

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

ZACHARY DAMATO,
LUCY TUREK,
Plaintiffs,

CASE NO:

vs.

PINELLAS COUNTY, a political
subdivision of the State of Florida,
Defendant.

_____/

**VERIFIED COMPLAINT FOR EMERGENCY INJUNCTIVE RELIEF
AND DECLARATORY JUDGMENT**

Plaintiffs, Zachary Damato and Lucy Turek ("Plaintiffs"), through undersigned counsel, hereby sues Defendant, PINELLAS COUNTY, a political subdivision of the State of Florida, ("Pinellas County"), and alleges the following:

JURISDICTION AND VENUE

1. This is a lawsuit for injunctive relief over which this Court has jurisdiction.
2. This is a lawsuit for declaratory judgment over which this Court has jurisdiction under Fla. Stat. § 86 (2019).
3. Venue is proper in Pinellas County, Florida under Fla. Stat. § 47.011 (2019), because it is where the cause of action accrued, it relates to certain orders issued by Pinellas County, through the Board of County Commissioners, and because all or part of the claim for relief at issue in this litigation arose in Pinellas County.
4. Plaintiffs, are Florida residents, residents of Pinellas County, and have been negatively

impacted by orders that have been issued by Pinellas County that have caused interference with their personal liberty.

5. Pinellas County is a proper Defendant in this action because Pinellas County created and implemented Pinellas County Emergency Order No. 20-14 ("Emergency Ordinance 20-14") on June 23, 2020, which deprives Plaintiffs' rights guaranteed to them by the Florida Constitution.

FACTS

6. On April 16, 2020, The White House released "Guidelines for Opening Up America Again," (hereafter "Guidelines") a publication that included a three-phased approach to opening the country during the response to the virus known as COVID-19 and based on the advice of public health experts. The Guidelines advised that individuals "strongly *consider* using face coverings while in public." *Guidelines for Opening Up America Again*, The White House (4-16-2020.) (emphasis added).

7. Afterwards, on April 29th, 2020, the Florida Governor Ron DeSantis released Executive Order 20-112 which included a "phased approach" to reopening Florida. This did not include the requirement that Floridians wear face masks in any setting. Executive Order 20-112 *Phase 1: Safe. Smart. Step-by-Step. Plan for Florida's Recovery*, State of Florida, (April 29th, 2020). Executive Order 20-112 left it up to an individual's own discretion whether to wear a face mask.

8. Thereafter, on June 23rd, Pinellas County issued Emergency Ordinance 20-14. Unlike the existing national and State of Florida emergency orders, Emergency Ordinance 20-15 requires Pinellas County residents to wear face masks in various circumstances.

10. The Emergency Ordinance 20-14 reads in part:

SECTION 2. Definitions. For purposes of this ordinance, the following terms are defined as follows:

(1) Face Covering. A “face covering” is a material that securely covers the nose and mouth and remains affixed in place without the use of one’s hands and serves as personal protective equipment. It can be secured to the head with ties or straps or simply wrapped around the lower face covering the mouth and nostrils, as described by applicable guidance from the CDC. A cloth face covering may be factory-made or sewn by hand or can be improvised from clothing or other household items. Examples of compliant homemade masks may be found at <https://www.cdc.gov/coronavirus/2019ncov/prevent-gettingsick/diy-clothface-coverings.html>. A plexiglass face shield may be worn in place of a mask type covering. Persons who wear face coverings should review the CDC and Florida Department of Health guidelines regarding safely applying, removing, and cleaning face coverings.

...(cont.)

(3) Companion. “Companion” means a person or persons by whom you are accompanied.

(4) Indoor Public Place. An “Indoor Public Place” is any location to which the public has or may obtain legally permissible access, whether publicly or privately owned, that is under a roof or is enclosed by two or more walls, doors or other means of weatherproof material, including fabric material such as that used for a tent.

(5) Operator. “Operator” means any individual or entity that owns a business or that controls the operation of a business location, even for a period of time, regardless of the formal title or role held by that individual or entity.

(6) Bar. A “Bar” is a place licensed to, and which does, serve alcoholic beverages. It does not include a Restaurant. It includes but is not limited to nightclubs, taverns, bottle clubs, fraternal order organizations, or other place that serves alcoholic beverages for on-site consumption. A Bar includes places outdoors, such as beach bars at hotels, etc., that otherwise meet this definition.

(7) Restaurant. A “Restaurant” is an on-site or takeout food service establishment that, at the time of adoption of this Ordinance, has for the preceding 30 days, received at least 51 percent of gross food and beverage revenue from the sale of food and nonalcoholic beverages.

...(cont.)

SECTION 3. Mandatory requirements and prohibitions.

