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

JUSTIN GREEN, Case No. 2020-CA-1249

Plaintiff,

v.

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

Defendants.
______________________________________/

PLAINTIFF'S BENCH MEMO FOR TEMPORARY INJUNCTION HEARING

COMES NOW JUSTIN GREEN ("Plaintiff"), providing the Court with a summary of excerpts from the cases provided to the Court by the parties in support of or opposition to the *Plaintiff's Emergency Motion for a Temporary Injunction*:[1]

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[1] For clarity, unless indicated differently all case citations, are: (i) emphasis added, and (ii) internal citations, quotations, brackets, and ellipses omitted.

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FLORIDA'S RIGHT OF PRIVACY

"**Right of privacy.**—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." Fla. Const. Art. I, § 23.

"The concept of privacy or right to be let alone is deeply rooted in our heritage and is founded upon historical notions and federal constitutional expressions of ordered liberty … The makers of our Constitution … conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation*, 477 So. 2d 544, 546 (Fla. 1985).

"The United States Supreme Court has fashioned a right of privacy which protects the decision-making or autonomy zone of privacy interests of the individual." *Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation*, 477 So. 2d 544, 546 (Fla. 1985).

The Florida constitutional "privacy right includes the right to liberty and self-determination." *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004).

"Florida's constitutional right to privacy has been implicated in a vast array of cases dealing with personal privacy." *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004).

"Article I, section 23, of the Florida Constitution, added by Florida voters in 1980, has remained unchanged since it was adopted. This Court has broadly interpreted that right, stating: The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. **Article I, section 23, was intentionally phrased in strong terms.** The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right **as strong as possible.** Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that **the right is much broader in scope than that of the Federal Constitution**." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1252 (Fla. 2017).

FUNDAMENTAL RIGHTS

Medical Self-Determination

"This Court has also [declared] in various contexts that there is a constitutional privacy right to refuse medical treatment. Those cases recognized the state's legitimate interest in (1) **the preservation of life**, [and] (2) **the protection of innocent third parties** … However, we held that **these interests were not sufficiently compelling** to override the patient's right of self-determination[.]" *Krischer v. McIver*, 697 So. 2d 97, 102 (Fla. 1997).

"[E]veryone has a fundamental right to the sole control of his or her person. As Justice Cardozo noted seventy-six years ago:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body....

An integral component of self-determination is the right to make choices pertaining to one's health, including the right to refuse unwanted medical treatment. …

Recognizing that one has the inherent right to make choices about medical treatment, we necessarily conclude that this right encompasses **all medical choices** … The issue involves a patient's right of self-determination and **does not involve what is thought to be in the patient's best interests**." *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990).

"[A] competent person has the constitutional right to choose or refuse medical treatment, and that right extends **to all relevant decisions concerning one's health**." *In re Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990).

"[T]he [Jacobson] Court acknowledged that the [mandatory vaccination] statute **unquestionably impinged** on the resident's **individual autonomy**, *cf. Guertin v. State*, 912 F.3d 907, 918–22 (6th Cir. 2019) (discussing the Fourteenth Amendment **right to bodily integrity**)[.]" *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020).

"[T]he [Jacobson] Court held [that] if a statute purporting to have been enacted to protect the public health … is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020).

Privacy as Fundamental Right

"**The right of privacy is a fundamental right**[.]" *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1252 (Fla. 2017).

"Florida's right of privacy is a fundamental right warranting strict scrutiny." *N. Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003)

"A fundamental right is one which has its source in and is explicitly guaranteed by the federal or Florida Constitution." *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004).

STRICT SCRUTINY

"This Court applies strict scrutiny to **any law** that implicates the fundamental right of privacy." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1253 (Fla. 2017).

"Florida courts consistently have applied the 'strict' scrutiny standard whenever the Right of Privacy Clause was implicated, **regardless of the nature of the activity**." *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004).

"When analyzing a statute that infringes on the fundamental right of privacy, the applicable standard of review requires that the statute survive **the highest level of scrutiny**." *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998).

"For an ordinance to withstand strict scrutiny, it must be **necessary** to promote a **compelling** governmental interest and must be **narrowly tailored** to advance that interest." *State v. J.P.*, 907 So. 2d 1101, 1122 (Fla. 2004).

