IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, STATE OF FLORIDA
CIVIL DIVISION

JUSTIN GREEN,

Plaintiff,

vs.

ALACHUA COUNTY, and the Honorable RON DESANTIS, in his capacity as Governor of the State of Florida,

Defendants.
_____/

Case No.: 01-2020-CA-001249

Division: J

DEFENDANT ALACHUA COUNTY'S RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY INJUNCTION

COMES NOW Alachua County, a political subdivision of the State of Florida, by and through its undersigned counsel, and pursuant to the Court's Order setting hearing dated May 13, 2020, responds to Plaintiff's Emergency Motion for Temporary Injunction and states as follows:

I. Introduction

Defendant, Alachua County, files its response in opposition to Plaintiff's Emergency Motion for Preliminary Injunction (Motion) as follows:

In the Motion, Plaintiff argues that he is entitled to emergency relief enjoining the enforcement of the challenged County Emergency Order 2020-21 (Amended) (herein, "Order" or "County Order") on the grounds that Order 20-21 fails under the Fifth and Fourteenth Amendments of the United States Constitution, and also violates Article I, section 2, entitled equal protection, and Article I, section 9, entitled privacy, of the Florida Constitution. Additionally, Plaintiff argues that the County lacks authority to issue its Order and that any authority that may have existed is preempted by the State.

To succeed, Plaintiff must show that he satisfies the four factors for receiving an injunction in Florida, namely (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy

at law; (3) a substantial likelihood of success on the merits; and (4) that a temporary injunction would serve the public interest. As discussed further below, because Plaintiff fails to satisfy the above criteria, this Court should deny Plaintiff's Motion for Temporary Injunction.

II. Background

Plaintiff has brought this case to enjoin the Board of County Commissioners (herein, "Board") from taking an action that it deems necessary to protect the public health and welfare of its constituents during an unprecedented public health care crisis, the COVID-19 worldwide pandemic. The Board acted pursuant to its authority under Sec. 252.38, Fla. Stat., to take actions necessary to protect the health and safety of its constituents and consistent with the authority granted it by state law and Executive Order of the Governor.

COVID-19 is a respiratory illness caused by a virus that spreads rapidly from person to person and may result in serious illness or death, which the Board has determined constitutes a clear and present threat to the lives, health, welfare, and safety of the people of Alachua County. On March 1, 2020, Governor DeSantis declared a Public Health Emergency because of COVID-19. Eight days later, Governor DeSantis issued Executive Order 20-52, declaring a general State of Emergency because of COVID-19. On March 11, 2020 the World Health Organization declared the spread of COVID-19 to be a global pandemic. Two days later, President Trump declared a national emergency concerning COVID-19. On March 16, 2020, Alachua County issued Emergency Order 2020-01 declaring a local state of emergency. The federal, state, and local states of emergency continue in effect today in an attempt to address the global pandemic that prompted them.

On April 1st, Governor DeSantis issued Executive Order 20-91 putting in place a state-wide safer at home order, directing the closure of "non-essential services and activities" and limiting the movement of persons. Beginning on May 4th, the Governor's Executive Order 20-112, "Phase 1:

Safe. Smart. Step-by-Step. Plan for Florida's Recovery," went into effect. Executive Order 20-112 opened a number of non-essential services and activities, rolling back many of the restrictions contained in Executive Order 20-91 and permitting substantially more retail businesses and restaurants to open. The guidance issued by the Governor's Office regarding both Executive Order 20-91 and Executive Order 20-112 explained that local governments were permitted under the orders to institute more stringent restrictions than those contained in his orders. Deft's Exhibits 4 and 5, respectively.

