

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

ISRAEL HAM,
STEVEN GORDON,
PHILLIP HOOKS,
HOLLYE MERTON,
and TOLAR POWELL,

Case No.: 1:20-cv-00111-MW/GRJ

Plaintiffs,

v.

ALACHUA COUNTY BOARD
OF COUNTY COMMISSIONERS,
and THE ALACHUA COUNTY MANAGER,

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR EMERGENCY INJUNCTIVE RELIEF**

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**DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY
MOTION FOR TEMPORARY INJUNCTIVE RELIEF**

COMES NOW Defendants ALACHUA COUNTY BOARD OF COUNTY COMMISSIONERS, and THE ALACHUA COUNTY MANAGER, by and through their undersigned counsel, and pursuant to the Court's Order Setting Expedited Briefing Schedule (ECF #16), dated May 22, 2020, responds to Plaintiffs' Motion for Emergency Injunctive Relief (ECF #7), and Plaintiffs' Addendum to the Motion for Emergency Injunctive Relief (ECF #17), and states as follows:

I. INTRODUCTION

Plaintiffs' Motion is brought under Rule 65, F.R.C.P. seeking a temporary injunction enjoining Defendants Alachua County Board of County Commissioners¹ and the "Alachua County Manager, (herein "County") from enforcing its Emergency Order (herein "Order") requiring the wearing of facial coverings in certain limited public circumstances. This Order is currently found in the Second Amendment to Emergency Order 20-25. (Ex. 1)

Plaintiffs claim that, because they have medical conditions, they cannot wear face covering required by the Emergency Order of the Alachua Board of County Commissioners in certain limited circumstances. They claim that the Order is an

¹ Florida Law requires that this matter be brought against Alachua County, rather than the Board of County Commissioners. Sec. 125.15, Fla. Stat.

unconstitutional invasion of their fundamental rights to travel within the State of Florida and to determine medical treatment under the privacy provisions of the Florida Constitution, and violates the Fifth and Fourteenth Amendments of the United States Constitution. It is not clear from their argument whether Plaintiffs are making an as-applied challenge or a facial challenge to the constitutionality of the Order. However, as they ask this Court to enjoin the enforcement of the Order as to all people, not just to themselves, it follows that their argument must be a facial challenge. Plaintiffs claim that they are unsure of their rights and that the County has prevented them from exercising their rights. Other than promulgation of the Order, Plaintiffs do not allege any action by the County. All of the actors are private persons or entities, or representatives of an entirely different governmental body.

Plaintiffs have brought this case to enjoin an action by the County that it deemed necessary to protect the public health and welfare of the residents of Alachua County during an unprecedented public health care crisis, the COVID-19 worldwide pandemic. The County 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.² “Safeguarding the life and property of its citizens is an innate

² Sec. 252.38(3)(5)(a), Fla. Stat. Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community.

responsibility of the governing body of each political subdivision of the state.” *See* Sec. 252.38, Fla. Stat. (2019). Plaintiffs ask this Court to set aside the deliberative judgment of the governing body of Alachua County, a political subdivision of the State of Florida.

II. BACKGROUND

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. Based upon the available evidence the Board has determined constitutes this virus to be 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, (Ex 2) 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 20-01 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. Alachua County’s current extension is Emergency Order 20-27, the 9th Extension of the State of Emergency. (Ex 3)

On April 1st, Governor DeSantis issued Executive Order 20-91 (Ex 4) 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,” (Ex 5) went into effect. Executive Order 20-112 opened a number of 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. This would necessarily entail more of the public coming into contact with each other.

