

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

COMES NOW JUSTIN GREEN ("Plaintiff"), replying to *Defendant Alachua County's Response to Plaintiff's Emergency Motion for Temporary Injunction* (the "Response"), and requesting an order of the Court enjoining Alachua County (the "County") from enforcing its *ultra vires* and unconstitutional mask order, and states:

Introduction

On May 4, 2020—at a time when the County's COVID-19 statistics were all in rapid decline—and against the advice of its own Health Administrator—Alachua County mandated one of the most intrusive, invasive, and coercive requirements of any county in Florida. At around the same time, looking at the same statistics that the County was observing, the presidents of UF and Santa Fe College opined that "Gainesville was one of the **safest places** to be in the pandemic."¹ At that time, the vast majority (over 90%) of counties in Florida had successfully weathered the pandemic without any mask mandate or even suggestion. At that time, one of the

¹ Gainesville Sun,

hardest-hit counties in Florida had already recovered just fine with only a *voluntary* mask suggestion to its residents.

The County is serious about compelling citizens' obedience. The mask mandate provides for up to *sixty days in jail* as well as substantial—if not crushing—fines for noncompliance. It allows for an exception from the mask requirement for medical reasons which would include *being infected with COVID-19*—but all healthy persons must comply. There's no exception for citizens of other states and counties traveling through Alachua County, who could be arrested and jailed for simply being unaware of the mask requirement.

But most important: the mask mandate invades fundamental rights of privacy explicitly guaranteed to Florida's citizens in the Florida Constitution. Absent a showing that the mask mandate is necessary to prevent overwhelming our medical capacity, and is narrowly tailored using the least intrusive means, the mask mandate cannot stand. Even in times of emergency, individual citizens retain constitutional rights, and courts retain oversight of the executive.

The Right to Privacy

The Florida Constitution guarantees every individual citizen a broad right to 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 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**. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1252 (Fla. 2017).² Since

² All citations in this Reply have emphasis added unless stated otherwise, and internal cites, quotation marks, ellipses, and brackets omitted.

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 explicitly found in the United States Constitution, the Florida Supreme Court concluded that **the privacy right is much broader in scope than is that of the Federal Constitution.**³ *Id.*

The Florida constitutional privacy right includes the right to liberty and self-determination, and has been implicated in a vast array of cases dealing with personal privacy. *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004). Even the *federal* right of privacy – narrower in scope than Florida’s right – protects the decision-making or autonomy zone of privacy interests of the individual. *Winfield v. Div. of Pari-Mutuel Wagering, Dep’t of Bus. Regulation*, 477 So. 2d 544, 546 (Fla. 1985).

The County’s mask mandate invades citizens’ right of privacy, decision making, self-determination, and autonomy. A mask is either a medical device intended to produce a health benefit, or it is merely apparel – as suggested in the County’s Response.⁴ If a mask is a medical device, then the mask mandate forces citizens to implement a medical device of the County’s choice into their personal body. This violates each citizen’s fundamental right to make their own medical choices.

The Florida Supreme Court has held, in various contexts, that there is a constitutional privacy right to refuse medical treatment. *Krischer v. McIver*, 697 So. 2d 97, 102 (Fla. 1997). The cases recognized the state's legitimate interest in both the preservation of life, *as well as* the protection of innocent third parties. *Id.* Still, the Court has held that even these laudable interests were not sufficiently compelling to override the patient's right of self-determination. *Id.*

³ The County attempts to hem in the right to privacy using examples of rights already guaranteed under the federal Constitution. But the Florida Supreme Court says Floridian’s right to privacy is **much** broader than the federal right.

⁴ “A facial covering is a removable *piece of clothing*[.]” Response, p. 9 (emphasis added).

On the other hand, if a mask is merely apparel—intended only perhaps to convey an ancillary health benefit—then the County’s mask mandate invades a citizen’s autonomous right to decide what clothing to wear on their body. The analysis would be the similar if the County ordered citizens to wear ball caps in order to prevent skin cancer, or ordered citizens not to wear *any* clothing on the basis that nudism was a more healthy lifestyle.

“Everyone has a fundamental right to the sole control of his or her person... Every human being of adult years and sound mind has a right to determine what shall be done with his own body ... [since] one has the inherent right to make choices about medical treatment, we necessarily conclude that this right encompasses **all medical choices.**” *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.**” *Id.* at 11.

The County has reached all the way back—bypassing 114 intervening years of case law—to the dusty case of *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905). But even *Jacobson* recognized that its relatively minor ordinance⁵ nevertheless invaded citizens’ *fundamental rights*:

“The [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).⁶

So either way—medical device or helpful item of clothing—the mask mandate invades the Plaintiff’s “fundamental right to the sole control of his or her person” and his right to control “all relevant decisions concerning [his] health.”

