IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

BRIAN C. DOLATA,

Plaintiff,

CASE NO.: 2020-10900-CIDL

v.

CITY OF DELAND, a political subdivision of the State of Florida,

Defendant.
_____/

FINAL JUDGMENT DENYING EMERGENCY INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT

This matter came before the Court for a final hearing on the Plaintiff's Verified Complaint for Emergency Injunctive Relief and Declaratory Judgment, as well as on the Defendant's motion to dismiss the Complaint. The Court, having considered the pleadings and studied the case law cited therein, having heard testimony of witnesses and argument of counsel, having taken judicial notice of all matters requested by counsel, and being fully advised in the premises, hereby finds as follows:

I. INTRODUCTION

The Plaintiff, a truck driver who is a resident of DeLand, Florida, filed the instant Complaint challenging an ordinance enacted by Defendant CITY OF DELAND ("City") which requires people to wear a face mask in certain circumstances. The Plaintiff claims that Ordinance No. 2020-12, titled "An Emergency Ordinance of the City of DeLand, Florida, Requiring Face Coverings for Indoor Locations in Order to Control the Spread of COVID-19," interferes with his personal liberty and business enterprise, infringes upon his expectation of privacy, and deprives him of rights guaranteed by the Florida Constitution.

The Ordinance

Following the World Health Organization's declaration of the spread of COVID-19 as a global pandemic, and following the declaration of a state of emergency at both the national and state level, on July 2, 2020, the City adopted and the mayor signed into law Ordinance No. 2020-12. The preamble of Ordinance No. 2020-12 recites several express findings, including the following: (1) the City Commission finds that "COVID-19 presents a danger to the health, safety, and welfare of the public;" (2) "COVID-19 is spread through airborne transmission from individuals sneezing, speaking, and coughing, and infectious droplet nuclei can spread for a great distance;" (3) "the use of face coverings has been identified as one of the primary means to prevent individuals who may be infected with COVID-19 from spreading it to other individuals;" (4) "to reduce the spread of the disease, the Centers for Disease Control ('CDC') recommends the use of cloth face coverings in public settings where other social distancing measures are difficult to maintain since many individuals with no symptoms can spread the virus, and even individuals who develop symptoms can transmit the virus to others before showing symptoms;" (5) "the State Surgeon General/State Health Officer issued a public health advisory which advised all persons in Florida, with certain enumerated exceptions, [to] wear face coverings in any setting where social distancing is not possible;" (6) "the number of confirmed cases of COVID-19 has been spiking both in Florida and in Volusia County;" (7) "the City Commission has determined that an emergency exists, and the immediate enactment of this Emergency Ordinance is necessary in order to mitigate the continued spread of COVID-19;" and (8) the implementation of Ordinance No. 2020-12 "is necessary for the preservation of the health, safety, and welfare of the community."

Ordinance No. 2020-12 mandates only two things. First, it requires any person in a business establishment to wear a face covering while in that business establishment. However,

the ordinance contains numerous exceptions to or exclusions from this requirement. Second, the ordinance requires every business establishment to post signs notifying all people of the requirement to wear masks as provided. Section 4 of Ordinance No. 2020-12 provides that a violation of the ordinance is a "noncriminal infraction" and that a violation "does not authorize the search or arrest of an individual." This section provides that a person be given an opportunity to comply with the ordinance or explain how an enumerated exception applies before a citation can be issued. Section 4 states that the "[f]ailure to comply with the requirements of this Emergency Ordinance presents a serious threat to the public health, safety, and welfare."

COVID-19 Pandemic

At this point, it is beyond dispute that COVID-19 is a severe virus that spreads rapidly from person to person and has resulted in serious illness and death to many people around the world. This fact recently has been recognized by the highest court in the land. Three months ago, and prior to the enactment of Ordinance No. 2020-12, United States Supreme Court Chief Justice John Roberts described COVID-19 as "a novel severe acute respiratory illness that has killed ... more than 100,000 nationwide" and noted that "there is no known cure, no effective treatment, and no vaccine" and "[b]ecause people may be infected but asymptomatic, they may unwittingly infect others." South Bay United Pentecostal Church v. Newsom, 140 S.Ct. 1613 (2020) (Roberts, C.J., concurring). In just a matter of a few months, "COVID-19 has thrust humankind into an unprecedented global public health crisis" and "has ravaged every corner of American society." Gayle v. Meade, 2020 WL 2086482 (S.D. Fla. April 30, 2020). COVID-19, a highly communicable respiratory disease that spreads among people who are in close contact, can be fatal for all age groups and has spread rapidly throughout the world. Id. In the United States the numbers of confirmed cases and deaths are the highest in the world, and, therefore, the

CDC recommends that people "wear masks when in public or in close proximity with others." Id.