The Board met on April 28th to discuss the challenges that increased opening of the state would bring. (Ex. 9) At that point there was a discussion on the use of facial coverings some of which was based upon a webinar sponsored by the Florida Association of Counties where researchers at the University of Florida discussed the pandemic and how their prior research applied to the current situation³. The recommendation of those participating in the webinar was that using a facial covering could capture a good amount of the particles ejected from the mouth and nose and was worth using as one of the methods to reduce the spread of COVID-19. Specifically, that this would slow the spread of the virus by preventing a person who

³ <https://mediasite.video.ufl.edu/Mediasite/Play/b8849c7ddb114f2db5fcc0be6a4ec0b41d>

has the virus from spreading it through droplets expelled by respiration, sneezing or even speaking.

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 Emergency Order 20-21, (Ex 6) the initial order forming the basis of 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 limitations 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 Health⁴, and the Centers for Disease Control (CDC) (Ex 7), 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, Sec. 252.38(3)(a)(5), Fla. Stat., if not renewed.

The stated purpose for the facial covering requirement is to limit the spread of this contagious, airborne virus and the Board was aware of substantial data indicating that face coverings may assist in reducing the spread of the virus. Alachua County is responsible for managing the emergency and taking actions against the spread of COVID-19 among its residents and also for ensuring its residents have access to medical care if they become infected.

III. ARGUMENT

In evaluating the reasonableness of the action of the Board of County Commissioners, it is important to place its actions in context of when those actions

⁴ Ex. 9, comments of Commissioner Cornell, p. 25, ln. 3 discusses the webinar.

were taken. The COVID-19 emergency is an incident of several months duration. Unlike hurricanes or civil unrest, which will normally be over in a matter of days or a weeks, this pandemic has raged across the globe over about 6 months and has killed 356,216 world-wide and 100,442⁵ in the United States. Florida has not been as hard hit as other parts of the Country and this may well be due to the actions taken early on by the Governor and the counties to close down businesses and to stop the spread by minimizing person-to-person transmission.

COVID-19 is unusual in that can be spread by asymptomatic individuals, 2 to 3 days before symptoms appear, if they appear at all. The main method of transmission is via airborne particles caused by people, coughing, sneezing and talking. Even exhaling can cause particulates to be exhaled. Facial coverings and social distancing are important public health tools for minimizing the transmission of this highly contagious and lethal virus.⁶

A. Standard for Preliminary Injunction

The purpose of a temporary injunction is to preserve the status quo while final injunctive relief is sought. *Schiavo et. rel Schindler v. Schiavo*, 403 F. 3d 1223, 1229 (11th Cir. 2005) *citing Klay v. United Healthgroup, Inc.*, 376 F. 3d 1092, 1101 (11th Cir. 2004).

⁵ <https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429>

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

A preliminary injunction is an “extraordinary remedy.” *Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7, 24 (2008). A district court may grant preliminary injunctive relief only when a party establishes each of four separate requirements:

(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc), cited in *Jones v. Governor of Fla.*, 950 F.3d 795, 806 (11th Cir. 2020).

For the reasons set forth in this response, Alachua County would urge this Court to take into account the urgency of the current situation and the role that local governments must play in protecting the health, safety and welfare of its people during these emergency circumstances.

B. Plaintiffs cannot demonstrate likelihood of success of the merits

Plaintiffs have not been subject to any violation of their Constitutional rights by Alachua County. The present order clearly sets forth its exemptions and the intent behind those exemptions. Plaintiffs cannot show any colorable due process violation or invasion of privacy rights under the Florida Constitution. There is no violation of

any constitutional right to travel and the right to move about protected under the Florida Constitution has not been violated.

C. Alachua County has authority to enter emergency orders, such as the one at issue

There is no question but that an emergency currently exists. This has been recognized in this District by Judge Vinson, *Dodero, et al, v. Walton County*, Case No.: 3:20cv5358-RV/HTC (ND Fla. April 17, 2020); in the Middle District by Judge Barber *Washington v. Hillsborough Cty. Comm'n*, Case No. 8:20-cv-853-T-60SPF (April 14, 2020) and by the 11th Circuit in *Robinson v. AG*, No. 20-11401-B, (11th Cir. April 23, 2020).

