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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN ANMD FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION DIV: "AF"

CASE NO.: 2020CA006920AXX

JOSIE MACHOVEC,
CARL HOLME,
KAREN HOLME,
RACHEL EADE,
and
ROBERT SPREITZER,

Plaintiffs,

vs.

PALM BEACH COUNTY, a political subdivision of the State of Florida,

Defendant.
_____/

ORDER DENYING PLAINTIFF'S VERIFIED EMERGENCY MOTION FOR TEMPORARY INJUNCTION

THIS CAUSE came before the Court on Plaintiffs, Carl Holme, Rachel Eade, and Robert Spreitzer's ("Plaintiffs") Verified Emergency Motion for Temporary Injunction (DE #4) filed June 30, 2020, pursuant to Fla. R. Civ. P. 1.610. The Defendant, Palm Beach County (the "County") filed its Response in Opposition (DE #54) on July 13, 2020, and Plaintiffs filed a Reply (DE # 124) on July 17, 2020. Argument by the parties was heard at a hearing held on July 21, 2020. Having carefully considered Plaintiffs' Motion, the County's Response, Plaintiff's Reply, the evidence presented during the hearing, the applicable law, and being otherwise fully advised in the premises, the Court finds as follows:

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A. Procedural and Factual Background.

COVID-19 is a respiratory illness caused by a novel coronavirus that spreads rapidly from person to person and may result in serious illness or death. The threat presented by the worldwide COVID-19 pandemic cannot be seriously disputed. As the Supreme Court of the United States stated over a century ago when addressing claims minimizing the threat of smallpox, "[w]hat everybody knows the court must know." *Jacobson v. Mass.*, 197 U.S. 11, 30 (1905) (approving the government's authority to require smallpox vaccination). Thousands of Floridians have been killed by COVID-19, and many more have been hospitalized.[1] (Def. Ex. "N"). A state of emergency has been declared at all levels of government. (Def. Ex. "A," "B," "C"). As of this date, COVID-19 has killed more than 140,000 Americans nationwide,[2] and there currently is no known cure, no effective treatment, and no vaccine. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). Suffice to say, the COVID-19 pandemic has thrust humankind into an unprecedented global public health crisis. *Gayle v. Meade*, No. 20-21553, 2020 WL 2086482, at *1 (S.D. Fla. Apr. 30, 2020). In addition to presenting a mortal threat, COVID-19 has proven particularly resistant to containment. "People may be infected but asymptomatic, [and] may unwittingly infect others." *Newsom*, 140 S. Ct. 1613.

It is with this background that the Palm Beach County Board of County Commissioners ("BCC") voted unanimously to enact Emergency Order No. 2020-12 on June 24, 2020. Emergency Order 12 ("the Mask Ordinance") requires the citizens of Palm Beach County to utilize

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[1] According to the Center for Disease Control ("CDC") statistics, as of July 21, 2020, there are 369, 834 Floridians with confirmed cases of COVID-19, and 5,206 deaths.

[2] CDC statistics as of July 21, 2020 are that 3,819,139 Americans have tested positive for COVID-19 with 140,630 deaths.

face coverings in the form of masks or plastic face shields while in designated public places. Exceptions to the Mask Ordinance are for children under the age of two years, persons actively engaged in socially distant exercise, persons who have a medical condition that makes wearing a facial covering unsafe, and persons who object based on their religious belief. The Mask Ordinance further allows for temporary removal of a face covering in order to consume food and beverages and to assist hearing impaired persons with lip reading.

Prior to the issuance of the Mask Ordinance, Palm Beach County experienced a sharp increase in the number of COVID-19 cases and attendant deaths. (Def. Ex. "G-3," "H-3," "N-1"). The Mask Ordinance is of temporary and finite duration, subject to a thirty (30) day expiration and review by the BCC. The County determined that Emergency Order 12 was warranted and necessary to combat this deluge of disease and death. Plaintiffs, who are Palm Beach County citizens, contest this Emergency Order as unconstitutional and seek an emergency temporary injunction to enjoin its enforcement.[3]