According to CDC statistics and the New York Times database, as of the date of this Final Judgment, there have been more than 6,000,000 confirmed cases of COVID-19 in the United States with over 183,000 COVID-19 related deaths. According to Florida Department of Health statistics, Florida currently has more than 622,000 reported COVID-19 cases, the third highest number of cases nationwide. The current number of cases reported in Volusia County is 9,244.

The Lawsuit

Despite these grim statistics and the harsh realities and risks associated with the COVID-19 pandemic, and despite the City's stated goal of protecting the health, safety, and welfare of the DeLand community, the Plaintiff wants this Court to void Ordinance No. 2020-12 because he doesn't want to be told that he has to wear a protective mask in public. The Plaintiff asks the Court for a judgment declaring Ordinance No. 2020-12 unconstitutional, illegal and void, and he requests an injunction enjoining the City from enforcing Ordinance No. 2020-12. Notably, this is not the only such lawsuit filed by this Plaintiff's attorney. The Plaintiff's lawyer has filed more than a dozen virtually identical lawsuits on behalf of others all over the state of Florida. In each of those form complaints filed, like in the instant Complaint, counsel generally makes the same attack on the city or county face mask ordinance at issue, claiming right to privacy, due process, and equal protection violations, and citing void for vagueness concerns, among others.

A Historical Perspective

From a historical standpoint, the COVID-19 pandemic era is not the first time Americans have debated and litigated face mask ordinances. We went through this 100 years ago during the "Spanish Flu" influenza pandemic of [redacted] The influenza pandemic of 1918, which lasted from January 1918 to December 1920, was the most deadly flu pandemic in recorded history. It

infected roughly one-third of the world's population, or around 500 million people, and caused the deaths of an estimated 50 million people worldwide and an estimated 675,000 people in the United States. See https://www.cnn.com/2020/04/03/americas/flu-america-1918-masks-intl-hnk/index.html.

In response to the deadly 1918 influenza outbreak, local governments began adopting initiatives to try to stop the spread of the flu. Most of those government actions are the same ones being taken today to combat the spread of COVID-19. One of the most widely used methods was the enactment of ordinances requiring people to wear face masks in public. Enactment of mask-wearing ordinances began mainly in the western states, and most people complied with them. See https://www.history.com/news/1918-spanish-flu-mask-wearing-resistance. On October 24, 1918, the City of San Francisco unanimously passed its Influenza Mask Ordinance, making the wearing of face masks in public mandatory for the first time in the United States. Mask-wearing laws largely had public support, and the United States soon led the world in mask wearing. See https://www.cnn.com/2020/04/03/americas/flu-america-1918-masks-intl-hnk/index.html. Although there were pockets of resistance to mask-wearing mandates in 1918 and 1919, it was not widespread. A group of thousands of dissenters formed the "Anti-Mask League" in San Francisco. The Red Cross fought back with public service announcements calling anyone who refused to wear a mask "a dangerous slacker," giving rise to the phrase of the time "mask slackers." See https://www.history.com/news/1918-spanish-flu-mask-wearing-resistance.

Face mask ordinances of [redacted] usually were enforced with citations and fines, with municipal judges holding what journalists referred to as "influenza court" in which a citizen could contest the citation. As a general rule, judges deferred to state and local elected officials

on face mask ordinances, and state and local judges routinely upheld them. See https://www.acslaw.org/expertforum/face-covering-requirements-and-the-constitution.

Since the founding of the United States, courts have considered the legality of public health interventions and the government's power to respond to epidemics. The general authority of state governments to pass laws providing for public safety and welfare and to regulate health under their 10th Amendment "police powers" was first recognized nearly 200 years ago by a unanimous United States Supreme Court in Gibbons v. Ogden, 22 U.S. 1 (1824). In that case Chief Justice John Marshall described quarantine laws and "health laws of every description" as "flowing from the acknowledged power of a State to provide for the health of its citizens." Id.

The framework governing emergency exercises of state authority during a public health crisis was established 115 years ago in the 1905 U.S. Supreme Court case of Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905). In Jacobson the Supreme Court addressed a claim that the state's compulsory vaccination law, which was enacted during a growing smallpox epidemic, violated the defendant's 14th Amendment right "to care for his own body and health in such a way as to him seems best." 197 U.S. at 26. In rejecting that claim, the Supreme Court explained that "the liberty secured by the Constitution ... 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." Id. Rather, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Id. at 27. In describing a state's police power to combat an epidemic, the Jacobson Court explained that "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such

restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Id. at 29.

Although constitutional doctrine has changed quite a bit since 1905, Jacobson continues to be the seminal decision on public health authority in an emergency, against which civil rights and liberties are balanced. Chief Justice John Roberts recently affirmed the central position of Jacobson in his concurring opinion in South Bay United Pentecostal Church v. Newsom when he wrote: "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.'" 140 S.Ct. 1613 (2020), quoting Jacobson, 197 U.S. at 38. "When those officials 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" 140 S.Ct. at 1613, quoting Marshall v. United States, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974).