In anticipation of the Governor's phased reopening of the state, the Board met on May 1st in special session to consider the Governor's Order and take public comment. The Board, after considering the public comment along with information received from the experts at the Florida Department of Health and the University of Florida regarding challenges raised at that point in time by COVID-19, determined that it was important to be cautious in the process of opening up businesses in the absence of detailed testing and contact tracing. The Board chose, through the County's Order 20-21, the order at question in this suit, to follow as many elements of the Governor's plan as local conditions would allow to be done with prudence. The Order revised the County's Emergency Order 20-09, relaxing certain local standards and opening certain businesses and services. Specifically, Order 20-21 allowed greater occupancy of essential businesses and services and retail establishments, increasing allowed occupancy from 1 person for every 750 square feet, to 1 person for every 500 square feet. It also permitted restaurants, private museums, libraries, botanical gardens and wildlife preserves to reopen at 25% occupancy.

The Board understood that relaxing these standards will result in more people coming into contact with each other in closer proximity than at any time since the Governor's Executive Order 20-91 went into effect. Upon review of the recommendations, and the data and analysis supporting the recommendations, of the White House, the University of Florida/UF Health, and

the Centers for Disease Control (CDC), among others, the Board concluded that the negative impacts of those close contacts could be mitigated by facial coverings and, therefore, mandated the use of those facial coverings in public places where social distancing is not practicable or possible. This requirement is directly tied to the County's state of emergency declaration and expires 7 days from adoption, if not renewed.

III. Legal Standard

Injunctions are an extraordinary remedy, which must be granted sparingly. Hiles v. Auto Bahn Fed'n, Inc., 498 So. 2d 997, 998 (Fla.4th DCA 1986). Before issuing a preliminary injunction, a trial court must determine that the petition or 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). To demonstrate a prima facie case for a temporary injunction the petitioner must establish four factors: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) that a temporary injunction would serve the public interest. Environmental Services v. Carter, 9 So. 3d 1258, 1261. The moving party has the burden of providing substantial, competent evidence each of the elements necessary to obtain a temporary injunction. Zupnik v. All Fla. Paper, Inc., 997 So. 2d 1234, 1238 (Fla. 3d DCA 2008); St. Johns Inv. Mgmt. Co. v. Albaneze, 22 So. 3d 728 (1st DCA 2009).

The failure to show any one of the relevant factors mandates denial of a preliminary injunction motion. Glenn v. 1050 Corp, 445 So. 2d 625, 626 (Fla 3d DCA 1984), *cited in* Zupnik, *supra*.

IV. Analysis

Plaintiff has the burden of demonstrating, by competent substantial evidence, that all of the elements necessary for a preliminary injunction exist. Plaintiff has failed to show that the County's

Order results in an irreparable harm, that there is no adequate remedy at law, that Plaintiff has a substantial likelihood of success on the merits, or that injunctive relief would serve the public interest. Accordingly, Plaintiff's Motion for preliminary injunction should be denied.

A. THE LIKELIHOOD OF IRREPARABLE HARM BASED ON PLAINTIFF'S CONSTITUTIONAL RIGHTS

Plaintiff argues that he has a personal right not to wear a facial covering when in close contact with other people in a public setting during a global pandemic and that deprivation of that personal right is an irreparable injury. Plaintiff cites no case law in his Motion or the underlying complaint that supports his bold assertion that being required to wear a facial covering in certain limited public settings implicates a constitutional right. Therefore, Plaintiff has failed to show any way in which he will suffer irreparable harm under County Order 20-21 and the Motion must be denied.

In his Amended Complaint Plaintiff simply asserts, with no legal authority, that the requirement he cover his mouth and nose in public is a violation of his fundamental right of privacy. Fundamental privacy freedoms include the right to marry,[1] to choose not to become pregnant,[2] to choose not to carry and give birth to a child,[3] to decide how to raise one's children,[4] and to reject artificial life support.[5] There are common themes in each of these instances, where courts have found a fundamental right of privacy: the underlying issues are related to deeply personal and intimate decisions about one's most close relationships and one's own body.