It has long been recognized that when there is an emergency, that the police power gives governmental authorities power to act for the public welfare that they might not otherwise have. This line of cases extends back to a 1905 Supreme Court case:

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. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

This case involved the use of mandatory vaccinations during a time of pandemic. Plaintiffs mention that at present there are exemptions based upon privacy in whether one must be immunized, but this is largely an issue of herd immunity and the failure of enough people to become vaccinated could result in another pandemic where an emergency might require mandatory vaccinations.

The Supreme Court just refused to grant an injunction in *South Bay United Pentocostal Church v. Gavin Newsome, Gov. of Calif.*, 509 U.S. ____ (2020) No 19A1044 (May 29, 2020). Chief Justice Roberts in speaking for the Court noted:

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905). When those officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” *Marshall v. United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985).

That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground.

In Florida, primary authority for Emergency Operations lies with the Governor. Under the Florida Constitution, the Governor has the sole executive authority for the State. Pursuant to Chapter 252, Fla Stat., he is given specific additional enumerated authority to respond in response to emergency conditions.

The Southern District has weighed in on the authority of the Governor in an emergency. In *Debra Henry v. Ron DeSantis*, Case No. 20-cv-80729, (May 14, 2020), Judge Singhal addressed the due process concerns raised by the petitioner:

Assuming her claims are for violations of the equal protection clause or for a violation of a fundamental right under substantive due process, both arguments fail. The Fourteenth Amendment provides, in relevant part, that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). This test is “highly deferential” to the government. *Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 (11th Cir. 2002). “The general rule gives way, however, when a statute classifies by race, alienage, or national origin.” *City of Cleburne*, 473 U.S. at 440. Such a claim is not presented here.

Applying the rational basis test, Petitioner’s Fourteenth Amendment claim fails. In the Executive Orders, the Governor stated the government interest as the state’s public health and slowing the spread of COVID-19 in a highly concentrated region. This is most certainly a “legitimate” government interest under the rational basis test.

... There is nothing arbitrary about the Governor’s actions. Using science, medicine, and data, the Governor took reasonable steps clearly related to the legitimate interest in protecting the public health.

Similarly, the County took reasonable steps clearly related to its legitimate interest in protecting the public health. The Board of County Commissioners, as the governing body of a political subdivision of the state, is the primary authority for emergencies within its jurisdiction. This is provided in Section 252.38, Florida Statutes. As there are 67 counties, there could very well be 67 different responses to any given emergency based upon local conditions and concerns. Depending on local conditions and concerns, and in coordination with local municipalities, there could be additional considerations for how emergencies are addressed. In addition, Alachua County is a Charter County with substantial home rule powers. Fla. Const., Art. VIII, Sec.1(g).

Alachua County has the responsibility of reducing the spread of COVID-19 among its residents and ensuring its residents have access to medical care if they become infected. The Board of County Commissioners based its decision to require facial coverings in certain limited public circumstances on substantial data indicating that face coverings may assist in reducing the spread of the virus. The Centers for Disease Control recommendations certainly played a major role.⁷ The webinar with explanations of the science by researchers at UF who have been studying air borne transmission of viruses for some time was considered. Two Board members

⁷ <https://www.cdc.gov/coronavirus/2019ncov/prevent-getting-sick/diy-cloth-face-coverings.html>

provided yet more supporting data and analysis with the other members of the County Commission. (Ex 8)

Plaintiffs argue that, without scientific certainty, action by the Board is flawed. If scientific certainty was required in every emergency, some necessary decisions would not be made. Scientific certainty is not even a requirement for many causes of action and spending weeks, months or even years waiting for the scientific world to come to a consensus would strip a local government of the ability to act to protect the health, safety and welfare of its residents during an emergency. The fact that the County relied upon science is clear from the record.