It was just 13 years after the Jacobson decision that the influenza pandemic of 1918 struck. Perhaps because that decision was still fairly new at the time, there are very few reported court cases concerning legal challenges to the face mask laws or other government public health regulations. Surprisingly, there appears to be only one known reported federal appellate court decision from that era pertaining to a governmental exercise of its police power in relation to the influenza pandemic.

In Benson v. Walker, 274 F. 622 (4th Cir. 1921), a county in North Carolina had enacted an ordinance prohibiting all traveling shows, circuses, and carnivals in the county in order to avoid the gathering of crowds of people at such events. The county's board of health made findings in the ordinance that "epidemics of contagious and infectious diseases are very prevalent and are likely to be spread and contracted by personal contact in dense crowds of people" and that the gathering of large numbers of people "would tend to the spread of the Spanish influenza ... bringing death and much sickness and disease in the community." 274 F.

622, 623-24. In finding the county's action valid as being clearly within its police power, the court held that "[n]othing is better settled than that in the consideration of ordinances and laws of the character in question here, 'every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.'" Id. at 624-25, quoting Dobbins v. Los Angeles, 195 U.S. 223, 235-36, 25 S.Ct. 18, 49 L.Ed. 169 (1904).

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, ... matter[s] of local concern, the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." Medtronic, Inc. v. Lohr, 518 U.S. 470, 475, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). It has long been recognized since Jacobson that when there is a public health emergency, the police power gives governmental authorities power to act for the public welfare that they might not otherwise have. "The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" In Re Abbott, 954 F.3d 772, 784 (5th Cir. 2020), quoting Jacobson, 197 U.S. at 31. See also In Re Rutledge, 956 F.3d 1018, 1028 (8th Cir. 2020) (acknowledging that in response to COVID-19, "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand"), quoting Jacobson, 197 U.S. at 29; and Prince v. Massachusetts, 321 U.S. 158, 166-67,

64 S.Ct. 438, 88 L.Ed. 645 (1944) (noting that "[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease or the latter to ill health or death.").

II. CLAIM FOR INJUNCTIVE RELIEF

In Count I of his Complaint the Plaintiff seeks injunctive relief enjoining the City from enforcing Ordinance 2020-12. In order to obtain injunctive relief, a petitioner is required to establish the following: (1) a substantial likelihood of success on the merits; (2) a lack of an adequate remedy available at law; (3) irreparable harm if the injunction is not entered; and (4) that injunctive relief will serve the public interest. Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1258 (Fla. 2017); Cole v. City of Deltona, 890 So. 2d 480, 482 (Fla. 5th DCA 2004). If the petitioner fails to prove one of these requirements, the request for an injunction must be denied. State of Florida, Department of Health v. Bayfront HMA Medical Center, LLC, 236 So. 3d 466, 472 (Fla. 1st DCA 2018). "Injunctions are an extraordinary remedy, which must be granted sparingly." Colonial Bank, N.A. v. Taylor Morrison Services, Inc., 10 So. 3d 653, 655 (Fla. 5th DCA 2009). The establishment of a clear legal right to the relief requested is an essential requirement prior to the issuance of an injunction. Mid-Florida At Eustis, Inc. v. Griffin, 521 So. 2d 357 (Fla. 5th DCA 1988).

Substantial Likelihood of Success on the Merits

A legal analysis of each of the Plaintiff's constitutional claims is necessary in order to determine whether he is substantially likely to succeed on the merits of any of them. The Plaintiff's primary claim is that the City's ordinance violates the Privacy Clause of Article 1, Section 23 of the Florida Constitution, which states that every person "has the right to be let alone and free from governmental intrusion into the person's private life...." He asserts that

Ordinance 2020-12 is a "radical infringement" of his expectation of privacy over his "bodily and facial autonomy" as well as his "medical privacy" by forcing him to wear a mask.

In his Complaint the Plaintiff cites to the Florida Supreme Court case of Winfield v. Division of Pari-Mutuel Wagering, Department of Business Regulation, 477 So. 2d 544, 547 (Fla. 1985), which holds that "the right of privacy is a fundamental right which ... demands the compelling state interest standard," and that it must be shown "that the challenged governmental regulation serves a compelling state interest and accomplishes its goals through the use of the least intrusive means." However, the constitutional right to privacy does not confer an absolute guarantee against governmental intrusion into someone's private life, as the right will yield to a compelling governmental interest. Id.; Stall v. State, 570 So. 2d 257, 262 (Fla. 1990). Most importantly, "before the right of privacy is attached, and the delineated standard applied, a reasonable expectation of privacy must exist." Winfield, 477 So. 2d at 547. The final determination of an expectation of privacy's legitimacy "takes a more global view, placing the individual in the context of a society and the values that the society seeks to foster. The right to privacy has not made each person a solipsistic island of self-determination." State v. Conforti, 688 So. 2d 350, 359 (Fla. 4th DCA 1997).