To equate the requirement to temporarily cover one's mouth and nose while in a public setting during a temporary public health emergency with such fundamental rights as childbirth,

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[1] *Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[2] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972).
[3] *Roe v. Wade,* 410 U.S. 113 (1973).
[4] *Kirton v. Fields,* 997 So.2d 349 (Fla. 2008).
[5] *Schiavo v. Bush*, 2004 WL 980028 (Fla. 6th Judicial Circuit 2004), aff'd. *Bush v. Schiavo,* 885 So.2d 321 (Fla. 2004).

marriage and child rearing is simply the height of hyperbole. Plaintiff's claim should be rejected by this Court.

Even in nonemergency times, individuals are subject to governmental limitations on their actions on a daily basis which do not rise to the level of a constitutional privacy concern. Examples include, wearing clothing (nudity statutes), not wearing masks with certain intent, Sec 876.12, et. seq. c.f. Sec 876.155, Fla. Stat., for application.

Yet, Plaintiff attempts to equate the privacy right impacted by a decision to obtain an abortion, certainly a very intimate and personal issue, with wearing a facial covering in public. Unlike the very intimate decisions about who he marries, who he associates with, his own medical treatments, or any matter that has actually been determined to implicate a right of privacy, facial covering in public during a global pandemic have never been determined to implicate a clear legal right. There is no reasonable expectation of privacy when you go out into public and go shopping. In Winfield v. Division of Pari-Mutuel Wagering, 477 So 2d 544, 547 (Fla 1985), the Court held that:

> The right of privacy does not confer a complete immunity from governmental regulation and will yield to compelling governmental interests.
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> However, before the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist. Thus, implicit within the question of whether article I, section 23 of the Florida Constitution prevents the Division of Pari-Mutuel Wagering from subpoenaing a Florida citizen's bank records without notice, is the threshold question of whether the law recognizes an individual's legitimate expectation of privacy in financial institution records.

In N. Fla. Women's Health & Counseling Servs. V. State, 866 So. 2d 612 (Fla 2003), the Florida Supreme Court dealt with the issue of the Florida Right of Privacy in the context of a parental notification law. At the time of that case it had been established, by case law that the decision to obtain an abortion was protected by the right of privacy. That is not the case here. One simply cannot claim that the burden shifts without showing that the right of privacy is invaded. In Von Eiff v. Azicri, 720 So. 2d 510 (Fla 1988), the Court held that allowing grandparent visitations

rights over the wishes of a surviving parent violated the parental privacy rights of how to raise their child. In Krischer v. McIver, 697 So. 2d 97 (Fla 1997), the Court held that Florida's anti-assisted suicide law did not invade the constitutional right of privacy and was separate and apart from an individual's decision not to continue medical care. While the decision to decline medical care was well rooted in the law, the right to assisted suicide was not and the Court chose not to second guess the Legislature. While the Court did analyze the case in terms of the right of privacy, it did so primarily noting that their prior cases on privacy militated against it. These cases clearly establish the very intimate nature of the right of privacy.

Plaintiff also claims that the potential of arbitrary enforcement causes him some type of harm because some violators of the Order may be subject to citations and others may be subject to criminal penalties. In the unverified complaint, Plaintiff states that he has already purchased and wears a facial covering. If Plaintiff's statement is true, there is no instance where he might be subject to enforcement at all. This cannot, therefore, form a basis for him to argue that he is harmed.

Plaintiff attempts to equate the fundamental right of privacy with the Libertarian political philosophy which rejects all governmental regulation. This definition of "freedom" has been rejected by the Supreme Court.

> The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. Jacobsen v. Massachusetts, 197 U.S. 11, 26 (1905).

The "freedom" to refrain from covering one's mouth and nose while in public, with no reasonable expectation of privacy, and during a global health crisis simply does not rise to the level

of a fundamental constitutional right. Because Order 20-21 does not implicate Plaintiff's right to privacy on any level, Plaintiff has not, and cannot, show that he will suffer irreparable harm. Therefore, this Court should deny the Motion.