As stated above, the County's decisions are, as a matter of law, temporary and must be renewed weekly. Failure to extend the emergency would result in all orders issued under the emergency, including the mandate for facial coverings, expiring. Plaintiffs have not put forward any argument that the County intends for this facial covering requirement to be in place indefinitely. As the two transcripts of hearings demonstrate, the issue is one that has brought up at Board meetings on a regular basis since the requirement was enacted. (Ex 9, 10)⁸ Plaintiffs even include a newspaper clipping showing the fact that there was intense debate among members of the Board on the matter on May 19th in two extended meetings, one with the City of Gainesville and, while there was an initial vote to make the facial coverings

⁸ Ex. 10 beginning at p. 25 shows a robust discussion on the issue of facial coverings.

strongly recommended (instead of mandated), by the end of the day and after additional public input and discussion with the policy makers for the largest city in Alachua County, the requirement was retained.

The Current Order 20-25 (second amendment) clearly provides an exemption from the requirement to wear a facial covering for all of Plaintiffs, due to their plead conditions, and does not subject them to any criminal penalty. Emergency Order 20-25 states in pertinent part:

“(4 c) A facial covering shall not be required for children under six, persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medical problem. *It is the intent of this provision that those individuals who cannot tolerate a facial covering for a medical, sensory or any other condition which makes it difficult for them to utilize a facial covering and function in public are not required to wear one. It is recognized that this requirement is broader than what might be considered to be a covered condition under the Americans with Disabilities Act.*”
Emergency Order 20-25 (emphasis added)

Civil citations are the only sanction:

“15. A violation of section 4 of this Order is a noncriminal infraction. A violation of section 4 of this Order does not authorize the search or arrest of any individual prior to issuing any citation the individual will be asked to comply with the order or be able to explain how 4(c) applies to them. Failure to comply with the requirements of section 4 of this Order presents a serious threat to the public health, safety, and welfare, pursuant to Chapter 162, Florida Statutes, and a citation may be issued immediately for such violation. The County shall enforce the first violation of section 4 of this Emergency Order through a fine of \$125.00 to the violator. The second violation of section 4 of this Emergency Order shall be subject to a fine of \$250.00 to the violator. All subsequent violations of section 4 of this Order shall constitute a

Class V violation under Article II, Chapter 24 of the Alachua County Code of Ordinances, requiring a mandatory court appearance and subject to a fine not to exceed \$500.00. All other remedies available at law or equity, including injunction, remain available to the County, even after issuance of a citation. The municipalities may enforce this Order as provided by Florida law and municipal code.” Emergency Order 20-25.

Emergency Order 20-21, the predecessor to the Order which was in effect at the time of the filing of Plaintiffs’ complaint, provided in Section 8(c). “A face covering shall not be required for children under six, persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medical problem.” It was the intent of the County, as shown in the transcripts, that those who could not wear a facial covering be exempted from the requirements.⁹

In order to drive this matter home, the County produced a Frequently Asked Questions document, published on its website, which stated that:

Children under six do not need to wear a mask. Individuals with legitimate medical conditions such as breathing issues, sensory problems or similar demonstrable medical issues are exempt from wearing a facial covering. Some of these conditions may result in the individual being more susceptible to the virus. Also, individuals who show no symptoms are known to have transmitted the virus. If you claim an exemption you may be asked about the basis for the exemption. This is not a violation of HIPAA or the ADA if the questions are limited to an explanation of why you shouldn’t have to wear a facial covering. You may ask to answer the questions out of the hearing of any other members of the public. You only need to answer

⁹ Ex. 9 p. 29, ln. 4; Ex. 10 p. 42. Commissioner Wheeler discusses information she received.

the questions if you are seeking an exemption, unless you have medical documentation you can present.

Businesses are expected to make sure their employees are using appropriate facial coverings and other methods to protect the employees and public. The business can restrict its customers to those who are following the Order, but the County does not expect them to enforce the requirements of the order. They may ask for the assistance of Law Enforcement or Codes Enforcement.