⁵ The mandatory vaccination statute had only a \$5 fine for non-compliance, and only required a single treatment of a vaccine widely known to be effective, in an effort to stop a deadly smallpox epidemic.

⁶ Note that *Jacobson* pre-dated both the Florida constitution’s explicit right to privacy as well as the Supreme Court’s cases describing the federal Constitution’s implied right of privacy.

The County's Response attempts to hem in the right of privacy, trying to enumerate a short list of protected rights and banish the right to the realm of issues that are "*deeply personal and intimate* decisions about one's *most close* relationships and one's own body." Response, p. 5 (emphasis added). But the Florida Supreme Court has never interpreted the right of privacy that narrowly – in fact it has never interpreted the right of privacy narrowly at all. Instead, "Florida courts consistently have applied the 'strict' scrutiny standard whenever the Right of Privacy Clause was implicated, **regardless of the nature of the activity.**" *J.P.*, 907 So. 2d at 1109.

"Florida's right of privacy is a **fundamental right** warranting strict scrutiny." *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003). "This Court applies strict scrutiny to **any law** that implicates the fundamental right of privacy." *Gainesville Woman Care, LLC*, 210 at 1253.

The mask mandate clearly invades the "broad" fundamental right of privacy requiring strict scrutiny. That has significant implications for the County's burden.

Strict Scrutiny and Burden Shifting

The highest standard of constitutional review applies when strict scrutiny is required. "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." *J.P.*, 907 So. 2d at 1122.

We will see that the mask mandate is the opposite of "narrowly tailored" and that the County cannot possibly prove that the mask mandate is "necessary" to promote the compelling state interest.

The Mask Mandate is not “Necessary”

To analyze necessity we must first identify the actual compelling state interest. The Response refers to “slowing the spread.”⁷ But, **why** slow the spread? There’s no obvious advantage in experiencing a bad thing slower. Slowing the spread is a *tactic* toward an objective. The objective is “flattening the curve,” meaning, preventing the occasion of so many simultaneous COVID-19 cases that our medical capacity is overwhelmed. By “slowing the spread,” we slow down the rate at which hospital admissions occur.

Currently the 7-day average for hospital admissions is *fewer than one per day* in Alachua County. There are hundreds of available hospital beds and over a hundred available ICUs. There is no risk of our medical capacity being overwhelmed, nor did the County make any finding that there was any risk of overwhelming our medical capacity under any conceivable scenario involving voluntary, mandatory, or even any use of face masks.

Finding “necessity” requires the state to show that the law does more than “possibly” or “hopefully” promote the compelling interest. “Where legislation is intended to serve some compelling interest, the government must ... demonstrate that the ... regulation will **in fact alleviate these harms in a direct and material way.**” *Id.* at 1116-17. As we will see, even the County’s own Health Administrator told the County Commission that there is no consensus on whether masks are helpful or harmful. If there is “no consensus,” it is impossible to show that the mask mandate will alleviate the burden on our medical capacity “in a direct and material way.”

The *Jacobson* Court—in considering “necessity”—evaluated “consensus” and found that there was broad consensus that vaccines were helpful to control smallpox: “[T]he [Jacobson] Court ultimately found that the ... safety and importance of vaccines ... were accepted by **the**

⁷ See e.g. Response, pp. 11, 14, 16, and 20.

mass of the people, as well as by most members of the medical profession." *Adams*, 956 F.3d at 925. The vaccine ordinance in *Jacobson* enjoyed broad consensus as to its effectiveness – the exact opposite of what the County was told relative to its mask mandate.

The Board of County Commissioners (BOCC) decided to implement the mask mandate at their public meeting on April 28, 2020. The Commissioners learned from the County's own Health Administrator – the medical expert most familiar with and responsible for the County's COVID-19 statistics – that there is no consensus about the utility of face masks in "slowing the spread:"

MR. BYERLY: ...So I'll just ask you, is there a consensus among health care professionals that face masks are effective and that we should be moving to mandatory face masks in public?

MR. MYERS: So, Commissioner Byerly, **there is no consensus**.

Tr. 27:22 – 28:3, 4-28-20 BOCC Meeting.

The County's own Health Administrator emphatically advised the BOCC that face masks should be a voluntary option:

MR. MYERS: ... wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain, grocery store, pharmacy, especially in areas of significant community-based transmission, that it should be a voluntary -- and I think **the key word here is voluntary** -- public health measure.

Tr. 28:11-13, 4-28-20 BOCC Meeting.

The County's own Health Administrator then pointed the BOCC to a review of fifty-two studies that he had selected for them, which determined that masks are ineffective in protecting individuals who wear masks or even those around them:

MR. MYERS: ... there's a great paper that was put out by the University of Minnesota, The Center for Infectious Disease Research and Policy, where they did not [do] an exhaustive literature review, but they cited **52 studies**, and what they came back with was that **cloth masks are ineffective as source control and PPE.**

Tr. 28:15-22, 4-28-20 BOCC Meeting.