B. UNAVAILABILITY OF AN ADEQUATE REMEDY AT LAW

Without explanation or basis, Plaintiff argues that it is "nearly impossible to quantify potential damages" or ascertain what action could be maintained at law. Plaintiff's argument that he cannot ascertain an action that could be maintained at law is negated by decades of civil rights litigation which permits plaintiffs, claiming potential invasions of their rights, to seek legal remedies, including restitution. Defendant does not seek to provide legal guidance to Plaintiff in how to carry out such a lawsuit but does assure the Court that such Section 1983, United States Code, cases and other state law equivalent cases are available and damages, if they are proven, are awarded in these cases.

The root of Plaintiff's difficulty in ascertaining his damages is likely the lack of precedent supporting his allegations of redressable injury. It is understandably hard to quantify damages when the injury seeking to be redressed is not well defined or proven or even in need of a remedy. The fact that the law does not recognize Plaintiff's alleged injury as an injury from which the law provides recovery is not a basis for stating that there is no adequate remedy at law. Not every perceived inconvenience imposed by society is actionable at law or equity. However, to the extent that this Court believes Plaintiff has at least alleged some recognizable injury, case law clearly supports redressability at law for the types of claims made by Plaintiff. With adequate legal remedies available, this Court should deny Plaintiff's Motion.

C. PLAINTIFF CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiff argues only that his right of privacy has been "invaded" and that, since he has simply made this allegation, there should be presumption that the County's Order is unconstitutional.

Plaintiff seeks to have this Court establish a new constitutional right, a personal right not to wear a facial covering when in close contact with other people in a public setting during a global pandemic, and to shift the burden to the County to show how its Order meets the "strict scrutiny" standard for government actions that implicate the right of privacy in the Florida Constitution. As stated above, wearing a facial covering in public has never been found to implicate any right to privacy. Instead of providing relevant case law supporting his position, Plaintiff attempts to immediately shift the burden to the County with an unsupported allegation.

Plaintiff has failed to show that any legally protected privacy interest is impacted by the County Order. Certainly, Florida courts have never recognized the right not to wear a facial covering as being an issue involving the constitutional right of privacy. Plaintiff claims that privacy is implicated because wearing a facial covering alters a person's physical appearance. While that may be true, wearing clothes also alters a person's physical appearance but no one has successfully argued that public indecency laws violate the right of privacy. Plaintiff has not argued that a requirement to wear a facial covering when in close contact with other people in a public setting during a global pandemic threatens a person's bodily integrity. A facial covering is a removable piece of clothing; no permanent alteration to the body is required.

Even if this Court were to find that the right of privacy in the Florida Constitution is implicated by the County's Order, constitutional liberties are not absolute and are often limited in emergencies for the public health, safety, and welfare. Government is given wide latitude in responding to emergencies, but its authority is not without its limitations. As established in Smith v. Avino, the standard for judicial review of government action in an emergency is one of "a good faith belief" and "real and substantial relationship," not the "sunny day" standard cited in Plaintiff's Motion and underlying complaint. The *Avino* Court explained that "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." Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) (internal citations omitted).

The 11th Circuit, in Robinson v. Attorney General, 2020 U.S. App. LEXIS 13096 (11th Cir. Apr. 23, 2020), reiterated the standard set forth in Smith v. Avino when it analyzed an Alabama emergency order restricting abortion procedures: "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." *Id.* at 31.

The courts have found that other constitutional rights have limited in emergency situations, as well. Amongst our most treasured rights is the right to move about. Yet, we are just coming off a state lock-down order. In fact, that order still recommends that the vulnerable stay home and that travel be limited. There are numerous cases where during a period without a declared emergencies, juvenile curfews were struck down. When a curfew is imposed as an emergency measure in response to an emergency, the scope of review in cases challenging its constitutionality is limited to a determination whether the government'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. Smith v. Avino, 91 F.3d 105; 1996 U.S. App. 11th Circuit 1996 see also Washington v. Hillsborough Cty. Comm'n Case No. 8:20-cv-853-T-60SPF (MDFL 4/14/20).