In an effort to assist business and the public the county issued an FAQ regarding questions that could be answered and which were generally allowable under the Americans with Disabilities Act for those individuals seeking an accommodation.

A business may ask the following 2 questions:

1. Are you unable to wear a facial covering due to a medical condition?
2. If yes, how does wearing facial covering exacerbate your medical condition?

a. Examples of acceptable responses:

Anxiety; Breathing Problems; Sensory Issues; Skin Sensitivity

Businesses should train staff to ask only these 2 questions and to accept reasonable responses with no further inquiries about the individual's medical condition. A doctor's note is not required as the individual claiming the exemption should be able to give a general response as to why they feel they are not required to wear a mask under the order. (Ex 11)

It is clear that the intent of the County has always been that individuals who would be negatively impacted by wearing a facial covering would not have to wear a facial covering. Plaintiffs note that portions of this Frequently Asked Questions document have been removed from the website recently. That is correct. The intent

of the County was more squarely placed in the Order rendering a parole explanation unnecessary.

D. Plaintiffs' complained-of actions were not by Alachua County

It is also clear that none of the declarations show County action in applying the Order, but rather were done by other actors. These allegations included stores, doctors' offices a City police officer and a City bus driver. None of these individuals are within the control of the County, but the County, through its FAQ and continued enhancement of the Order made it clear what the Order was intended to do and who could claim an exemption.

ECF 7-1 p. 2 - Israel Ham - Does not indicate he was asked why he was not wearing a facial covering or offered any explanation. But in paragraph 9 says he does go out and gets what he needs.

ECF 7-1 p. 4 - Hollye Merton - Does not indicate that she has requested an exemption from using a facial covering when she goes into businesses.

ECF 7-1 p. 5. - Philip Hooks - Denied entry by Walmart for lack of a note, it is clear that no note is required under the order. Dollar Tree asked about a specific medical issue and no answer was given.

ECF 7-1 p. 6. - Tolar Powell - "Harassed at Walgreens store," no indication given if she advised why she couldn't wear a facial covering, just that she was questioned.

ECF 7-1 p. 7. - Steve Gordon - unable to enter medical office. Questioned by Gainesville Police officer. No indication that the medical practice was allowing non-masked individuals into the building.

None of these declarations indicate that the Board of County Commissioners is enforcing the Order against individuals who were exempted from the requirement to wear facial coverings. Since private actors were not empowered by the Order to enforce its mandates, the only enforcement question arose with a City of Gainesville police officer on May 4th, the first day the facial covering order went into effect. If every law that was misapplied by a law enforcement officer was ruled to be unconstitutional, on that basis alone, it is fair to say that very few laws would withstand constitutional scrutiny.

Private actors are another story. As stated earlier, the Order does not empower business owners to enforce its mandates. Even without the Order, each private business has the ability to require its customers to comply with its own private requirements to gain access to its goods or services. The businesses complained-of by Plaintiffs, especially the medical clinic, were free to require facial coverings, with or without a County mandate. It is clear from the County's order that businesses were not empowered or expected to ensure that its customers meet their requirement to use facial coverings. Businesses were expected to meet the occupancy limits and follow safety guidelines, from OSHA, the CDC or any applicable licensing body.

Exemptions from the facial coverings requirement were clearly stated in the Order from its first rendition and has been made even clearer over each iteration of the order. Since Plaintiffs are entitled to this exception, they are not under any threat of civil citation. A mechanism is in place to permit Plaintiffs to claim the exception prior to the issuance of any citation. The issuing authority must first engage with an individual, not wearing a facial covering, at which time the individual can state their basis for an exemption. There is no requirement in the Constitution that the County take names and grant individuals some sort of permit. To begin with, this would strain County resources during an emergency and secondly, there is no similar requirement for Federal laws such as the Americans with Disabilities Act which requires engagement between the individual seeking accommodation and the entity from whom accommodation is desired.

