

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.

**PLAINTIFFS' REPLY TO ECF NO. 20, DEFENDANTS' RESPONSE TO
PLAINTIFFS MOTION FOR EMERGENCY INJUNCTIVE RELIEF**

Plaintiffs invoked jurisdiction of the Court pursuant to 28 U.S.C §§ 1331 and 1343 for deprivation of rights secured by the United States Constitution. (ECF No. 1: para. 3). Chapter 42 U.S.C. § 1983, the Civil Rights Act, codifies causes of action to bring suit for deprivations of federally protected rights under color of state and municipal law. (ECF No. 1: para 2). Plaintiffs have not alleged any deprivations nor seeks any remedies under the Florida Constitution. Defendants are incorrect where they submit that Plaintiffs brought suit under the Florida Constitution. (ECF No. 20: page 6, section I. "Introduction"; page 12, section III. "Argument", subsection B).

The Plaintiffs invoke U. S. Const. amend. V, and the U.S. Const. amendment XIV. (The Fifth and Fourteenth Amendments) (ECF No. 1: para 84, 93, 100, 112, and 122).

Plaintiffs challenge the as-applied effects of the County Face Mask Ordinance, and also the lack of an administrative remedy, under the Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. Defendants claim: “The present order clearly sets forth its exemptions and the intent behind those exemptions.” (ECF No. 20: page 12, section B). Yes, it is clear that Defendants have amended their Face Mask Ordinance several times to clarify medical exemptions. Defendants concede: “The Current Order 20-25 (second amendment) clearly provides an exemption from the requirement to wear a facial covering for all of Plaintiffs, due to their plead conditions, and does not subject them to any criminal penalty.” (ECF 20: page 18, section III, subsection C). However, the chaotic and arbitrary enforcement of the Face Mask Ordinance leaves Plaintiffs with daily uncertainty whether county-wide enforcers will allow them an exemption to access food, medical appointments, public transportation, and government services. Defendants also say that Plaintiffs are not subject to criminal penalty. Even if that is true, Plaintiffs are still subject to civil penalties. Defendants act like the threat of a civil fine is “no big deal.” Defendants cannot say with any certainty that Plaintiffs can access the community without a mask and avoid civil

penalty. Plaintiffs cannot afford the risk of accessing the community without a mask. A threat of civil penalty includes not only the out-of-pocket expense but also the possibility of a court hearing where a cited individual would foreseeably need to take time off of work and even hire counsel to defend against the County fine.

Defendants try to toss responsibility for their Face Mask Ordinance to anyone but themselves. They claim they have no control over how their Face Mask Ordinance is applied. Plaintiffs will prove on the merits that but for the County Face Mask Ordinance, they would not be suffering the daily infringement upon their rights to travel and their rights to medical privacy. The County Face Mask Ordinance has created a community environment of utter fear and division. Defendants are fully responsible for their rule-making and how it is applied in the community. If Defendants truly had no responsibility for ensuring the clear and equitable enforcement of the Ordinance, they would not be taking the pains to constantly update the County website that provides guidelines for businesses to enforce the order. At the time of this filing, the County Website addresses businesses and provides that a 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.” Defendants explicitly state that a business owner or employee can deny someone access to food, medical appointments, public transportation, or government services

to those who are “following the order.” Right here the Defendants appoint citizens as the arbiters and enforcers of the Order. It is true citizens cannot write citations, but citizens have become the gatekeepers of Plaintiffs’ access to essential services. Citizens can also call to “tattle on their neighbors”. “The Alachua County information line may be reached at 3-1-1...They can also take anonymous complaint for any violation of the order.” (Exhibit A: June 1st, 2020 County Website).

Plaintiffs complain not just for the fear and threat of civil penalty, but also for the fear and threat of being unable to safely access basic services. Law and code enforcement are not the gatekeepers to food, transportation, or medical appointments. The County-appointed citizen enforcers determine who gets to grocery shop without a mask. Defendants cannot shrink away from how they have directed County-wide enforcement of this Face Mask Ordinance.

In addition to the as-applied violations of Plaintiffs due process rights, Defendants provide no opportunity for an administrative determination of their exemption. For example, the County could provide for a simple administrative determination as to whether Plaintiffs could access the community without a mask. Plaintiffs could call the County “3-1-1” line, privately discuss their need for an exemption, and be provided a type of “exemption ID card” that could be shown if questioned by a business owner or employee. This would eliminate the confusion of whether Plaintiffs need to carry around their medical records and reveal private

medical information to members of the public. But Defendants provide no certainty. Exemptions to vaccines are handled in an administrative capacity, and since Defendants argue masks are a public health measure as opposed to private medical choice, Defendants should provide an administrative process prior to citation. The Florida Department of Health provides a form that can be used by a patient and physician to seek medical and religious exemptions to mandatory vaccinations. (Exhibit B: Florida Certificate of Immunization form DH-680). The damage occurs to Plaintiff before any potential citation because they are being deprived of access to the community for essential services, and suffering invasions into their medical privacy. Defendants argue they don't have the time and resources to lawfully enforce and apply the Face Mask Ordinance, and think their emergency powers authorize them to deprive Plaintiffs of due process while subjecting them to unequal protection of the law.