Presumption of Unconstitutionality

"**Any law** that implicates the right of privacy is **presumptively unconstitutional**[.]" *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1256 (Fla. 2017).

"It is well settled that if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution it is **presumptively unconstitutional**." *N. Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003) (discussing right to privacy).

Burden Shifts to State

"The right of privacy … **shifts the burden of proof to the state to justify an intrusion on privacy**." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1252 (Fla. 2017).

"The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test **shifts the burden of proof to the state** to justify an intrusion on privacy." *N. Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003)

"[T]he First District Court of Appeal misapplied and misconstrued our precedent by placing the initial evidentiary burden on Petitioners to prove a "significant restriction" on Florida's constitutional right of privacy before subjecting the Mandatory Delay Law to strict scrutiny." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1245 (Fla. 2017).

"[T]here is no additional evidentiary burden on challengers to establish by sufficient, factually supported findings showing a law imposes a significant restriction on the right of privacy before a law that implicates the right of privacy is subjected to strict scrutiny." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1245–46 (Fla. 2017).

"**Any law** that implicates the right of privacy is **presumptively unconstitutional**, and the **burden falls on the State** to prove both the existence of a compelling state interest and that the law serves that compelling state interest through the **least restrictive means**." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1256 (Fla. 2017).

"[A] petitioner **need not present additional evidence** that the law intrudes on her right of privacy if it is evident on the face of the law that it implicates this right." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1255 (Fla. 2017).

"[T]his Court has repeatedly applied strict scrutiny to laws that intrude upon an individual's fundamental right of privacy **without first requiring in-depth factual findings about the extent of the burden imposed** by the law." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1255 (Fla. 2017).

"Likewise, the Court has **not required an additional evidentiary prerequisite** before strict scrutiny applies in other cases implicating the right of privacy[.]" *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1256 (Fla. 2017).

"[B]ecause Louisville allows other, non-religious and no-more-essential parking and drive-throughs, there is not yet any evidence in the record that stopping Louisville from enforcing its unconstitutional order will do it any harm." *On Fire Christian Ctr., Inc. v. Fischer*, 3:20-CV-264-JRW, 2020 WL 1820249, at *9 (W.D. Ky. Apr. 11, 2020).

"Legislative statements of policy and fact do not "obviate the need for judicial scrutiny." *N. Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 628 (Fla. 2003).

Narrowly Tailored

"In order for an ordinance to be narrowly tailored, there must be a sufficient nexus between the stated government interest and the classification created by the ordinance." *State v. J.P.*, 907 So. 2d 1101, 1117 (Fla. 2004).

"Where a curfew **sweeps too broadly** and includes within its ambit a number of **innocent activities** which are constitutionally protected, it does not satisfy the narrowly tailored aspect of strict scrutiny." *State v. J.P.*, 907 So. 2d 1101, 1117 (Fla. 2004).

"[T]he imposition **of criminal sanctions is not narrowly tailored** to achieve the stated interests. **The same goals could be achieved by imposing a civil penalty**." *State v. J.P.*, 907 So. 2d 1101, 1119 (Fla. 2004).

"[Because] the ordinances suffer from other constitutional failings which render them invalid[,] severing the criminal penalty provisions cannot save these ordinances." *State v. J.P.*, 907 So. 2d 1101, 1119 (Fla. 2004).

"Even a clear, precise ordinance may be 'overbroad' if it prohibits constitutionally protected conduct." *Smith v. Avino*, 91 F.3d 105, 108 (11th Cir. 1996), *abrogated by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

Compelling State Interest

"Where legislation is intended to serve some compelling interest, the government must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, **and that the regulation will in fact alleviate these harms in a direct and material way**." *State v. J.P.*, 907 So. 2d 1101, 1116-17 (Fla. 2004).

"The cities assert that the ordinances serve several compelling interests, including reducing juvenile crime, protecting juveniles from victimization, **protecting all citizens**, residents, and visitors from juvenile crime[.]" *State v. J.P.*, 907 So. 2d 1101, 1116 (Fla. 2004) (finding ordinance unconstitutional).