B. Temporary Injunction Standard.

The extraordinary remedy of a temporary injunction "should be granted sparingly and only after the moving party has alleged and proved facts entitling it to relief." *Hiles v. Auto Bahn Fed'n, Inc.*, 498 So. 2d 997, 998 (Fla. 4th DCA 1986). To obtain a temporary injunction, the movant must establish the following: (1) a substantial likelihood of success on the merits; (2) a lack of an

[3] At oral argument, Plaintiffs' counsel discussed the enforcement of a mask requirement at various business establishments. Such actions by private businesses are not directly implicated by this lawsuit. Nevertheless, the Court notes here, as it did during argument on the Motion, that private businesses are free to impose mask requirements so long as they do not implicate enforcement discrimination based on any protected class. In fact, numerous businesses have enacted such a requirement nation-wide irrespective of any local or State mandated mask requirement. Other businesses have instituted state-wide mask requirements.

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adequate remedy at law; (3) the likelihood of irreparable harm absent the entry of an injunction; and (4) that injunctive relief will serve the public interest. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258 (Fla. 2017). The movant must prove each element with competent, substantial evidence. *State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 472 (Fla. 1st DCA 2018). If the movant fails to prove one of the requirements, the motion for injunction must be denied. *Id.*

C. Plaintiffs' Position.

Plaintiffs argue they have a substantial likelihood of success on the merits because Emergency Order 12 violates two constitutional rights: their right to privacy pursuant to Article I, Section 23 of the Florida Constitution ("Every natural person as the right to be let alone and free from governmental intrusion into the person's private life..."), and their right to due process pursuant to Article I, Section 9 of the Florida Constitution ("No person shall be deprived of life, liberty, or property without due process of law"). As to their right to privacy, Plaintiffs' argue that the requirement to wear a facial covering in public spaces constitutes an impermissible intrusion into their private lives, including an individual's right to refuse "medical treatment." As a result, Plaintiff's claim that "strict scrutiny" of the Mask Ordinance is required, and that the Order should be enjoined because it does not further a compelling state interest using the least intrusive means. *Gainesville Woman Care, LLC* 210 So. 3d at 1253; *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989). As to their due process rights, Plaintiffs argue that the Mask Ordinance is vague, arbitrary, and unreasonable, and is not backed by any compelling state interest or facts to support that interest.

Plaintiffs further argue they have no adequate remedy at law because monetary damages are not available for violation of privacy rights. *See Tucker v. Resha*, 634 So. 2d 756 (Fla. 1st DCA 1994), and that they will suffer irreparable harm because the loss of fundamental freedoms,

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even for a minimal period of time, constitutes irreparable injury. *Gainesville Woman Care, LLC*, 210 So. 3d at 1263 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Plaintiffs also point to the fact that the Mask Ordinance is enforceable by law enforcement, and can result in being charged with a second-degree misdemeanor, and fines ranging from $250.00 up to $500.00. Finally, Plaintiffs argue the public interest is served by preventing the placement of undue and unconstitutional burdens on individuals.

Plaintiffs raised additional grounds challenging Emergency Order 12 both in their Amended Complaint and at the hearing, including the County's legal authority to enact the order under Section 252.38, Florida Statutes, whether the Order is inconsistent with general law in violation of Art. VIII, § 1 Fla. Const., and whether the Order violates Plaintiffs' rights to free speech pursuant to Art. I, § 4 Fla. Const. However, because these grounds were not raised in Plaintiffs' Verified Emergency Motion for Temporary Injunction, they will not be addressed by this Order. *See* Fla. R. Civ. P. 1.100(b) (motion must state with particularity the grounds for it); *See Lingelbach's Bavarian Rests., Inc. v. Del Bello*, 467 So. 2d 476, 479 (Fla. 2d DCA 1985) (holding that a motion, not complaint, for injunctive relief is the appropriate mechanism for seeking preliminary injunction); *Nationstar Mortg., Ltd. Liab. Co. v. Weiler*, 227 So. 3d 181, 184 (Fla. 2d DCA 2017) (finding procedural due process rights are violated when court hears and determines matters outside the scope of the pending motion).