So, unlike in *Jacobson*, in Alachua County the BOCC ignored the scientific opinion of the medical expert best positioned to make the determination and ignored the lack of scientific consensus and – worst of all – ignored the possible *risks* to citizens incident to wearing masks. The W.H.O. strongly advises that healthy persons should not wear masks:

As described above, the wide use of masks by healthy people in the community setting is **not supported by current evidence** and **carries uncertainties and critical risks**.

“Advice on the use of masks in the context of COVID-19”, World Health Org., April 6, 2020.

The W.H.O. identifies a number of risks posed to wearers of masks, among them:

- self-contamination that can occur by touching and reusing contaminated mask
- depending on type of mask used, potential breathing difficulties
- inhalation of excessive carbon dioxide and insufficient oxygen
- a false sense of security, leading to potentially less adherence to other preventive measures such as physical distancing and hand hygiene

While there is no consensus that masks help prevent the spread of COVID-19 or protect the wearer, there *is* wide consensus that there are significant risks involved in wearing masks. For example, in a news article based on University of Florida research published May 18, 2020, WCJB TV20 uncontroversially reported that “Traditional masks typically **can collect viruses and bacteria** and medical workers must dispose of them often.”⁸ Note that the collection of viruses and bacteria is not limited to COVID-19 – wearing masks also increases citizens’ risks of acquiring *other* diseases.

The BOCC never balanced the risks to its citizens against the potential benefit from requiring mask use. The “findings” supporting its mask mandate fail to mention risks at all.

⁸ Available online at <https://www.wcjb.com/content/news/Researchers-at-UF-start-process-develop--570582761.html>.

The BOCC was late in ordering compulsory mask usage. Unlike in other Florida counties where masks were recommended or required, Alachua County ordered its citizens to wear masks over a month past the “peak” of cases in Florida. At the time Alachua County ordered mask use, nearly every county in Florida was trending down in new COVID-19 cases and—more importantly—trending down in positive rates. The vast majority of counties had in fact qualified for Phase 1.

Alachua County’s positive rate is 3.0%—less than half of Florida’s 6.9% rate. Alachua County has seen one death—fantastically better than the vast majority of counties in the state.⁹ Alachua County’s COVID-19 death rate is trivial compared to its influenza virus (“flu”) death rate. In 2018, twenty-seven (27) people died from flu here. That’s notwithstanding the fact that (a) there is a vaccine for flu, and (b) there are well-established treatment options for flu.

In the sixteen days beginning just before the mask mandate took effect, only seven days have seen hospital admissions for COVID-19 in Alachua County. In other words, the majority of days were admission-free. And, despite dramatically increasing testing in the County to 300-400 per day,¹⁰ the number of new cases per day has *been steadily declining*. This is not unique to Alachua County. All over the state, in spite of vast increasing in testing, both the actual numbers of new cases as well as the proportion of positive cases have been steadily—if not rapidly—declining.

Significantly, this trend—which the County could easily observe on April 28—was unfolding not just in Alachua County but also in the 60+ counties in Florida having no mask

⁹ The single fatality was a 67 year-old female with multiple comorbidities. There have also been six deaths at one single nursing home in the County. Those deaths are categorically different and not useful for this analysis, as the mask mandate does nothing to resolve the problems faced at that historically troubled institution. All the people who died from COVID-19 here were already very, very ill. There have been no deaths in Alachua County of any otherwise healthy person.

¹⁰ See Tr. 12:5-9, where Paul Myers disclosed this figure to the BOCC on April 28, 2020.

requirement or a purely voluntary mask suggestion. Significantly, even Palm Beach County – one of the three “hardest hit” counties in Florida – has successfully trended downward while only having a voluntary mask recommendation.¹¹

At the time the County imposed the mask requirement, the citizens of Alachua County were already subject to all the requirements of the Governor’s Emergency Order. They were already practicing social distancing. They were already practicing enhanced hand washing and sanitation. They were already subject to drastically reduced occupancy limits compared to the rest of the state. All of their COVID-19 statistics were already steadily –if not rapidly– on the decline. They had already held the death rate from COVID-19 to 1/27th of the flu death rate. Most important: their available hospital beds and ICUs were already orders of magnitude in excess of any conceivable need.

Yet –in spite of all these historically effective existing restrictions– the BOCC made no finding why the County’s most oppressive and invasive mandate was necessary to protect the health of Alachua County’s residents. That’s because the mask mandate is not necessary to protect the health of the County’s residents. The mask mandate is overbroad:

- It applies to all healthy persons. The County cannot –but must– show why a narrower requirement for masks only for persons who are sneezing or coughing would not have achieved the same benefit.
- It is mandatory not voluntary. The County cannot –but must– show why a less intrusive voluntary order would not have achieved the same benefit.