A circuit judge in Florida's Eighth Judicial Circuit recently ruled on a claim nearly identical to the instant Plaintiff's. In that case the plaintiff sought to enjoin Alachua County from enforcing a very similar face mask ordinance. In finding that the plaintiff had failed to show a clear legal right to the relief requested, the court held that "[t]here is no recognized constitutional right *not* to wear a facial covering in *public* locations or to expose other citizens of the county to a contagious and potentially lethal virus during a declared pandemic emergency." Green v. Alachua County, Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020). That court went on to rule that an individual's "right to be let alone is no more precious than the

corresponding right of his fellow citizens not to become infected by that person and potentially hospitalized." Id. See also Machovec v. Palm Beach County, Case No. 2020CA006920AXX (Fla. 15th Cir. Ct. July 27, 2020) ("There is no reasonable expectation of privacy as to whether one covers their nose and mouth in *public* places, which are the only places to which the mask ordinance applies.")

No recognized right to a reasonable expectation of privacy exists in a public location. See Picou v. Gillum, 874 F.2d 1519, 1521 (11th Cir. 1989) (examining Florida's motorcycle helmet laws and holding that "[t]here is little that could be termed private in the decision whether to wear safety equipment on the open road [in public]"). See also Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D. Fla. 1992) (noting that an individual does not have a protected legitimate expectation of privacy in activities such as sleeping and eating in public). In Picou the court noted that there "is no broad legal or constitutional 'right to be let alone' by government. In the complex society in which we live, the action and nonaction of citizens are subject to countless local, state, and federal laws and regulations." 874 F.2d at 1521.

There is nothing in Ordinance 2020-12 that requires the citizens of DeLand to wear a face mask in private. Rather, the ordinance only requires the use of face coverings in limited ***public*** circumstances and provides numerous categories of exceptions to that requirement. Even if the instant Plaintiff had a recognized right to privacy here, which he does not, it is clear that the City's interest in reducing the spread of COVID-19 is a compelling state interest. See Murray v. Cuomo, 2020 WL 2521449 at *10, n. 12 (S.D.N.Y. May 18, 2020) ("Courts have held that the government's interest in minimizing the spread of deadly infectious disease is a compelling state interest."); SH3 Health Consulting, LLC v. Page, 2020 WL 2308444 at *8 (E.D. Mo. May 8, 2020) (finding that the "City and County adopted the Orders in this case to serve a compelling state interest – their interest in maintaining the health and safety of the public during a global

pandemic, and to slow the transmission of COVID-19"); Gish v. Newsom, 2020 WL 1979970 at *6 (C.D. Cal. April 23, 2020) (holding that slowing the spread of COVID-19 is a "state interest that is not only legitimate but compelling").

The critical role and responsibility that local governments have in protecting the health, safety and welfare of their citizens is recognized by Section 252.38 of the Florida Statutes, which states: "Safeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state." Pursuant to Section 252.38(3)(a)5., each political subdivision has the power and authority to take "whatever prudent action is necessary to ensure the health, safety, and welfare of the community." "[T]he public policy of this state has been legislatively declared in favor of the protection of the interest of the inhabitants of this state, as individuals, from exposure to persons known to be afflicted with vile and loathsome communicable infectious, contagious ... diseases...." Lewis v. City of Miami, 173 So. 150, 151 (Fla. 1937). See also State Department of Agriculture & Consumer Services Division of Animal Industry v. Denmark, 366 So. 2d 469, 470 (Fla. 4th DCA 1979) ("It is within the police power of the State to enact laws to prevent the spread of infectious or contagious diseases."). Furthermore, "there are circumstances in which a public emergency, for instance, a fire, the spread of infectious or contagious diseases or other potential public calamity, presents an exigent circumstance before which all private rights must immediately give way under the government's police power." Davis v. City of South Bay, 433 So. 2d 1364, 1366 (Fla. 4th DCA 1983). "The ongoing dire public emergency caused by COVID-19 is precisely the sort of exigent circumstance that justifies governmental intrusion into individual autonomy." Machovec v. Palm Beach County, at p. 12.

Clearly, the City has a compelling interest in stopping the uncontrolled spread of COVID-19. It is clear that Ordinance 2020-12 is narrowly tailored to achieve that interest. The

ordinance requiring people to wear a mask applies only in public business establishments and includes a multitude of exceptions and exclusions to wearing the face coverings. The ordinance is a rationally related, narrowly tailored, response to the ongoing COVID-19 public health crisis and bears an undisputed relationship to public health.

