction but will most likely benefit from an injunction that requires them to rescind their unconstitutional order. They will save the costs of enforcement and litigation that can benefit the taxpayers. Finally, the public will benefit if this Court grants an injunction. The uniform application of statewide Covid-19 emergency response standards will protect the individual liberty of Plaintiffs and all citizens while fostering a beneficial re-opening of our local, state, and national economy. The chilling effect of the Face Mask Ordinance on community travel and commerce must be stopped. Less invasive safety measures are already in place, and since Alachua County is not an “area of significant spread”, the community will remain safe and prosperous.