¹¹ Palm Beach, with a voluntary mask recommendation, improved faster than the other two hardest-hit counties of Broward and Miami-Dade, both of which have mandatory mask requirements. Palm Beach was the first of the three counties to qualify for Phase 1.

- It criminalizes otherwise innocent conduct. The County cannot—but must—show why a small civil fine would not have achieved the same benefit.

The Burden Shift

Once the Court agrees that the mask mandate facially invades Plaintiff's right to privacy, strict scrutiny is invoked, and the entire evidentiary burden shifts to the County. The Plaintiff is required to prove nothing further. *Gainesville Woman Care, LLC*, 210 So. 3d at 1255 (“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”).

The County must then prove that its mask mandate *is* constitutional by meeting the requirements of strict scrutiny. “**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.” *Id.* at 1256.

Granting the Plaintiff's request for a temporary injunction will not harm the County. It has recovered from the worst of the pandemic without a mask mandate. “[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).

Plaintiff Easily Satisfies the Elements for an Injunction

The County's Response argues that the Plaintiff cannot establish any of the elements necessary to obtain an injunction. The County is wrong, because it mistakenly believes that its

mask mandate does not invade Plaintiff's right "to be let alone." To the contrary, because the mask mandate is presumptively unconstitutional, Plaintiff can easily establish all the elements.

Standing

The Plaintiff's affidavit clearly states that he will be occasionally unable to wear a mask and faces a credible threat of prosecution.¹² "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).

Irreparable Harm

Because the mask mandate invades the Plaintiff's fundamental right to privacy, irreparable harm is presumed under both state and federal law. "[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*, 210 So. 3d at 1263-64. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* "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).

Likelihood of Success on the Merits

Because the mask mandate facially violates Plaintiff's fundamental right to privacy – and because the burden has shifted to the County – he has already demonstrated a likelihood of succeeding on the merits. "The trial court ... correctly applied strict scrutiny in determining

¹² Cite.

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*, 210 So. 3d at 1246. "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*, 2020 WL 1952370 at *2.

Lack of Adequate Remedy at Law

The violation of a citizen's constitutionally protected rights cannot be measured in dollars, particularly where loss of liberty is at issue. The County's Response argues that Plaintiff does have an adequate remedy at law—but then fails to explain or quantify what that remedy might be. Ultimately, the County falls back on its "mere inconvenience" argument, which can be viewed as an admission that the mandate *does* injure the Plaintiff (in other words, shifting the argument to the *extent* of the injury). In *Robinson*, the state conceded that there was no adequate remedy at law for the violation in that case of constitutionally protected privacy rights. *Id.* at *16 ("Defendants concede the unavailability of an adequate remedy at law if the law goes into effect and is found to be unconstitutional.").

The County's "mere inconvenience" argument—even if correct, which it is not—fails anyway under established law. "[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*, 210 3d at 1245-46.

Public Interest

"[I]t is always in the public interest to prevent violation of a party's constitutional rights."

Adams, 956 F.3d at 929.

Conclusion

There is neither a “sunny day” Constitution nor a “rainy day” Constitution. “[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*, 2020 WL 1952370 at *5. “[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.” *Id.*

The Constitution’s Bill of Rights—and the Florida constitution’s Right to Privacy—secure rights to *individuals*. The County’s Response suggests a distaste for individual rights,¹³ characterizing the desire for such rights as radical¹⁴ or excessively “Libertarian.” This is an unfair mischaracterization (with apologies to libertarians). Plaintiff wants the County to do everything in its power to keep its citizens safe, but also do so in a way that protects individual liberties.

When local government exceeds the bounds of its authority—as it is surely tempted to do in emergent conditions—it is the role of citizens and the courts to provide a necessary correction. The *Jacobson* Court taught that—even during an emergency—“if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety ... 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.” *Jacobson*, 197 U.S. at 31.

It is this Court’s duty to determine that the mask mandate is unconstitutionally broad. The County could have effected its desired objective with a more narrowly tailored and less intrusive order, as did Palm Beach and 60+ other counties in Florida. The desire of citizens to be

¹³ See *e.g.* Response, p. 14 (“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.”)

¹⁴ See *e.g.* Response, p. 7, placing scare quotes around the word, “freedom.”

let alone by the government is not—as the County suggests—“radical” or excessively libertarian. To the contrary, “[t]he 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*, 477 So. 2d at 546.

WHEREFORE Plaintiff requests the Court grant the relief requested in the Plaintiff’s *Emergency Motion for Temporary Injunction*, award attorney’s fees and costs, and order all such further relief as the Court determines is necessary and just.

Dated this 19th 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

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