D. The County's Position.

The County only disputes Plaintiffs' argument that it has a substantial likelihood of success on the merits and that the public interest is served by refusing to enforce Emergency Order 12.

As to Plaintiffs' likelihood of success on the merits, the County asserts that no constitutional right to privacy has been infringed by the Mask Ordinance because: (a) there is no

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reasonable expectation of privacy regarding one's physical appearance in public places; (b) there is no reasonable expectation of privacy in one's decision to unwittingly subject others to illness and death, or otherwise do as one pleases in public; and (c) requiring the wearing of facial coverings does not constitute medical treatment or otherwise intrude upon an individual's right to make private medical decisions.

The County further asserts that no right to due process has been infringed because the Mask Ordinance is not vague — individuals are not left to guess about what is required (wear a face covering or face shield), where it is required (places identified in Section 4a-d), or for whom it is required (everyone not falling within an exception in Section 4e). The County also argues due process has not been violated because Emergency Order 12 is not arbitrary since the government has a legitimate interest in protecting public health by stopping the spread of COVID-19, and both the regulation as well as all stated exceptions have a clear rational basis.

Because no constitutional right has been implicated, Plaintiffs argue that this Court should not apply "strict scrutiny" to Emergency Order 12, and must instead review the order using a "rational basis" standard. The County asserts there is a clear rational basis for the Mask Ordinance because facial coverings help reduce the spread of COVID-19, and the Court must defer to this conclusion even if reasonable people can disagree about the effectiveness of the chosen policy.

Finally, the County argues that Emergency Order 12 would even pass strict scrutiny should that be necessary, because the government's interest in preventing widespread death and injury from COVID-19 is compelling, and the Order is narrowly tailored to advance that interest due to its stated exceptions and the County's decision to enact a mask requirement as opposed to other, more drastic measures (such as closing public establishments altogether).

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E. Legal Analysis.

Plaintiffs have failed to show, by competent substantial evidence, they have a substantial likelihood of success on the merits or that the public interest would be served by enjoining the enforcement of Emergency Order 12. Like the three other Florida courts which have addressed this issue to date, this Court finds no constitutional right is infringed by the Mask Ordinance's mandate to wear a facial covering, and that the requirement to wear such a covering has a clear rational basis based on the protection of public health. *See Green v. Alachua Cty.*, No. 0102020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020); *Ham v. Alachua Cty. Bd. of Cty. Comm's*, No. 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020); *Power v. Leon Cty.*, No. 2020-CA-001200 (Fla. 2d Cir. Ct. July 10, 2020).

The duly elected representatives of this county have come to a reasonable and logical conclusion that mandating the wearing of facial coverings best serves their constituents, and neither this Court nor an apparent vocal group of residents has the authority to second guess that policy decision. *See Jacobson v. Mass.*, 197 U.S. 11, 35 (1905); *Newsom*, 140 S. Ct. 1613 (2020) (citing *Jacobson* with approval). This Court is not prepared to find that unelected persons residing or remaining in any city or town where COVID-19 is prevalent, and enjoying the general protection afforded by an organized local government, may nonetheless defy the will of its constituted authorities based solely on their personal disagreement with the manner in which those authorities seek to safeguard the general public. *See Jacobson*, 197 U.S. at 37. To rule otherwise would unravel the very fabric of government in the midst of a global health crisis.

1. Plaintiffs Do Not Have a Substantial Likelihood of Success on the Merits.

Emergency Order 12 does not infringe any cognizable privacy right of individuals in Palm Beach County. Article I, Section 23 of the Florida Constitution does not guarantee against all

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intrusion into the life of an individual. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1027-28 (Fla. 1995) (citing *Fla. Bd. of Bar Examiners re Applicant*, 443 So. 2d 71 (Fla. 1983)). 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. *Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985). *See, e.g. Picou v. Gillum*, 874 F.2d 1519, 1521 (11th Cir. 1989) (rejecting a claim that one has a "right to be let alone" from Florida's helmet laws and stating, "[t]here is little that could be termed private in the decision whether to wear safety equipment on the open road."); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1574 (S.D. Fla.1992) (holding that an individual has no legitimate expectation of privacy in such activities as eating and sleeping in public). Plaintiffs cite to no contrary authority suggesting the existence of their specifically claimed right to privacy in the decision to wear a mask in public.