(1) All persons must wear a face covering while in any Indoor Public Place within Pinellas County. All persons who own, manage, or are employed by any Restaurant or Bar within Pinellas County must wear a face covering at all times while on duty and directly or indirectly preparing food or beverage, or serving food or beverage, or having customer contact, regardless of where the food or beverage is being prepared or whether the customers being served food or beverage or the customer contact is inside an Indoor Public Place or outdoors, such as on a patio or sidewalk. Persons are generally discouraged from utilizing N95 rated masks, as those are critical supplies for health care workers, police, fire, emergency management, or other persons engaged in life/safety activities.

- (2) The face covering requirements of this Ordinance do not apply to:
- a. A person under the age of 18, except that person's use of a face covering is left to the discretion of that person's parent, guardian, or accompanying adult.
 - b. Anyone while they are dining and/or consuming beverages while seated at a table or bar in a Bar or Restaurant as long as they are Social Distancing.
 - c. These requirements do not apply if (i) less than 10 people are in the location and (ii) the people in that location maintain Social Distancing.
 - d. Governmental entities, such as schools, courthouses, city halls, fire stations, State offices, etc. Governmental entities are encouraged to develop procedures to protect their own employees and members of the public transacting business within their entity.

...(cont)

3) The owner, Operator, manager, and employee of a Bar, Restaurant or Indoor Public Place shall ensure that every individual in that establishment complies with this Ordinance. Each owner or Operator should establish rules for that business establishment that encourage social distancing, hand washing, and other protective measures for customers and employees based upon guidelines provided by the Centers of Disease Control and the State Department of Health, and where applicable, OSHA.

...(cont)

SECTION 4. Penalties and Enforcement.

This ordinance may be enforced through any of the following legal

processes:

(1) Non-Criminal Citation.

a. A code compliance or law enforcement officer may, upon observation of a violation by a person who does not immediately put on a face covering after receiving a warning, issue a Local Ordinance Violation citation to appear in County Court.

b. A code enforcement or law enforcement officer may, upon observation of a violation of any other provision of this ordinance, including Paragraph 4 of Section 3 of this Ordinance, by an owner or employee of a Restaurant or Bar, or a customer of such establishment, issue a Local Ordinance Violation citation to appear

in County Court.

c. Any person or business establishment prosecuted under this subsection and found in violation of this ordinance may be punished by a fine of \$100 for a first violation, \$250 for a second violation and \$500 for a third violation.

...(cont)

(3) Misdemeanor Arrest or Notice to Appear for Repeat Violations. Repeat violations of this Ordinance, which was enacted for emergency purposes during a State of Local Emergency declared by the County, may be enforced by police officers or Sheriff's Deputies pursuant to the provisions of §§252.47 and 252.50, Florida Statutes.

(4) Defenses. An owner, Operator, manager, and/or employee of a business establishment shall not be liable in any enforcement action taken under this section for the violations of a guest, customer, and/or patron if that owner, Operator, manager, or employee directed that guest, customer, and/or patron who refuses to comply with the provisions of this Ordinance to vacate the premises or face prosecution of trespass.

11. Plaintiffs are residents of Pinellas County who are personally and negatively affected by the mandate to wear a mask, both privately and professionally.

12. In a highly cited paper published by the Center for Disease Control, it was found that medical researchers did "not find evidence that surgical-type face masks are effective in reducing laboratory-confirmed influenza transmission, either when worn by infected persons (source control) or by persons in the general community to reduce their susceptibility." (The Center for Disease Control, *Policy Review*, " Xiao, J., Shiu, E., Gao, H., Wong, J. Y., Fong, M. W., Ryu,

S....Cowling, B. J. (2020). Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures. *Emerging Infectious Diseases*, 26(5), 967-975. <https://dx.doi.org/10.3201/eid2605.190994>.)

LAW

13. The Emergency Ordinance 20-14 is unconstitutional both facially and as-applied because it violates the Privacy Clause of Article 1 § 23 of the Florida Constitution. Article 1 § 23 of the Florida Constitution states: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." The explicit constitutional right of privacy listed in the Florida Constitution embraces more privacy interests and extends more protection than the right of privacy provided under the due process clause of the federal constitution. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544, 548 (Fla.1985). The Emergency Ordinance 20-14 is a radical infringement of the reasonable and legitimate expectation of privacy that most Floridians expect to have over their own bodily and facial autonomy in addition to their medical privacy. Plaintiff's medical privacy is and will continue to be infringed by the Emergency Ordinance 20-14 which requires him to both wear a mask and investigate and require any visitor to his business to also wear mask.