E. Plaintiffs have no right to intrastate travel and, even if they do, that right is not limited by Alachua County

The facial covering mandate of the Order does not stop anyone from going anywhere. It does not require facial coverings in all circumstances outside of one's home, but only in those certain limited public situations where the Board determined that social distancing is not possible or are difficult to implement. One is free to walk outside, enjoy the parks, sit on a bench or any other activity outside without the need to wear a facial covering. Plaintiffs point to a situation involving a public bus. It bears noting that bus service in Alachua County is not a County function, but one of

a different governmental entity entirely. Government entities, when acting in their proprietary capacities, are exempted from the Orders. Any action that a different government entity would have taken, even if ostensibly under the County's Order, was taken under its own proprietary authority.

Plaintiffs claim that there is a recognized intrastate right to travel, with which the Order unconstitutionally interferes. This is not the case. The United States Supreme Court has never recognized an intrastate right to travel, *Dickerson v. City Of Gretna*, 2007 U.S. Dist. LEXIS 29460 (ED, LA 2007). The case cited by Plaintiffs, *Papachristou. v. City Of Jacksonville*, 405 U.S. 156 (1971), dealt with a loitering ordinance and the ability of "suspicious persons" to "move about." The *Papachristou* Ordinance was found deficient as it required law enforcement to arrest all "suspicious" persons, a vague criminal standard. The County's facial covering mandate is neither vague nor criminal.

As set forth in *Jacobson*, the government has the ability to exercise its police powers. "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community." *Jacobson*, at 26. *See also Dodero, et al, v. Walton County*, Case No.: 3:20cv5358-RV/HTC (ND Fla. April 17, 2020).

Plaintiffs have failed to demonstrate irreparable injury. Based upon their declarations, each of them is exempt from the Order. A person cannot be injured by an order that does not apply to that person. Plaintiffs only need to be able to provide the minimal information set forth in Emergency Order 20-25, *i.e.*, to say why they cannot wear a facial covering, to be exempt from the County's mandate.

Businesses may have their own reasons for requiring individuals to wear facial coverings, even if they are not required by the Order. Even were the facial covering order no longer exist, individuals could still be challenged upon entry into a private business and their only option, at that point, would be to assert rights under the American with Disabilities Act. Even the Equal Employment Opportunity Commission has provided guidance as to how to handle employees in the current environment¹⁰

The only irreparable injury Plaintiffs raise is the assertion that somehow wearing a facial covering violates their right to medical self-determination. This is an illusory argument since the Order does not require them to wear a facial covering. . *Robinson v. AG*, No. 20-11401-B (11th Cir April 23, 2020) currently pending before the 11th Circuit, arose during the current emergency and is cited to by Plaintiffs. This involved a ban on certain abortions in a stated effort to save hospital beds and

¹⁰ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

personal protective equipment for the COVID-19 event. The State's argument to the trial court was determined to be fairly flimsy, as abortions rarely require hospitalization and the use of surgical garb was no greater than for other procedures which were allowed. In coming to this decision, the Robinson Court relied upon the long history of protection of a woman's right to choose and the lack of any real state interest under the circumstances in banning a specific type of procedure while permitting similar procedures. However, the Court did note that *Jacobson and Smith v. Avino* were both part of the calculation.

This is the second case Alachua County has defended on this matter. The Honorable Donna Kiem, denied a preliminary injunction of the facial covering Order against authority and privacy claims. *Green v. Alachua County*, 01-2020-CA-001249 (8th Jud. Cir. May 26, 2020). It is worth noting that the Florida constitutional right of privacy is broader than the right of privacy implied by the Federal Constitution. Even so, were a right of privacy legitimately involved, it could not stand against the real and imminent harm caused to an innocent third party of being exposed to a person with COVID-19.

Much like the situation in *Green*, the threatened injury to Plaintiffs in disclosing, in very general terms, the reason they cannot wear a facial covering does not outweigh the potential damage in granting the injunction may have on the public.