Following his right to privacy argument, the Plaintiff claims Ordinance 2020-12 is unconstitutional because it violates the Due Process Clause of the Florida Constitution in that it is an arbitrary and unreasonable exercise of governmental power not backed by a compelling state interest. The Plaintiff also makes the broad, conclusory, and unsupported statement that he has been deprived of substantive due process by the City's interference with his private actions and personal liberty.

A government ordinance satisfies substantive due process if it "bears a rational relation to a permissible legislative objective that is not discriminatory, arbitrary, capricious, or oppressive." Jackson v. State, 191 So. 3d 423, 428 (Fla. 2016). Recently, in Henry v. DeSantis, 2020 WL 2479447 at *6-*7 (S.D. Fla. May 14, 2020), in a COVID-19 public health ruling, the district court rejected arguments as to any violation of the Due Process and Equal Protection clauses. Applying the rational basis test, the court held that the government interest in slowing the spread of COVID-19 "is most certainly a legitimate government interest under the rational basis test." Id. Having already found that the City has a compelling government interest here, this Court further finds that Ordinance 2020-12 does not violate due process for being discriminatory, arbitrary, capricious, or unreasonable. Furthermore, the Court finds that the Ordinance mask requirement bears a rational relationship to the legislative government objective of protecting the public health by preventing the spread of COVID-19. See Machovec, at p. 9-10; and Ham v. Alachua County Board of County Commissioners, Case No. 1:20-cv-00111-MW/GRJ (N.D. Fla. June 3, 2020).

The Plaintiff also claims Ordinance 2020-12 is an unconstitutional violation of the Due Process Clause of the Florida Constitution because it is void for vagueness and overbroad. To test an ordinance for vagueness, a court must determine if the ordinance "gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." Kuvin v. City of Coral Gables, 62 So. 3d 625, 639-40 (Fla. 3d DCA 2010). An ordinance is void for vagueness only when persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Samples v. Florida Birth-Related Neurological Injury Compensation Association, 114 So. 3d 912, 919-20 (Fla. 2013). The void for vagueness doctrine comes into play where the enforcement of an ordinance involves "the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." Id.

The Plaintiff contends that certain language in Ordinance 2020-12 is too vague for the average citizens of DeLand to understand, forcing them to guess at its meaning. Phrases in the Ordinance which he alleges are ambiguous and create confusion for the person of common intelligence in DeLand are "persons who have trouble breathing," "chronic pre-existing condition," "documented or demonstrable medical problem," "tolerate a facial covering," and "sensory." The Court notes that all of these phrases are found in just one single exception of the ten (10) exceptions outlined in the ordinance. That single exception, found in Section 3(ii)b. of the ordinance, states as follows:

> 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 face covering and function in public are not required to wear one.

The Plaintiff wants the City's entire 6-page ordinance declared unconstitutionally void for vagueness due to these few phrases found in just one of the ordinance's many exceptions.

This Court must have a higher opinion of the common intelligence of City residents than the Plaintiff has. The Court does not believe that "persons of common intelligence" in the City of DeLand would be so flummoxed by these phrases that they would have to guess at what they mean. All of these phrases have common sense, plain usage meanings, none of them is unduly ambiguous, and they are used in common conversation among residents. Certainly, the phrases are not so vague that they render the City's face mask ordinance unconstitutional. The Plaintiff has not shown and cannot show that these challenged phrases cannot be understood by persons of common intelligence. The Court finds, as other courts recently have found regarding very similar ordinances, that the City's Ordinance 2020-12 is not unconstitutionally vague. See Machovec, at p. 9; Power v. Leon County, Case No. 2020-CA-001200 (Fla. 2d Cir. Ct. July 27, 2020); Carroll v. Gadsden County, Case No. 20-542-CA (Fla. 2d Cir. Ct. Aug. 24, 2020).

Next, the Plaintiff claims Ordinance 2020-12 is unconstitutional because it violates the Equal Protection Clause of the Florida Constitution. According to the Plaintiff, the ordinance violates his "basic rights" because his "right to control the property of his own body and face is fundamental." Where, as here, a challenged ordinance does not involve a suspect class or fundamental right, the rational basis test will apply to evaluate an equal protection challenge. Estate of McCall v. United States, 134 So. 3d 894, 901 (Fla. 2014). "To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed." Id.