14. The Emergency Ordinance 20-14 is also unconstitutional both facially and as-applied because it violates the Due Process Clause of Art. 1 § 9 of the Florida Constitution, which reads: "No person shall be deprived of life, liberty or property without due process of law...". The due process clause protects the individual against the arbitrary and unreasonable exercise of governmental power. *Noel v. State*, 191 So. 3d 370, 373 (Fla. 2016). The Emergency Ordinance 20-14 is arbitrary and unreasonable because it is not backed by a compelling state interest or any facts proving such an interest. (See Section 11 of this complaint.) The original basis for the state

of emergency in Pinellas County which resulted in the issuance of the Emergency Ordinance 20-14 was to reach a goal of “flattening the curve” of new hospitalizations resulting from COVID-19 and the mask mandate is not rationally related to it. Due process of law protects against the unreasonable legislative deprivation of life, liberty, or property and the Emergency Ordinance 20-14 deprives Plaintiff of his liberty. Plaintiff has been deprived of substantive due process by way of Pinellas County's interference with his private action and personal liberty.

15. An additional reason the Emergency Ordinance 20-14 is unconstitutional both facially and as-applied and violates the Due Process Clause of Art. 1 § 9 of the Florida Constitution is because it is void for vagueness. The Emergency Ordinance 20-14 leaves the most significant terms contained within it undefined. Due process is violated when a statute “forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning.” *D'Alemberte v. Anderson*, 349 So.2d 164, 166 (Fla. 1977) (quoting *Cline v. Frink Dairy Co.*, 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927)). Section 3(2) of the Emergency Ordinance 20-14, which contains a list of exceptions to the ordinance, reads: "These requirements do not apply if following these requirements would be detrimental to health, safety, or security." (Emergency Ordinance 20-14, Sec. 3(2)(m)). This unclear exception would confuse any person as to its meaning and would allow any government enforcement official absolute discretion in interpreting and enforcing the Emergency Ordinance 20-14. Multiple terms in the Emergency Ordinance 20-14 also remain undefined, such as "conflict with the Americans with Disabilities Act." Pinellas County has created immediate confusion for the person of common intelligence. Ultimately, the language of the Emergency Ordinance 20-14 is too vague for the average citizen to understand, forcing Pinellas County residents to guess at the meaning and then be subject to the heavy criminal and civil punishment: up to 60 days of jail and a \$500 dollar fine. A statute

is void for vagueness when persons of common intelligence must guess as to its meaning and differ as to its application, or if it lends itself to arbitrary enforcement at an officer's discretion. *Davis v. Gilchrist County Sheriff's Office*, 280 So. 3d 524, 532 (Fla. 1st DCA 2019). The Emergency Ordinance 20-14 lends itself to arbitrary enforcement at an officer's discretion due to its vagueness and indefinite terms.

16. Additionally, Emergency Ordinance 20-14 is unconstitutional both facially and as-applied because it violates the Equal Protection Clause of Art. 1 § 2 of the Florida Constitution, which reads: "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry...". The Emergency Ordinance 20-14, without reason, does not include Pinellas County Buildings or employees. The legal treatment of government operation separate from private businesses is a violation of the Equal Protection Clause of Art. 1 § 2 of the Florida Constitution. Such a classification must bear a rational relationship to a legitimate government interest.

Furthermore, in the Emergency Ordinance 20-14 certain government employees are exempt from wearing masks, namely "Governmental entities, such as schools, courthouses, city halls, fire stations, State offices... Hospitals and other health care facilities... Public safety, fire, EMS, law enforcement and other life safety and healthcare personnel...". (Emergency Ordinance 20-14 Sec. 3(2)(d)(e)(h)). No difference of risk or exposure and infection exists between those required to wear masks and government employees.

Finally, this exception subsection does not just limit these certain employees from the requirement that they wear masks on the job; but instead it suspends mask-requirement for them indefinitely: anywhere they visit in Pinellas County—at any time—is exempted from the legal

requirement to wear a mask. By arbitrarily requiring only a portion of the population to comply with the mask mandate, Pinellas County treats similarly situated people and businesses differently without a rational basis and places unique burdens on some individuals and not on others without justification. Such a classification must bear a rational relationship to a legitimate government interest or it will violate Florida Constitution's equal protection clause. *North Broward Hospital District v. Kalitan*, 219 So. 3d 49, 55 (2017). No conceivable state of facts can provide a rational basis for classifying government employees as existing in a different situation than the average patron or employee. Thus, Pinellas County has no reason for treating government employees differently and the classification is not rationally related to a legitimate end. Finally, the criminal punishment of businesses for actions taken by members of the public on the premises of the business property violates the Equal Protection Clause of Art. 1 § 2 of the Florida Constitution because there is no rational basis for punishing the business instead of the individual person who violated the Emergency Ordinance 20-14. Such a method of legal enforcement and classification is unprecedented.