Not only has the issue been addressed regarding curfews during an emergency, but also as to limitations on the use of property. In Dodero v. Walton County CASE NO.: 3:20-cv-05358-RV-HTC, (ND FL, 4/17/2020), the Plaintiffs challenged an order by Walton County that no one could go onto the beaches which included that part of the beach owned by a number of property

owners. The Plaintiffs pointed out that it was private property and would impact family units. Judge Vinson denied the preliminary injunction. He focused on the issues of authority and the fact that there was no real taking because of the temporary nature of the imposition. He also pointed out that Plaintiffs were not the only persons impacted by the pandemic and that they would not suffer any irreparable injury as a result of the order

The evidence supporting the Board's good faith belief that and the factual basis for the decision that facial coverings are effective tools in slowing the spread of COVID-19, especially from asymptomatic viral spreaders, is vast. A sampling of the data and analysis available to the Board at the time it made its decision follows; more is available should the Court request.

The CDC concludes that wearing facial coverings contains aerosolized droplets expelled or exhaled by the person wearing the facial covering and "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.[6] It goes without saying that the better the covering the more effective it is, but even regular cloth coverings can stop a significant amount of the transmission of droplets by the person wearing a facial covering. This recommendation is referred to as a non-mandatory recommendation. A lot has been made about this being only a recommendation but a recommendation is all the CDC can issue as it is an advisory body, not a regulatory body like the Board. If you are wearing a facial covering which has less effectiveness than an N-95 mask, the material will still catch more of the aerosolized droplets than no facial covering at all. As cited in Order 20-21, the webinar link[7] from the University of Florida and UF Health went into detail about where we are in the process of the

[6] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html <last accessed May 18, 2020>.
[7] https://mediasite.video.ufl.edu/Mediasite/Play/b8849c7ddb114f2db5fcc0be6a4cc0b41d <last accessed May 18, 2020>.

disease and how the spread of aerosolized particles is understood at present. The content of this webinar was discussed at the hearing on April 28th beginning at page 14 and throughout (Plaintiff's Exhibit B). It was not the intent, nor does it have to be the intent, of Order 20-21 to absolutely stop the transmission of the disease through the wearing of the facial coverings. The goal is to slow the spread of the virus. This is a virus where those who are asymptomatic can be positive and shed and spread the virus. That is why it is so important to obtain as much participation in wearing facial coverings as possible. One person can infect many who then can infect many.

In addition to the CDC and the University of Florida, Johns Hopkins[8] and the Mayo Clinic[9] have released information on the use of facial coverings and how they can help prevent the spread of the virus if used with other means such as social distancing and washing one's hands. There is also a recent study that supports the use of facial coverings.[10] Royal Society DELVE Initiative, Face Masks for the General Public, May 4, 2020.

The County (and the Board during its meetings) readily acknowledge that the issue regarding the efficacy of facial coverings has not yet reached complete scientific consensus, as applied to COVID-19, a virus that has been known to exist for only six months at this point. Rightfully, courts do not hold those charged with the awesome responsibility of protecting the health, safety, and welfare of residents during an emergent situation to the standard of "medical certainty," as Plaintiff invites this Court to do. Medical certainty may not exist for months or years (or never). After all, scientists are still debating the 1918 pandemic. The good faith and real and substantial relationship test that courts hold decision-makers to is a test that recognizes

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[8] https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-face-masks-what-you-need-to-know <last accessed May 18, 2020>.

[9] https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449 <last accessed May 18, 2020>.

[10] https://rs-delve.github.io/reports/2020/05/04/face-masks-for-the-general-public.html <last accessed May 18, 2020>.

that lawmakers must act in their best judgement given the information available at the time of the decision. These decisions cannot be viewed in hindsight.

Quite simply, at the time that the Board mandated facial covering, there was, and there continues to be, enough data showing that facial coverings play a role in reducing the spread of COVID-19 to support more than a good faith belief that this restriction is necessary and real and substantially related to the public health, safety, and welfare of the people of Alachua County in keeping the numbers of infected and mortally impacted residents in Alachua County low. In such extraordinary times, the Constitution rightfully does not demand precision, only reason and good faith.