Emergency Order 12 also does not infringe an individual's right to refuse medical treatment. Plaintiffs cite to the Food and Drug Administration's ("FDA") definition of "medical device" to posit that a mask falls within that definition. Whether a mask is a "medical device" is irrelevant to whether the mandated wearing of one is a prohibited "medical procedure." The Court is not persuaded by Plaintiffs' argument that the wearing of a mask is a medical treatment or medical procedure. Moreover, in the case of uninfected or asymptomatic individuals, merely wearing a mask does not address any medical malady of the wearer. Rather, the covering of one's nose and mouth is designed to safeguard other citizens. A mask is no more a "medical procedure" than putting a Band-Aid on an open wound. It is also not close to being analogous to the consequential or invasive medical procedures at issue in other cases addressing the right to medical privacy, such as decisions involving the termination of pregnancies or life itself. *Gainesville Woman Care, LLC*, 210 So. 3d at 1244; *N. Fla. Women's Health & Counseling Servs., Inc. v. State*,

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866 So. 2d 612, 615 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989); *In re Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990). In fact, wearing a mask or face covering is less intrusive than the preventative measure of placing fluoride in drinking water which has been held by this District as not being a medical procedure and being constitutional. *Quiles v. City of Boynton Beach*, 802 So. 2d 397, 399 (Fla. 4th DCA 2001).

Second, Emergency Order 12 does not infringe an individual's autonomy over their own medical health because, the moment the wearing of a facial covering *does* implicate the mask wearer's health, they become exempt to the requirement pursuant to Section 4(e)(6) of the Mask Ordinance. This exception vitiates the argument that the Mask Ordinance constitutes government intrusion into Plaintiffs' medical autonomy. If anything, the County's narrowly tailored regulation has wisely left the Plaintiffs' individual medical autonomy intact.

Also, Emergency Order 12 is not unconstitutionally vague. "The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." *Jones v. Williams Pawn & Gun, Inc.*, 800 So. 2d 267, 270 (Fla. 4th DCA 2001). The Court finds that Plaintiffs are not substantially likely to succeed with any claim that the Mask Ordinance is unconstitutionally vague based on the Court's own reading of the plain language of the Order and the County's common sense responses to the alleged ambiguities.

Emergency Order 12 does not violate due process for being arbitrary, capricious, or discriminatory. "Under substantive due process, the test 'is whether the statute 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) (internal citation omitted). The Court finds that the Mask Ordinance bears a rational relationship to the legitimate government

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objective of protecting the public health by preventing the spread of COVID-19. *See Ham v. Alachua Cty. Bd. of Cty. Comm's*, No. 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020).

Plaintiffs' argument and evidence that facial coverings are unable to completely prevent the spread of COVID-19 cannot establish that Emergency Order 12 is arbitrary or irrational. There may be a healthy public and scientific debate about the precise level of effectiveness of masks to protect the public health in this circumstance. As United States District Judge Walker observed in *Ham, supra*, "[the] Court is not tasked with deciding whether the [Alachua County Emergency Order] at issue is a good idea or bad idea." Further to that point, the Florida Supreme Court observed, in discussing the application and restrictions contained within the Youthful Offender Act promulgated by our Legislature, that

> [c]ourts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ill or achieve the interest intended. If there is a legitimate state interest that the legislation aims to effect, and if the legislation is a reasonably related means to achieve the intended end, it will be upheld.

Jackson, 191 So. 3d at 428.

The fact that the wisdom of a regulation can be disputed does not make it irrational or unreasonable, and this remains particularly true during the uncertain times of the COVID-19 pandemic. *See Xponential Fitness v. Ariz.*, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at *7 (D. Ariz. July 14, 2020) (stating requirement that a regulation attempting to stem the spread of COVID-19 be rational does not require it to be either the most effective, or the least restrictive, means to do so); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, No. 20-1581, 2020 WL 3468281, at *3 (6th Cir. June 24, 2020) (same). *See also S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (stating in the context of a regulation imposing limitations on gatherings of people during the COVID-19 pandemic that, when public officials

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undertake to act in areas fraught with medical and scientific uncertainties, the latitude given to them must be especially broad).