In Ham v. Alachua County Board of County Commissioners, Case No. 1:20-cv-00111-MW/GRJ (N.D. Fla. June 3, 2020), the federal court recently held that, in applying the rational basis test, Alachua County's face mask ordinance "is rationally related to a legitimate interest – preventing a spread of COVID-19 – and, therefore, Plaintiff's equal protection claim fails." See also Henry v. DeSantis, 2020 WL 2479447 at *6-*7 (S.D. Fla. May 14, 2020), in which another

federal court rejected arguments as to any violation of the Due Process and Equal Protection clauses. Applying the rational basis test, that court held that the government interest in slowing the spread of COVID-19 "is most certainly a legitimate government interest under the rational basis test." Id. Very recently, in another federal court case concerning a challenge to executive orders which included a requirement for wearing face masks in all businesses, the court found no equal protection or due process violations. See 910 E Main LLC v. Edwards, 2020 WL 4929256 (W.D. La. Aug. 21, 2020). Applying the standards set forth in Jacobson and Abbott, the district court denied injunctive relief, holding that it was not the court's role "to second guess the policy choices made" by the government and stating that "[c]rises like COVID-19 can call for quick, decisive measures to save lives. Yet those measures can have extreme costs – costs that often are not borne evenly. The decision to impose those costs rests with the political branches of government." Id. at *13.

In applying the rational basis test, this Court finds that Ordinance 2020-12 bears a rational and reasonable relationship to a legitimate government interest – preventing the spread of COVID-19 – and that the ordinance is not arbitrarily or capriciously imposed. Thus, the Court finds no equal protection violation.

These issues raised by the Plaintiff are being litigated all over the state of Florida, as the attorney for the instant Plaintiff has filed more than a dozen virtually identical lawsuits on behalf of others throughout the state and promises to file more. As of the date of this judgment, for the sixth time now, a judge in Florida has rejected arguments that a local ordinance requiring people to wear face masks to reduce the spread of COVID-19 is unconstitutional. The other five Florida courts all have found that no constitutional right is infringed upon by the local government's ordinance mandating the wearing of a face mask, and that the requirement to wear such a face covering has a clear and rational basis based upon the protection of the public health. See Green

v. Alachua County, Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020); Ham v. Alachua County Board of County Commissioners, Case No. 1:20-cv-00111-MW/GRJ (N.D. Fla. June 3, 2020); Machovec v. Palm Beach County, Case No. 2020CA006920AXX (Fla. 15th Cir. Ct. July 27, 2020); Power v. Leon County, Case No. 2020-CA-001200 (Fla. 2d Cir. Ct. July 27, 2020); and Carroll v. Gadsden County, Case No. 20-542-CA (Fla. 2d Cir. Ct. Aug. 24, 2020). See also Cooper v. Sununu, Case No. 226-2020-CV-00266 (N.H. Super. Ct. July 13, 2020) (New Hampshire court rejecting constitutional arguments against local ordinance requiring face masks in businesses or public buildings). In denying injunctive relief, the Cooper court ruled that "it is plain-as-day that the ordinance bears a substantial relation to public health and safety. It seems common sense – to everyone except the plaintiff, his attorney, and his expert – that requiring individuals to cover their faces while indoors will help reduce the transmission of a highly contagious virus that is spread through the air." Cooper, at p. 12. Based on these cases and all of the foregoing, this Court finds that the instant Plaintiff has failed to show, by any competent substantial evidence whatsoever, that he has a substantial likelihood of success on the merits.

Lack of an Adequate Remedy Available at Law

Regarding the next element for injunctive relief, the Plaintiff claims he does not have an adequate remedy at law to protect his rights and that his "ability to move freely has been deprived." It is well established that injunctive relief will not lie where there is an adequate remedy of law available. Meritplan Insurance Company v. Perez, 963 So. 2d 771, 776 (Fla. 3d DCA 2007).

"Clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of [an] injunction." City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So. 2d 750, 753 (Fla. 1st DCA 1994), approved 659 So. 2d 1046 (Fla. 1995). An injunction should be granted only after the moving party has both alleged and

proved facts entitling it to relief. Sammie Investments, LLC v. Strategica Capital Associates, 247 So. 3d 596, 600 (Fla. 3d DCA 2018). The party seeking the injunction has the burden of providing competent, substantial evidence and proving that he has no adequate remedy available at law. Concerned Citizens for Judicial Fairness, Inc. v. Yacucci, 162 So. 3d 68, 72 (Fla. 4th DCA 2014). Where there are no factual findings whatsoever and a petitioner offers no evidence to support granting injunctive relief, only the unsworn argument of his attorney, no injunction will stand because "an attorney's unsworn argument does not constitute evidence." Id.

One big problem with the instant case is a lack of evidence to support issuance of an injunction. The Plaintiff did not testify at the final hearing of this case. He offered no proof demonstrating that he has no adequate remedy at law or how his "ability to move freely has been deprived" by the City's ordinance. The face mask requirement is, at best, "a *de minimis* infringement on the [P]laintiff's public interactions." Green v. Alachua County, at p. 6-7; Power v. Leon County, at p. 23. The Plaintiff has failed to assert any actual harm which could not be adequately remedied by an action for money damages, such as a federal Section 1983 claim for damages, were the face mask requirement found to be unconstitutional. Green, at p. 6-7. Finally, if the Plaintiff violates the City's ordinance and receives a citation imposing a fine on him, he would have an adequate remedy at law because he could contest the citation and fine in court. Power, at p. 23. Thus, the Court finds that the Plaintiff has an adequate remedy at law and has failed to establish otherwise.