"The Tampa ordinance does not contain a statement of factual support, but simply states that the 'City of Tampa hereby finds and determines as a matter of fact that the city is faced with a number of problems, including an unacceptable level of crime, including juvenile crime that threatens citizens and visitors, and that this crime level presents **a clear and present danger to the public order and safety**.'" *State v. J.P.*, 907 So. 2d 1101, 1116 (Fla. 2004) (finding ordinance unconstitutional).

"If sitting in cars did pose a significant danger of spreading the virus, Louisville would close **all** drive-throughs and parking lots that are not related to maintaining public health, which they haven't done." *On Fire Christian Ctr., Inc. v. Fischer*, 3:20-CV-264-JRW, 2020 WL 1820249, at *9 (W.D. Ky. Apr. 11, 2020).

INJUNCTIONS

"The chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." *Robinson v. Attorney Gen.*, 2020 WL 1952370 (11th Cir. 2020).

Standing

"When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo

a criminal prosecution as the sole means of seeking relief." *Robinson v. Attorney Gen.*, 2020 WL 1952370, *3 (11th Cir. 2020).

"[T]he plaintiffs have established a credible threat of prosecution, a standard we have described as 'quite forgiving.'" *Robinson v. Attorney Gen.*, 20-11401-B, 2020 WL 1952370, at *3 (11th Cir. Apr. 23, 2020).

Irreparable Harm

"[T]he United States Supreme Court has stated that **the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."** *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1263–64 (Fla. 2017).

"[B]oth the federal courts and Florida district courts of appeal have **presumed irreparable harm when certain fundamental rights are violated**." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1263–64 (Fla. 2017).

"See, e.g., Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988) (irreparable harm presumed in Title VII cases); Cunningham v. Adams, 808 F.2d 815, 822 (11th Cir. 1987) (stating that the injury suffered by the plaintiff is irreparable only if cannot be undone through monetary remedies); Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983) (irreparable injury presumed from violation of First Amendment rights "for even minimal periods of time"); see also Tucker v. Resha, 634 So.2d 756, 759 (Fla. 1st DCA 1994) (finding no legislative waiver of sovereign immunity as to the privacy provision of the Florida Constitution and therefore concluding that money damages are not available for violations of that right); Thompson v. Planning Comm'n of Jacksonville, 464 So.2d 1231, 1237 (Fla. 1st DCA 1985) (where calculation of damages is speculative, legal remedy is inadequate)." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1263–64 (Fla. 2017).

"The **deprivation of personal rights** is often equated with irreparable injury and serves as **an appropriate predicate for injunctive relief**." *Hitt v. N. Broward Hosp. Dist.*, 387 So. 2d 482 n. 3 (Fla. 4th DCA 1980).

"The loss of First Amendment freedoms, for even minimal periods of time, **unquestionably constitutes irreparable injury**." *On Fire Christian Ctr., Inc. v. Fischer*, 3:20-CV-264-JRW, 2020 WL 1820249, at *9 (W.D. Ky. Apr. 11, 2020).

"**[I]rreparable harm can be presumed** where a discovery order compels production of matters implicating **privacy rights**." *Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163, 165 (Fla. 1st DCA 2014).

Likelihood of Prevailing on Merits

"The trial court … correctly applied strict scrutiny in determining Petitioners' **likelihood of success** on the merits **because the law, both facially and based on evidence presented, clearly infringes on the constitutional right of privacy**." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1246 (Fla. 2017).

"Based on the evidence presented at the preliminary injunction hearing … the medical restrictions … violate the Fourteenth Amendment [federal right to privacy]. Accordingly, … the plaintiffs demonstrated a substantial likelihood of success on the merits and [were] granted a preliminary injunction." *Robinson v. Attorney Gen.*, 20-11401-B, 2020 WL 1952370, at *2 (11th Cir. Apr. 23, 2020).

Public Interest

"[I]t is always in the public interest to prevent violation of a party's constitutional rights." *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020).

STATE'S EMERGENCY POWERS

"[E]ven under *Jacobson*, constitutional rights still exist." *On Fire Christian Ctr., Inc. v. Fischer*, 3:20-CV-264-JRW, 2020 WL 1820249, at *8 (W.D. Ky. Apr. 11, 2020).