> In such circumstances, governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency. 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."
> Smith v. Avino, 91 F. 3d 105, 109 (11th Cir. 1996) (citations omitted).

Plaintiff simply disagrees with the reasonable judgment of the Board, as he is entitled to do in a democracy. However, his disagreement does not render Order 20-21 impermissible. His remedy is at the ballot box, not the courthouse.

Public health officials have tied Alachua County's low numbers at present to the cautious approach that the County has taken during this emergency, as well as the tremendous medical infrastructure that we are fortunate to have in this community. In an emergency, the County is not required to take Plaintiff's suggestion and wait to take action until its metaphorical house is on fire. This is an ongoing, emergent situation and the good faith belief of the County, as well as the relationship between the data and Order 20-21 satisfies the *Avino* standard and supports the County's decision. This makes it unlikely that Plaintiff has a substantial likelihood of success on

the merits in his challenge of Order 20-21. Therefore, Plaintiff fails to satisfy at least one of the factors for an injunction and this Court should deny the Motion.

D. A TEMPORARY INJUNCTION WOULD DAMAGE THE PUBLIC INTEREST BY INCREASING THE HEALTH RISK TO THOUSANDS.

Plaintiff argues that he, a single resident of the County, stands in the place of all 269,043 individual residents of Alachua County in protecting their constitutional right to be free from a requirement to wear a facial covering when in close contact with other people in a public setting during a global pandemic. In this argument, Plaintiff misses the point. The common good, as expressed by the Supreme Court in Jacobson, necessarily subjects individuals to manifold restraints of their personal liberties. This is especially true in times of emergencies.

Plaintiff would have this Court believe that voiding Order 20-21, and allowing facial coverings to be voluntary is more in the public's interest than following the vast evidence supporting the Board's good faith belief that facial coverings are effective tools in slowing the spread of COVID-19, especially from asymptomatic viral spreaders. The Board, as the elected representative body of the people of Alachua County, has determined, based on the available science and recommendations of public health researchers and organizations, that the more people who wear the facial coverings the more effective this will be.

There can be no question that the County, the state, the nation and the world face a public health emergency. As of May 17, 2020, over 45,000 Floridians had contracted COVID-19, over 8,200 have been hospitalized and over 1,900 have died[11]. Nationally over 1.4 million cases have been diagnosed and over 88,000 have died. Worldwide over 4.7 million people have contracted the disease and over 310,000 have died. Reducing the further spread of COVID-19 is the public interest against which Plaintiff's request must be weighed.

[11] https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429 <last accessed May 18, 2020>.

This is a temporary restriction in certain, limited public places. A facial covering is not required while individuals take a walk, ride a bike or drive their car. This small inconvenience to the public weighed against the spread of a virus which is contagious when someone has no symptoms clearly weighs in favor of the public interest in wearing facial coverings. The Board was reasonable in determining that the more compliance there is, the slower the spread of COVID-19 will be, and therefore the greater the protections afforded to the public. After considering the public interest in reducing the spread of COVID-19 this Court should deny Plaintiff's Motion.

V. THE COUNTY HAS PROPERLY EXERCISED ITS EMERGENCY POWERS.

A. Introduction

In his Motion, Plaintiff makes reference to an argument articulated in his Amended Complaint that the County acted outside of its authority in issuing Order 20-21. However, this action of the County cannot be separated from the times in which we live. It is common knowledge that we are living through the largest global pandemic since the Influenza pandemic at the close of WW I, a century ago. There is no vaccine for this highly contagious virus which since its first probable identification in Snohomish County, WA on January 19th has raced through our country leaving more fatalities in the last two months than we normally see from influenza in a year.

The first two Floridians who were positive for COVID-19 were identified on March 1st. Just like how the spread of the 1918 virus was hastened by the increased travel caused by the war, our modern global transportation system has hastened this pandemic. In the relatively short period of time those numbers have grown tremendously as set forth above with no expected end in sight.