Irreparable Harm if Injunction is not Entered

Next, the Plaintiff claims that he will suffer irreparable harm if an injunction is not issued because the mask requirement violates his constitutional right to privacy. An injunction may be issued only in situations where a plaintiff can "clearly demonstrate that irreparable injury would follow the denial of the injunction." Jacksonville Electric Authority v. Beemik Builders &

Constructors, Inc., 487 So. 2d 372, 373 (Fla. 1st DCA 1986). Speculation as to possible future detrimental effects is not irreparable harm and cannot justify the entry of an injunction. Id.

The Plaintiff claims no real injury or particular harm other than a generic assertion that wearing a face mask in public during a deadly pandemic will invade his right to privacy. Ordinance 2020-12 requires the face covering only in limited circumstances – when a person is in a business establishment – and provides for a multitude of exceptions which may apply to the Plaintiff. "The wearing of a face covering in public under the limited circumstances contained in the [ordinance] will not, in any way, alter the Plaintiff's physical person or result in permanent disfigurement." Green, at p. 7-8.

Again, the Plaintiff chose not to testify at the final hearing to explain how his right to privacy is being violated or to support any of his other claims. He offered no testimony elaborating on how he has been irreparably harmed or otherwise negatively impacted by the ordinance. There was no evidence presented at the final hearing that established irreparable injury so as to warrant entry of an injunction. See Jacksonville Electric Authority, 487 So. 2d at 373. Since the Plaintiff did not testify to show irreparable harm, and all that was offered was his attorney's unsworn argument, the Plaintiff has failed to meet his burden of proving that he will suffer irreparable harm if the injunction is not entered. See Concerned Citizens for Judicial Fairness, Inc., 162 So. 3d at 72.

The Court cannot help but note that the only way the Plaintiff might suffer irreparable harm here is if the City's face mask ordinance is found unconstitutional and the Plaintiff, therefore, is placed at greater risk of contracting COVID-19 because the citizens of DeLand stop wearing face coverings in public. The Plaintiff suffers no irreparable harm by the face mask requirement being upheld because his risk of getting infected with COVID-19 or giving it to someone else will be decreased.

Injunctive Relief Will Serve the Public Interest

The Plaintiff contends that an injunction will serve the public interest because the City's residents "are burdened by the over-reach of their local government" and because the "public has a strong interest in protecting their rights and their ability to control their own bodies and health."

Injunctive relief may be denied where the injury to the public outweighs any individual right to relief. Knox v. District School Board of Brevard, 821 So. 2d 311, 314 (Fla. 5th DCA 2002); Dragomirecky v. Town of Ponce Inlet, 882 So. 2d 495, 497 (Fla. 5th DCA 2004) ("Where the potential injury to the public outweighs an individual's right to relief, the injunction will be denied.").

The Florida courts that have ruled on the face mask issue have determined that the public interest is to keep the COVID-19 infection rate low so that the virus does not spread and that it is in the public interest to protect the most vulnerable from infection. Power v. Leon County, at p. 25. "It is therefore not in the public interest to enjoin the enforcement of [an] emergency ordinance that requires face coverings in limited circumstances." Id. "Limited mandates such as the one at issue here with broad exemptions are certainly in the public interest if they contribute to slowing the spread of COVID-19." Ham v. Alachua County Board of County Commissioners, at p. 4. "The county's need to take measures to control the spread of COVID-19 clearly outweighs the Plaintiff's private interest in not wearing a mask in the limited circumstances required by the county's emergency order, and an injunction in this situation would disserve the public interest." Green v. Alachua County, at p. 8. "It is beyond dispute that the potential injury to the public that would result from enjoining the government's ability to prevent the spread of a presently incurable, deadly, and highly communicable virus far outweighs any individual's right to simply do as they please." Machovec v. Palm Beach County, at p. 11.

The Plaintiff, who did not testify, has completely failed to show that granting him injunctive relief will serve the public interest.

The Testimony

As previously stated, there was no testimony from the Plaintiff himself to support any of his claims, as he chose not to testify at the final hearing. However, each side did present testimony from a medical expert. The Plaintiff called Andrew Bostom, M.D., an epidemiologist and associate professor of family medicine (research) at Brown University in Rhode Island. Dr. Bostom testified generally that there are no studies that prove for certain that mask usage stops the spread of COVID-19. He explained that there are no controlled studies outside of health care settings showing that masks are effective. He stated that the observational studies that exist are flawed and that controlled studies are needed for reliability.