In this case, the emergent situation that the County is responding to is a highly contagious virus that is much more infectious and deadly than the normal flu. Not only can it spread by those infected with the virus and showing symptoms (which is why all the orders say to stay home if you are sick), but also can be spread by those who are infected and either will never have symptoms, or will develop symptoms days after potentially spreading it in the community. At this time, there is no practical way of testing all 269,048 residents of Alachua County (not to mention visitors to the community) at one point-in-time, sorting all these individuals into these categories, and only mandating that facial coverings be worn by those who are contagious.

The primary purpose of facial coverings is a public health one, not a private health one. The requirement is not to protect the person wearing the facial covering; it is to protect the person who is interacting with the individual who is wearing a facial covering. Additional support for the wearing of face coverings has been published by Johns Hopkins (Ex12) and the Mayo Clinic (13)^{11 12} Plaintiffs are basically asking this Court to set-aside the protective measures which are in place to protect them and allow them to be put at risk of infection by the general public. That is what will

¹¹ <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-face-masks-what-you-need-to-know>

¹² <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449>

happen if the Order is found to be unconstitutional. There is no reason for this as Plaintiffs are already exempt from wearing a facial covering. To the extent they have to mention to a store employee that they are not wearing a facial covering because they have extreme facial sensitivity, or they react badly to wearing a facial because of medical issues, this is a small inconvenience in the face of the general public interest in protecting the health and safety of the public. Another option is for Plaintiffs to get a doctor to say that for medical reasons they cannot wear a facial covering. They are not being asked any more than a business asks when it puts a sign up that says, “no shirt, no shoes, no service.” They are going into public and there is no reasonable expectation of privacy in public. One can be seen by all those in the vicinity. The only issue here is that, if challenged by a person in authority, they need to be able to respond as to how they are exempt from the Order. No specific medical details are required, some of the individuals claiming an exception may be more susceptible to the virus and would rely upon others wearing facial coverings and following social distancing to protect them. Additionally, while these individuals are not wearing facial coverings, they could end up transmitting the virus, even if they are not symptomatic. It bears repeating. You wear a facial covering to protect others.

Plaintiffs attempt to distinguish *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996), because the emergency in *Smith* was a hurricane. This is a distinction without meaning because, the *Smith* Court’s finding was not limited to the type of

emergency; the ruling rose and fell on the emergency authority of local government. Hurricane recoveries can last a long time, just as long as this pandemic has. *Smith* involved being out of the house and travel after hours. In one argument, Plaintiffs claim that “being out of the house and traveling after hours: is protected by the Federal Constitution, in another they say that it is not. We go back to the fact that each case upholding or striking emergency authority looked at the relationship of the action taken to the emergency presented. There is clear evidence which is growing that facial coverings can make a difference in the transmission of the virus.

F. No irreparable injury will be suffered by Plaintiffs if an injunction is denied.

Plaintiffs, based upon their declarations, are already exempt from the Order. What they are not exempt from, and what this Court cannot grant them, is an exemption from the judgment of individuals who are wearing facial coverings. This seems to be at the basis of their argument: that somehow they will suffer stigma from wearing facial coverings. There are no doubt individuals who do not comply with the Order because they object to it on a political or philosophical basis and they may be judged by those who comply. There are no doubt individuals who are judgmental when they see someone not wearing a facial covering. Government cannot stop this private behavior, even were it to issue an order strongly recommending the wearing of facial coverings with no penalty for failing to do so. In that situation, were

businesses to continue requiring a facial covering, the only option Plaintiffs would have is to seek an accommodation under the Americans with Disabilities Act.