The CDC has announced that COVID-19 is spread primarily through in-person interactions, either "[b]etween people who are in close contact with one another" or "[t]hrough respiratory droplets produced when an infected person coughs, sneezes or talks." *See* CDC, How COVID-19

Spreads (last updated Apr. 13, 2020), https://www.cdc.gov/corona-virus/2019-ncov/prevent-getting-sick/how-covid-spreads.html. It can be spread by people who are not showing symptoms and do not know they are infected with the virus. *Id.* The goal of current restrictive efforts are to slow the spread down so that hospitals are not overwhelmed (Def Ex 7 p 36).

As there is no vaccine or treatment for COVID-19, there is not currently a reasonable expectation of eliminating the spread, only to slow it down so that hospitals are not overwhelmed. It also must not be forgotten that Shands and North Florida Regional Medical Center are the primary trauma and specialty hospitals for a number of counties that are in our region.

Alachua County has managed to do its part in slowing the spread by imposing social restrictions recommended by public health officials, some of which have been stricter limitations than those of the Governor. This does not mean that the County is "back to normal" now or will be anytime soon. The Governor's plan to reopen Florida is a phased plan where segments of the economy open up and new cases are tracked. As of May 17, 2020, there are 653,081 individuals listed as tested, with 45,588 with positive tests resulting in a 7 % positive rate statewide.[12] Alachua County has only performed 10,763 tests with a positive rate of 3.1%.[13] While it should be noted that these figures are not based upon any statistical sampling, but just reflect those who were self-referred or refereed by their physicians for testing, it appears that the efforts of the Board of County Commissioners have had a positive impact. However, the percentage of positive tests do not reflect the prevalence in the community. It is a snapshot. Those who tested negative can later test positive or come down with COVID-19. What is called for by the Governor and the Department of Health is much more testing to determine what is happening in the community. This includes

[12] https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429 <last accessed May 18, 2020>.

[13] Historically, the trend downwards of positive results has gone significantly downwards since the initiation of the mandatory facial coverings. This may be nothing more than correlation.

retesting those who have tested negative to determine if they have been exposed since their first test.

The number of deaths in the State is still significant, as is the number of new cases diagnosed. The analysis from the Department of Health listed above shows that the number of cases has increased since the filing of this action as has the number of deaths, statewide and inside Alachua County.

Plaintiff seeks to use this rate to discredit the basis for the County's actions. However, the testing is merely a snapshot of a tiny segment of our community, a point in time reference for testing and prevalence. Much more testing would be required to get an accurate picture of the pervasiveness of COVID-19 in the County, but extrapolating the current known positive rate to the entire county population, the number of positive individuals, many of whom could be spreading the virus could be as high as 8,340 individuals using the estimated population of Alachua County of 269,043.[14]

What's more, it is not reasonable to view Alachua County as an island unto itself as travel continues both in and out of the County from surrounding counties and through the County on I-75 and US 441 and 301. Until there is a vaccine, this situation is undisputed: more human-to-human contact leads to more exposure; more exposure leads to more symptomatic and asymptomatic carriers in our community; more carriers in our community leads to more people becoming ill and, tragically, losing their lives from this virus. Facing this undisputed truth, the Board chose caution as the state, and our county, moves toward more human-to-human contact.

B. State of Emergency

There is no dispute that President Trump, Governor DeSantis and Alachua County have each declared a state of emergency as a result of the COVID-19 pandemic. There is no dispute

[14] https://www.census.gov/quickfacts/alachuacountyflorida <last accessed May 18, 2020>.

that, as of the time of adoption of Emergency Order 2020-21, an emergency existed at each level of government. The State declaration of emergency has been extended by Executive Order 20-112 which will last into June 2020 unless extended. By Statute and the emergency provisions found in Chapter 27, Alachua County Code, the County's declaration of emergency is temporary and lasts for no more than 7 days, unless renewed. Any County emergency order is only effective while a local state of emergency exists, so at any date, no longer than 7 days from that date. If no extension was entered, the order would expire as a matter of law as would the legal state of emergency.