17. To obtain a preliminary injunction, Plaintiff must prove: (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. *Sch. Bd. of Hernando Cty. v. Rhea*, 213 So.3d 1032, 1040 (Fla. 1st DCA 2017). All four elements are shown and proved below.

18. Plaintiffs have a very high likelihood of success on the merits because the Emergency Order is presumptively invalid, implicating an infringement of Plaintiffs' privacy right under Article I, Section 23 of Florida's Constitutional. Due to the fundamental and highly guarded nature of the constitutional right to privacy, any law that implicates the right, regardless of the activity, is

subject to strict scrutiny and, therefore, presumptively unconstitutional; thus, the burden of proof rests with the government to justify an intrusion on privacy. *Weaver v. Myers*, 229 So. 3d 1118, 1133 (Fla. 2017). This state constitutional right to privacy includes the right to liberty. *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004). (holding that the Florida constitutional right to privacy includes the right to liberty and self-determination). An integral component of self-determination is the right to make choices pertaining to one's health and to determine what shall be done with one's own body. *Burton v. State*, 49 So. 3d 263, 265 (Fla. 1st DCA 2010). Furthermore, Pinellas County has made no attempt to justify this intrusion on privacy. Vague, unproven messaging from the Pinellas County Commission regarding public "safety" has not come close to establishing a compelling state interest justifying the intrusion. Ultimately, this explicit constitutional right of privacy embraces more privacy interests and extends more protection than the right of privacy provided under the due process clause of the federal constitution. *Winfield*, 548. Additionally, the EPG has no legal authority to pass the Emergency Ordinance 20-14.

19. Plaintiffs lack an adequate remedy at law. No other remedy exists to protect Plaintiffs' rights which the Pinellas County government is infringing upon. The test for the unavailability of an adequate remedy at law is whether the "irreparable injury is an injury that cannot be cured by money damages." *Lutsky v. Schoenwetter*, 172 So.3d 534, 534 (Fla. 3d DCA 2015) (citing *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLP*, 137 So.3d 1081, 1092 (Fla. 3d DCA 2014)). The deprivation of Plaintiffs' rights cannot be remedied by money or any judgment other than an injunction. The ability to move freely has been deprived from the Plaintiff, disallowing him to be "let alone and free." Art. 1 § 23, Fla. Const..

20. Unless an injunction is issued, Plaintiffs will suffer irreparable harm because their Constitutional rights are being violated. The mask requirement infringes Plaintiffs' right to privacy

under the Florida Constitution, Article 1, Section 23. Worse, Plaintiffs could be fined if they do not comply with the unconstitutional mandate. The likelihood of criminal arrest or civil citation by Pinellas County Code Enforcement or Pinellas County Sheriff causing irreparable harm resulting from the Emergency Order's enforcement is significant not only for Plaintiffs, but also for Pinellas County's other 974,996 residents.

21. A temporary injunction of the Emergency Order will serve the public interest. The citizens of the Pinellas County public are burdened by the over-reach of their local government unprecedented in Florida history. The mask requirement violates both the Plaintiff's and the public's fundamental Florida Constitutional rights. It unduly burdens 974,996 Pinellas County residents. The public has a strong interest in protecting their rights and their ability to control their own bodies and health. Additionally, the Emergency Ordinance 20-14 is written so vaguely that it lends itself to arbitrary enforcement at an officer's discretion and would allow for the arrest and prosecution of law-abiding citizens.

COUNT I INJUNCTIVE RELIEF

22. Plaintiffs reallege and incorporate herein paragraphs 1 – 21.

23. Plaintiffs seek injunctive relief enjoining Pinellas County or any other government entity from enforcing the Emergency Ordinance 20-14.

COUNT II DECLARATORY JUDGMENT

24. Plaintiffs reallege and incorporate herein paragraphs 1 – 21.

25. Plaintiffs seek declaratory judgment declaring the Emergency Ordinance 20-14, or portions thereof, as unconstitutional and at conflict with the Article 1, Section 2, 9, and 23 of the Florida Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter:

(a) a declaration that the Emergency Ordinance 20-14 violates Article I Sections 2, 9, and 23 of the Florida Constitution.

(b) a temporary injunction enjoining Pinellas County or any other government entity from enforcing the Emergency Ordinance 20-14.

(c) and any other further relief as this Court deems just and proper.

VERIFICATION

I, ZACHARY DAMATO, declare under penalty of perjury pursuant to the laws of Florida that the foregoing is true and correct,

By: */s/ Zachary Damato*

ZACHARY DAMATO

I, LUCY TUREK, declare under penalty of perjury pursuant to the laws of Florida that the foregoing is true and correct,

By: */s/ Lucy Turek*

LUCY TUREK

DATED this 16th day of July, 2020

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