"[J]ust as constitutional rights have limits, so too does a state's power to issue executive orders limiting such rights in times of emergency." *Robinson v. Attorney Gen.*, 20-11401-B, 2020 WL 1952370, at *5 (11th Cir. Apr. 23, 2020).

"[W]hile states and the federal government have wide latitude in issuing emergency orders to protect public safety or health, they do not have *carte blanche* to impose any measure without justification or judicial review." *Robinson v. Attorney Gen.*, 20-11401-B, 2020 WL 1952370, at *5 (11th Cir. Apr. 23, 2020).

"The state argues that applying the April 3 order to abortion providers serves three interests: … (3) it **slows the spread of the virus** by reducing social interactions." *Robinson v. Attorney Gen.*, 20-11401-B, 2020 WL 1952370, at *7 (11th Cir. Apr. 23, 2020) (upholding preliminary injunction against order).

"[Jacobson's] 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 … 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." *Robinson v. Attorney Gen.*, 20-11401-B, 2020 WL 1952370, at *5 (11th Cir. Apr. 23, 2020).

"This effective denial of a constitutional right represents the type of plain, palpable invasion of rights identified in *Jacobson* as beyond the reach of even the considerable powers allotted to a state in a public health emergency." *S. Wind Women's Ctr. LLC v. Stitt*, CIV-20-277-G, 2020 WL 1932900, at *7 (W.D. Okla. Apr. 20, 2020).

DISTINGUISHING *JACOBSON*

"In *Jacobson*, the Supreme Court affirmed the imposition of a **five-dollar** criminal **fine** on a Cambridge, Massachusetts resident who refused to comply with the city's mandatory vaccination regime, which Cambridge had enacted in response to a **smallpox outbreak**." *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925 (6th Cir. 2020).

"[T]he Court ultimately found that the … safety and importance of vaccines while not accepted by all, were accepted by the mass of the people, as well as **by most members of the medical profession**." *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925 (6th Cir. 2020).

"In *Jacobson*, the Supreme Court rejected the defendant's argument that compulsory vaccination violated his Fourteenth Amendment rights, explaining that 'a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.' 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.'" *Robinson v. Attorney Gen.*, 20-11401-B, 2020 WL 1952370, at *5 (11th Cir. Apr. 23, 2020).

"And although the State cites language in *Jacobson* stating, 'it is no part of the function of a court or a jury to determine which one of two responses is likely to be most effective for the protection of the public against disease,' and suggests that this means we must defer uncritically to the State's *ipse dixit* that [its order is] necessary to save critical PPE and preclude risky interpersonal contact, neither *Jacobson* in particular, nor Supreme Court abortion precedent in general, requires such abdication. *See, e.g.*, *Jacobson,* 197 U.S. at 34–38, 25 S.Ct. 358 (discussing the **voluminous medical evidence in support of vaccination**); *Hellerstedt*, 136 S. Ct. at 2310 (noting that uncritical deference to a legislature's factual findings regarding abortion is inappropriate)." *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020).

WHEREFORE, Plaintiff provides this summary of the law provided to the Court for its convenience.

Dated this 18thday of May, 2020.

Childers Law, LLC
2135 NW 40th Terrace, Suite B
Gainesville, Florida 32605
tel 866-996-6104 fax 407-209-3870
net jchilders@smartbizlaw.com

/s/Seldon J. Childers
Seldon J. Childers
Florida Bar No. 61112
jchilders@smartbizlaw.com
J. Eric Hope
Florida Bar No. 65379
ehope@smartbizlaw.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished this day via filing with the Florida Courts E-Filing Portal to the following:

Robert C. Swain, Esq.
Office of the Alachua County Attorney
12 Southeast 1st Street
Gainesville, Florida 32601
bswain@alachuacounty.us
CAO@alachuacounty.us
Attorney for Defendant, Alachua County

Colleen Ernst, Esq.
Executive Office of the Governor
The Capitol, PL-5
400 S. Monroe Street
Tallahassee, FL 32399
Colleen.Ernst@eog.myflorida.com
Attorney for Defendant,
Governor Ron DeSamtis

/s/ Seldon J. Childers, Esq. .
Florida Bar No. 61112