Any action of the County must be examined on the facts as they exist and the situation presented at the time of adoption and renewal and not in hindsight or as if the threat posed by COVID-19 did not and does not continue to exist.

Florida, as a matter of policy and law provides the Governor and political subdivisions with authority to act expediently during an emergency. Section 252.38, Fla. Stat., specifically provides that the County is the primary local authority below the Governor for emergency management. This statute provides a broad grant of authority to the counties to provide for the public health, safety and welfare. Additionally Sec. 252.52, Fla. Stat., provides for liberal construction of the emergency statutes: "Liberality of construction.—Sections 252.31-252.90 shall be construed liberally in order to effectuate their purposes."

Plaintiff incorrectly asserts that Sec. 27.08, of the Alachua County Code does not allow the Board to adopt the requirement in question. However, Plaintiff conveniently ignores subsection (d) which specifically authorizes the Board to:

> "Prohibit or <u>regulate</u> the participation in or carrying on of any business activity and prohibit or regulate the keeping open of places of business, places of entertainment, and any other places of public assembly" (emphasis added)

Sec. 27.05, Alachua County Code, provides that the Chapter should be liberally construed:

> This chapter shall be liberally construed in order to carry out the purposes hereof effectively. Such purposes are deemed to be in the best interest of the public health, safety, and welfare of the citizens and residents of the county.

Florida has expertise and experience in dealing with emergencies that arise from hurricanes. The current situation is a totally different one than most Floridians have experienced. Most hurricanes have short term impacts on individuals as it relates to government involvement. Hurricanes present a clear preparation, event, recovery model: the preparation (shelters, sandbags, public information), the event (winds, rain, flooding) and the recovery phase (clearing roads, reestablishing utilities, redirecting flood waters) if the area has been affected. This usually involves downed trees and power issues for most people. Some areas are harder hit and those are the ones who during the recovery phase have had a deeper involvement of government - Homestead after Andrew, Punta Gorda after Charlie, Mexico Beach after Michael. Right now, we all are currently living through the recovery from the COVID-19 public health emergency. We just can't walk outside of the house into that hot humid post hurricane weather with no other impact. In the current circumstance, unlike with hurricanes, the recovery is ongoing at the same time as the event is continuing. There is a balancing between keeping people safe from the virus, which is still very much in the community, and having the retail and dining establishments open up which present new opportunity for the spread of the virus.

It has long been recognized, under the Federal Constitution, that during a period of emergency, the actions of the Executive and local governments are given a degree of deference. Even constitutional rights are not without their limits, especially when they come into conflict with the rights of others in an emergency. In Jacobsen v. Massachusetts, 197 U.S. 11; (US 1905), a case decided during a smallpox epidemic, the court held:

> "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold

> restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. The court has more than once recognized it as a fundamental principle that persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned."

The action being pursued by government in *Jacobsen*, and which was upheld by the United States Supreme Court, was the vaccination of the residents, certainly more invasive and permanent than wearing a facial covering to go shopping.

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VI. Conclusion

As the United States Supreme Court explained in Jacobson v. Mass., "the libert[ies] secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free 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." 197 U.S. 11, 26 (1905). The Board's Order subjects all persons in the County to "manifold restraints" to further the public interest in public health and safety. These restraints have been imposed for the common good to slow the spread of COVID-19 and to save the lives of countless people.

Plaintiff has failed to show irreparable harm suffered due to Order 20-21, 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 County appropriately exercised its authority in issuing Order 20-21. This Court should deny Plaintiff's Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Alachua County Clerk of Court by using the Florida Courts E-Filing Portal, which will also serve a copy to: Seldon J. Childers, Esquire, James W. Kirkconnell, Esquire, and J. Eric Hope, Esquire, Counsel for Plaintiff (to jchilders@smartbizlaw.com, jkirkconnell@smartbizlaw.com and ehope@smaartbizlaw.com), this 18th day of May, 2020.

OFFICE OF THE ALACHUA COUNTY ATTORNEY

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