

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 SUPPLEMENTAL MEMO RE: COMPELLED SPEECH

COMES NOW JUSTIN GREEN ("Plaintiff"), providing the Court with this supplemental memorandum on compelled speech, and states:

In addition to violating the Plaintiff's Right to Privacy, the County's mask mandate violates the Free Speech Clause of the First Amendment to the Constitution of the United States.

At least part of the County's purpose in mandating its citizens to wear masks is its desire that citizens "show" they are part of the solution. On May 5, 2020—the day after the mandate became effective—Commission Chair Hutchinson posted a detailed explanation of the mask mandate to his Facebook page. The post is included in the Plaintiff's hearing exhibits as Exhibit J and attached hereto for convenience as **Exhibit A**. Commissioner Hutchinson was clear on this part of the County's objective:

"[M]asks are the only **outwardly visible signal** that you are contributing to the solution. And for essential workers such as first responders, store clerks, and personal service providers who come in close proximity to dozens or hundreds of strangers each day, **masks are also a sign of respect** that you recognize their risk and are doing something to lower it."

Exhibit A, ¶ 1, Robert Karl Hutchinson Facebook Post, May 5, 2020.

The County is not wrong that the wearing of masks can send a message. The Supreme Court has recognized that apparel can be speech:

As we shall discuss, **the wearing of armbands ... was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.**

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (emphasis added, internal cites omitted).

The First Amendment guarantees that citizens may not be compelled by the government to speak:

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech “includes both the right to speak freely and **the right to refrain from speaking at all.** ...

As Justice Jackson memorably put it: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*”

Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31, 138 S. Ct. 2448, 2463 (2018) (emphasis added, italics in original, internal cites omitted).

The right to be free from compulsion to carry the message of the government is a fundamental and essential right guaranteed by the Constitution:

A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.”

Wooley v. Maynard, 430 U.S. 705, 714 (1977)

Since the wearing of masks is speech, which cannot be compelled, the mask mandate violates fundamental First Amendment rights of free speech and requires strict scrutiny. But, because the County’s objective in forcing its citizens to wear masks is *political or ideological*, the mask mandate requires even more exacting review than strict scrutiny. “When a law burdens

core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an **overriding state interest.**" *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 347 (1995) (emphasis added).

Dated this 20th day of May, 2020.



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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:

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Robert Karl Hutchinson

May 5 at 12:56 PM ·

The Alachua County Commission enacted an emergency order requiring people to wear masks when they are interacting with others in public places. Some people – such as infants and those with mental or physical conditions that make it difficult to wear masks – are exempted.

The arguments we've received from people who don't want to wear masks in public are:

- masks don't work
- you can't tell me what to do
- if you require masks, then you have to provide them, and
- why weren't they required earlier

Here's my brief response to these points:

1. Masks do reduce but not eliminate the spread of the coronavirus. They are the front line of a range of efforts that include frequent hand washing, temperature screening, abundant tests with quick and accurate results, rapid and thorough contact tracing, effective isolation, and eventually a vaccine. Of all of these, masks are the only outwardly visible signal that you are contributing to the solution. And for essential workers such as first responders, store clerks, and personal service providers who come in close proximity to dozens or hundreds of strangers each day, masks are also a sign of respect that you recognize their risk and are doing something to lower it.
2. Local governments, under the current state of emergency, have the authority to enact more protective measures than those rolled out by the State. This has been confirmed by the Governor's office by people who have checked with them, including some who were considering legal challenges. The State of Florida has preempted its local governments from opening businesses, facilities, or activities which the State has ordered to be closed.
3. Local government agencies are not required to provide masks or other protective gear, and in many cases employers are not providing them even if they require them. This is not dissimilar to protective equipment like steel-toed shoes, safety goggles, hard hats, and other stuff that some workers are expected to wear to job sites. However, some agencies are attempting to find supplies of masks that they can provide to people so they won't be turned away, and some businesses may do the same for their customers especially as supply chains for masks become more robust and costs return to normal.
4. In the early phase of the pandemic, we didn't mandate masks for a couple of reasons. First, there was conflicting information about their effectiveness, but today there is consensus from most authorities that the benefits of widespread mask usage outweigh their costs and inconvenience. And secondly, during the six weeks of the stay-at-home phase, there were substantially fewer people out and about, and this social distancing flattened the curve of the infection rate. In this first phase of re-opening, with all retail, plus restaurants, construction sites, and many other activities back in operation, it is very likely that the epidemic will re-kindle unless we take proactive measures to reduce its person-to-person spread – and masks are one part of the strategy that each of us can do.

It deeply troubles me that store clerks are being threatened by those who are too selfish or inconsiderate to be part of the solution rather than part of the problem. And those who say they would wear a mask only if you suggest we do, but will refuse if you tell us we have to, are engaging in juvenile temper tantrums. We are all frustrated, but taking it out on store

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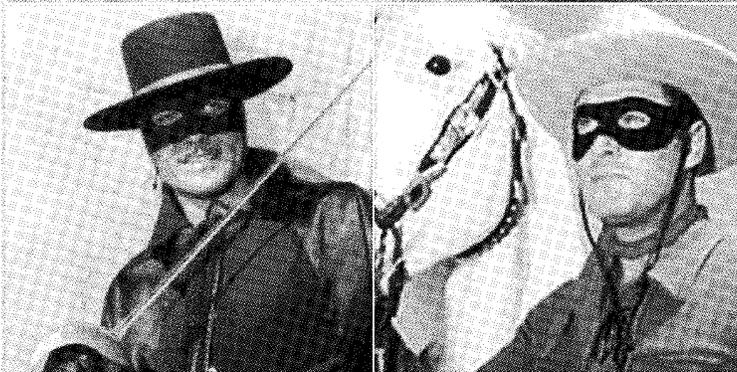
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clerks is simply indecent.

And then there's folks who have said they would comply if the President or Governor say we have to, but not if local officials do. I wish those at the top were making it easier by leading, but from my vantage point, local governments are doing the best that we can with the information and resources we have, and have shown creativity, flexibility, and transparency to the best of our abilities.

Thank you for your efforts, large and small, to work together towards a full and safe recovery for our community.

Robert Hutchinson
Alachua County Commissioner



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