G. Granting an injunction would be adverse to the public interest.

There are still concerns over exactly what the incidence rate of COVID-19 is. This is due in part to how accurate testing is. By one method¹³ of testing with nasal swabs, Alachua County has 5650 individuals in a county of 269,048 who may be positive when the figures are extrapolated to the entire County. By blood testing, this goes up to 13,454 in the County.¹⁴

Alachua County is the most affected county of the counties which border Alachua County. This is despite the fact that Marion County has a larger population. However, the City of Gainesville is the largest city in the area. A purpose of social distancing and wearing a facial covering along with avoiding contact and washing one's hands frequently is to slow the spread of the virus so that the hospitals are not overwhelmed. In addition, this protects the most vulnerable who are more susceptible to the ravages of the disease and buys time until an effective vaccine becomes available. This is especially true in Alachua County which hosts three regional hospitals relied upon by North Central Florida. The County has an interest in slowing the spread of the virus, keeping the incidence rate in the County low and

¹³ <https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429>

¹⁴ <https://www.gainesville.com/news/20200526/health-chief-more-than-13000-in-alachua-county-may-have-been-exposed>

the concomitant lessening of stress on the medical system. Additionally, Sec. 252.38, Fla. Stat. provides "Emergency management powers of political subdivisions.—Safeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state." The judgement of the County is to continue the facial covering as long as there is still a reasonable basis to do so. Medical/Scientific certainty is not required for this determination. Medical consensus is not a requirement either. *See Smith v. Avino*, 91 F.3d 105. There is substantial scientific information available to support the decision of the Board of County Commissioners to mandate wearing of facial coverings except for those who cannot do so for a medical reason as set forth in the Emergency Order.¹⁵ ¹⁶ As the Order has evolved, the County has made every effort to make the Order clearer and to keep up with the science that continues to develop. The more people who wear the facial coverings the lower the rate of transmission will be.

H. The injury Plaintiffs' claim does not outweigh the damage injunction may cause the public

In considering the balance of the equities, this Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987).

¹⁵ <https://rs-delve.github.io/reports/2020/05/04/face-masks-for-the-general-public.html>

¹⁶ <https://science.sciencemag.org/content/early/2020/05/27/science.abc6197>

Plaintiffs have failed to show a meaningful privacy argument in a requirement to wear facial coverings, a requirement from which they are exempt. Plaintiffs have not shown that the enforcement of the Order, from which they are exempt, imposes any restriction on them. Plaintiffs' due process arguments simply do not exist at this stage of the proceedings.

Against this is the interest the County has in the health of the public, keeping the infection rate low as the economy opens and maintaining sufficient medical resources and the interest in the welfare of its residents as set forth in Section 252.38, Fla. Stat. A balancing of the equities clearly is in the favor of the County.

I. Issuing an injunction against the facial covering order is not in the public interest.

The public interest is to keep the infection rate low so that the disease does not spread. It is in the public interest that the most vulnerable be protected from infection. It is in the public interest that the individual you are interacting with in those few places where social distancing is not possible are taking the minimal effort of wearing a facial covering that will contain respiratory droplets which can carry the infection. Given that a large percentage of those who can transmit the virus are never symptomatic and others can shed the virus for days before they have symptoms.

IV. CONCLUSION

Plaintiffs have failed to demonstrate any of the four elements necessary for a preliminary injunction. Most importantly, they have failed to show any cognizable Constitutional issue or that they have a likelihood of success on the merits. Based upon this, the Motion for Preliminary Injunction should be denied.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE

I HEREBY CERTIFY that this Response complies with the requirements of N.D. Fla. Local Rule 5.1.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

I HEREBY CERTIFY, pursuant to Rule 7.1(F), N.D. Fla. Local Rules, that this document is less than 8,000 words. Specifically, according to the word count of the word processing system used to prepare this document, it is 7,571 words, inclusive of the headings, footnotes and quotations, but excluding the case style, signature block, and Certificate of Service.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the U.S. District Court, Northern District of Florida, via the CM/ECF portal, which will also serve a copy to Raemi Eagle-Glenn, Esquire, Counsel for Plaintiffs (to raemi@eagleglennlaw.com), this 30th day of May, 2020.

Respectfully submitted,

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