2. Plaintiffs Have Not Shown the Public Interest is Served by Enjoining Emergency Order 12.

In situations such as these, where the potential injury to the public outweighs an individual's right to relief, the injunction must be denied. *Dragomirecky v. Town of Ponce Inlet*, 882 So. 2d 495, 497 (Fla. 5th DCA 2004). As set forth above, Plaintiffs have failed to establish that any constitutional right is implicated by the requirement to wear a facial covering in public. There are also ample exceptions to the requirement. What remains is a *de minimus* right entitled to little protection — the right to *not* wear a mask in public spaces.[4] Plaintiffs' minimal inconvenience caused by the Mask Ordinance must be balanced against the general public's right to not be further infected with a deadly virus. 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. *See Green v. Alachua Cty.*, No. 0102020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020); *Legacy Church, Inc. v. Kunkel*, No. CV 20-0327 JB\SCY, 2020 WL 3963764, at *101 (D.N.M. July 13, 2020) (public's interest in limiting the COVID-19 outbreak in the State outweighs the right to gather for religious services).

F. Conclusion.

The right to be "free from governmental intrusion" does not automatically or completely shield an individual's conduct from regulation. More to the point, constitutional rights and the

[4] Of course, Plaintiffs' arguments concerning the difficulty in breathing fresh air through a mask are completely refuted by the ability to wear a face shield, a measure provided for by the Mask Ordinance.

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ideals of limited government do not absolve a citizen from the real-world consequences of their individual choices, or otherwise allow them to wholly shirk their social obligation to their fellow Americans or to society as a whole. This is particularly true when one's individual choices can result in drastic, costly, and sometimes deadly, consequences to others. *See Picou*, 874 F.2d at 1521-22. After all, we do not have a constitutional or protected right to infect others. Regulations which remove an individual's discretion to make such choices are both reasonable and pervasive. *See* § 509.221(8), Fla. Stat. (2019) (prohibiting person with contagious disease from working at a public lodging or food service establishment); § 384.24(1), Fla. Stat. (2019) (making it unlawful to spread sexually transmitted disease through intercourse without the informed consent of the other person); §§ 386.202, 386.204, Fla. Stat. (2019) (prohibiting person from smoking or vaping in enclosed indoor workplaces).

"[T]here 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 S. Bay*, 433 So. 2d 1364, 1366 (Fla. 4th DCA 1983) (emphasis added). *See also Jacobson*, 197 U.S. at 29 ("...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...as the safety of the general public may demand"). The ongoing dire public emergency caused by COVID-19 is precisely the sort of exigent circumstance that justifies governmental intrusion into individual autonomy. Further, the individual choice to not wear a facial covering, in the midst of a pandemic where asymptomatic carriers can unconsciously and unknowingly spread a deadly virus to others, can hardly be characterized as a "private" or "individual" choice.

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The County has determined that an individual's decision whether to wear a mask is one of great public concern and grave consequence. In promulgating Emergency Order 12, it has duly utilized its police powers in order to protect the public health. *State Dept. of Agric. & Consumer Servs Div. of Animal Indus, 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"). Plaintiffs clearly dispute the merit of that action, but their vigorous desire to debate the efficacy or wisdom of requiring masks does not establish that a constitutional right has been violated, or that the government lacked a rational basis for its action.

As this community tries desperately to navigate the tumultuous seas presented by COVID-19, it is reasonable and logical that our elected officials are throwing the citizens of Palm Beach County a lifeline in an attempt to ameliorate the spread of this deadly, unbridled, and widespread disease. Based on the evidence presented, this Court will not second guess the manner in which a co-equal branch of government sought to discharge its sacred duty to protect the general public. **WHEREFORE**, it is hereby

ORDERED and ADJUDGED that Plaintiffs' Verified Emergency Motion for Temporary Injunction is **DENIED.**

DONE and ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida, this 27 day of July, 2020.

JOHN S. KASTRENAKES
Circuit Judge

COPIES FURNISHED:

All counsel of Record

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