Testifying for the City was Peter K. Harman, M.D., ICU Medical Director at Halifax Health Medical Center in Daytona Beach. Dr. Harman generally agreed that the observational studies are flawed and are not conclusive that masks help. However, he strongly advocates for following the CDC and Florida Department of Health recommendations to wear masks, and he opined that everyone should wear a mask when going into a place of business. Dr. Harman further testified that the "best impression" he and most of his critical care colleagues have is that face masks are effective in controlling the spread of COVID-19. At the conclusion of his testimony, Dr. Harman summed up his professional opinion about COVID-19 with the following stark observation:

> This isn't a parlor game. I'm watching people die every day. And they may not be you, they may not be healthy people, but they're someone's grandmother, there are some with frailty. And now we're seeing more and more patients who are otherwise healthy. I think it's incumbent on the medical profession to recommend to towns and villages that we do everything in our power to control the spread of this disease. It is not a hoax. It is a real disease. All

> I can do is strongly recommend that you continue to support ... the wearing of masks in public places because there are examples with this particular virus where it has been extremely effective when incorporated with other preventive measures.

III. CLAIM FOR DECLARATORY RELIEF

In Count II of his Complaint the Plaintiff asks this Court for a declaratory judgment declaring Ordinance 2020-12 unconstitutional, illegal, and void. The Complaint fails to state a cause of action for declaratory judgment because the Plaintiff has failed to demonstrate ultimate facts showing a bona fide, actual, present practical need for the declaration. The test for sufficiency of a complaint seeking a declaratory judgment is not whether a plaintiff will prevail in obtaining his desired outcome, but whether he is entitled to a declaration of rights at all. Messett v. Cohen, 741 So. 2d 619, 621 (Fla. 5th DCA 1999).

A plaintiff must show that he is in doubt as to the existence or nonexistence of some right, status, immunity, power, or privilege and that he is entitled to have such doubt removed. See Wilson v. County of Orange, 881 So. 2d 625, 631 (Fla. 5th DCA 2004). Additionally, a plaintiff must show "a present controversy based on articulated facts which demonstrate a real threat of immediate injury." Scott v. Francatti, 214 So. 3d 742, 747 (Fla. 1st DCA 2017). A dispute must be justiciable in the sense that it is based upon some definite and concrete assertions of right which demonstrate a real threat of immediate injury. Apthorp v. Detzner, 162 So. 3d 236, 241 (Fla. 1st DCA 2015). The bare assertion that a plaintiff's legal rights will be affected without showing how or why is insufficient to demonstrate that any question exists which requires an answer through operation of the Declaratory Judgment Act. Williams v. Howard, 329 So. 2d 277, 281 (Fla. 1976).

In the instant case the Plaintiff has failed to establish any fact showing a real threat of imminent injury in order to obtain relief under the Declaratory Judgment Act. The Plaintiff's

asserted claims of injury are nonspecific and hypothetical and do no more than question the constitutionality of the City's ordinance. As outlined herein, there is no constitutional right to **not** wear a face mask in public during a pandemic, and the Plaintiff has completely failed to show any constitutional violations. The Plaintiff is not entitled to the declaratory relief he seeks.

IV. CONCLUSION

This is an extraordinary time in our history. The COVID-19 pandemic of 2020 is now threatening to overtake the Spanish influenza pandemic of [redacted] as the deadliest in our country's recorded history. Because extraordinary times call for extraordinary measures, state and local governments all over America are enacting emergency laws designed to protect their citizens from the spread of this deadly virus – just like they did 100 years ago.

In an exercise of good governance, the City of DeLand acted on its obligation under the law to protect the health, safety and welfare of its citizens from the spread of the COVID-19 virus by enacting Ordinance No. 2020-12. The City's ordinance created a *de minimis* requirement that people wear a simple cloth face mask covering their nose and mouth only in the limited circumstance of when they are in a business establishment, and the ordinance provides for a multitude of exceptions.

Contrary to the Plaintiff's claims, Ordinance 2020-12 is wholly consistent with the Florida Constitution. It does not violate anyone's right to privacy, substantive due process, equal protection, or any other constitutional right. It is not vague or overbroad. The ordinance is authorized not only by statute, but by well settled case law precedent dating back over a hundred years. For the reasons explained herein, the Plaintiff has come nowhere close to demonstrating that he is entitled to injunctive or declaratory relief, and thus his request for an injunction and declaratory judgment against the City must be denied.

Based on all of the foregoing, it is hereby

ORDERED AND ADJUDGED:

That the Plaintiff's Verified Complaint for Emergency Injunctive Relief and Declaratory Judgment is denied. Final Judgment is entered in favor of the Defendant, CITY OF DELAND, and the Plaintiff shall take nothing by this action.

DONE AND ORDERED in DeLand, Volusia County, Florida, this 31st day of August, 2020.

Randell H. Rowe, III

RANDELL H. ROWE, III
CIRCUIT JUDGE

Copy to:

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