Plaintiffs raise Fourteenth amendment claims. "No state...shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amendment XIV. The Face Mask Ordinance infringes upon life and liberty without due process of law, and is applied in an unequal manner to Plaintiffs because of their medical conditions. "The substantive component of the Due Process Clause protects those rights that are 'fundamental,' that is, rights that are 'implicit in the concept of

ordered liberty.’”¹ In the recent case *Robinson v. Harris*, the 11th circuit made it clear that a government does not have *carte blanche* authority to enact whatever it wants during a pandemic, especially when government action or policy infringes on a fundamental right.² That fundamental right implicated in *Robinson* was the unenumerated, prenumbral right of privacy.³ “A finding that a right merits substantive due process protection means that the right is protected ‘against certain government actions regardless of the fairness of the procedures used to implement them.’”⁴ Defendants can argue *ad nauseam* why they enacted the Face Mask Ordinance and why they think that Alachua County is a bastion of public health that requires strict measures not taken by almost every other Florida County. Plaintiffs will spare the Court a battle of the experts if the Court does not consider a level of heightened scrutiny for the County’s actions beyond rational basis. Plaintiffs are aware that courts have not uniformly defined a fundamental right to intrastate travel, but our 11th circuit has certainly touched upon the issue.⁵ As applied, the County Face Mask Ordinance operates to chill the right to travel. Plaintiffs are not seeking recreation or extracurricular activities. They’re just trying to buy food, ride the bus, and go to the doctor.

¹ *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

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

³ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁴ *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115 (1992)).

⁵ *Catron v City of St Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011); *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972).

Plaintiffs are asking this Court to make a determination that their right to medical privacy and bodily integrity has been trampled by the Face Mask Ordinance. While the right to an abortion is a fundamental right, then so should be the right to make other personal and medical decisions regarding one's own body. Plaintiffs are asking for the basic liberty to be free from medically contraindicated discomfort and exacerbation of their conditions. They merely want to breathe freely, at their own risk of contracting a virus, and to enter a grocery store without scrutiny by citizen enforcers. The County Face Mask Ordinance invades the medical privacy and bodily integrity of Plaintiffs. Plaintiffs do have a fundamental right to exist without fear from a County Order that punishes them for the non-criminal state of having diagnosed mental conditions, skin cancer, and asthma. Why should Israel Ham have to explain every single day to any number of community gatekeepers that he is a Veteran and has diagnosed mental conditions from his service, and that he can't wear a mask for reasons of a deeply personal nature? (ECF No. 1: Exhibit A, "Declaration of Israel Ham). So instead he just puts on the mask and suffers in order to ride the bus. He is being forced to wear a mask and it is the responsibility of Defendants. Can Defendants even imagine how this climate of fear and confrontation in the community is affecting mental health? This is not mere frustration or inconvenience. People are suffering.

The current state of emergency is waning. (Exhibit C: County Face Book post June 1st, 2020). Can Defendants justify their unprecedented, abnormal Ordinance with these statistics, where the application of their Ordinance insults the liberty interests of Plaintiffs? No new deaths (deaths have remained static at 7 total), and a positivity rate of 1.9%.

In *Smith v Alvino*, a curfew was constitutional as Miami-Dade cleaned up for months after a hurricane that decimated infrastructure.⁶ What if after the streets were cleared, homes and businesses rebuilt, and flood waters receded, the county decided to extend the curfew just in case another hurricane would follow? Defendants are invading the privacy and bodily integrity of Plaintiffs, and preventing them from safe travel to access basic services, on a great big “Maybe.” Plaintiffs suffer as Defendants continue to force Plaintiffs to wear a mask. Plaintiffs must comply in order to literally not starve. Plaintiffs must comply to avoid having a medical discussion with a store clerk. Plaintiffs are under threat of civil penalty that is a “pretty big deal” to people who are struggling economically in dire economic circumstances.

Plaintiff will prove: Defendants have enacted an unconstitutional as-applied ordinance; Defendants have failed to provide an administrative remedy for deprivation of rights to life and liberty; and Defendants have trampled upon

⁶ *Smith v. Alvino*, 91 F.3d 105 (11th Cir. 1996).

Plaintiffs' unenumerated, fundamental rights to access their communities and to medical privacy. The unequal application of the law to Plaintiffs because of their medical conditions demands a level of scrutiny a notch higher than mere rational basis.

Masks are not mandatory at the state level nor the Federal level. The data indicates there are no new deaths, few new cases as testing expands, and the infection rate of the County population is at less than 2%. (Exhibit C). The mandatory mask ordinance is shocking to the conscience of Plaintiffs and one can glean the divisive nature of mandating masks by reading the local paper, watching the local news, or conversing with community members on social media platforms like the County website. Defendants are wielding power that oversteps the boundary of individual liberty with flimsy data to support their drastic measures. The data plainly shows that granting an injunction would not be adverse to the public interest. Defendants interest in administering the public welfare in this case does not outweigh the daily damage inflicted upon Plaintiffs and all those who did not enter the case as Plaintiffs but who have come forward in a hundred calls and emails to the undersigned. Their stories have been gut wrenching. The public interest will be served by moving past the Mask Mandate and engendering a community spirit of recovery rather than embedding ever more fear and division. The Face Mask Ordinance serves to reveal

that Defendants are enacting drastic measures for the sake of sheer power – and not for the sake of public health and wellbeing.

Respectfully submitted on June 1st, 2020.



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Certificate of Service

I hereby certify that a copy of this Response has been served upon Attorney Robert Charles Swain via email to bswain@alachuacounty.us and cao@alachuacounty.us , and to Attorney Sylvia Torres at Storres@alachuacounty.us , upon filing this document.



Certificate of Compliance with N.D. Fla. Loc. R. 7.1(F)

This Reply Memorandum does not exceed 3200 words. The total word count is 2,275 words.

