IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

JOSIE MACHOVEC, et al.

Plaintiffs

CASE NO. 50-2020-CA-006920-XXXX-MB
CIRCUIT CIVIL DIVISION AF

v.

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

Defendant.
_____/

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, the Plaintiffs, by and through the undersigned, file this Reply to Defendant Palm Beach County's Response to the Plaintiffs' Emergency Motion for a Temporary Injunction, and Incorporated Memorandum of Law, in further support of Plaintiffs' Motion for Temporary Injunction, and state as follows:

INTRODUCTION

This is an action to defend the constitutional rights of not only the Plaintiffs, but more than a million Florida residents who have suffered and will continue to suffer irreparable harm without a court ordered injunction against the Defendant's Mask Mandate because it blatantly violates Sections 2, 4, 9 and 23 of the Florida Constitution. Defendant's unlawful mandate **expressly** infringes upon the fundamental rights of privacy and freedom of speech and is presumptively unconstitutional. The evidence submitted to the Court thus far meets the standard for injunctive relief. Defendant Palm Beach County absurdly claims in its response to Plaintiffs' Motion that "[t]he County's action in requiring face coverings to be worn in public places is directly and substantially related to the public health and is not an invasion of constitutional rights". In reality,

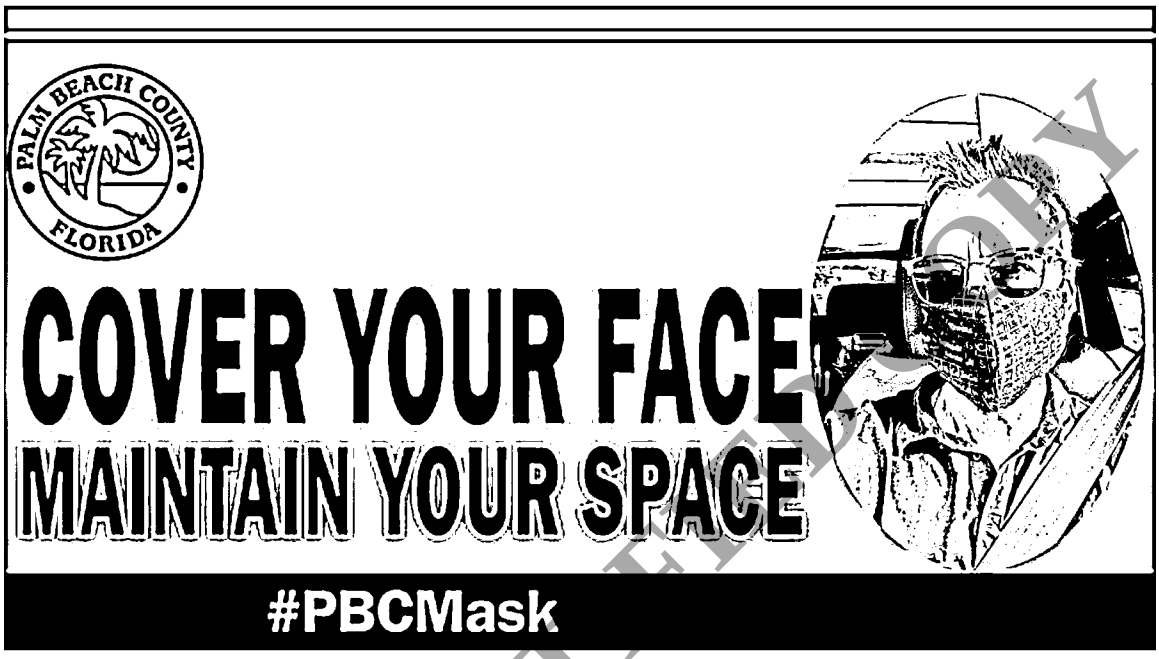
Defendant's unlawful order, which, for the first time in Palm Beach County history, arbitrarily forces "non-exempt" citizens to wear masks—actually harms all residents of Palm Beach County by depriving them of their constitutional rights and causing discrimination, harassment, and civil unrest[1]. *See, e.g.* **Plaintiffs' Exhibits J-5, J-6, J-7, & O-2.** Defendant has no legitimate interest in forcing Plaintiffs or any other non-exempt Floridian to mask themselves. Without question, Defendant's Mask Mandate has subjected countless Palm Beach County residents, including the Plaintiffs, to harm and violates well-settled constitutional rights all Floridians share, necessitating immediate, as well as permanent injunctive relief from this Court. The Defendant's Mask Mandate is patently unconstitutional, for many reasons, and based on the evidence submitted to the Court, Plaintiffs have proven likelihood of success on the merits.

Defendant's Unconstitutional Mask Mandate

Defendant's unconstitutional Mask Mandate forces the Plaintiffs and countless citizens protected by the Florida Constitution in Palm Beach County to cover their noses and mouths, ostensibly to "stop the spread" of coronavirus infections, despite the fact countless experts and officials, including the U.S. Surgeon General, have openly stated wearing a mask has no benefit whatsoever against viruses like COVID-19. **Plaintiffs' Exhibit I-2.** *See also* **Plaintiffs' M1-M20.** Despite overwhelming evidence of harm caused by masks, Defendant has nonetheless vigorously

[1] A viral video of a Florida resident threatened for not wearing a mask reportedly resulted in "hundreds of threatening texts, emails and voicemails, some threatening his son's life, while others have published the address of his home online." *See* Palm Beach Post, Man in viral Florida Costco video defends himself after outburst during face mask argument, posted July 13, 2020 at https://www.palmbeachpost.com/news/20200713/man-in-viral-florida-costco-video-defends-himself-after-outburst-during-face-mask-argument., Plaintiffs' Exhibit J-5. On July 14, 2020, a man pulled a gun on a masked shopper at a Palm Beach County Walmart over a mask dispute. *See* South Florida Sun-Sentinel https://www.msn.com/en-us/news/crime/a-maskless-man-pulled-a-gun-on-a-masked-shopper-at-a-walmart-in-palm-beach-county-in-a-possible-dispute-over-covid-19-masks/ar-BB16JMd2 ("The suspect is not wearing a ***medical*** mask")(emphasis added).

promoted and unlawfully forced masks upon all Palm Beach County residents, warranting an immediate injunction to stop Defendant from continuing to issue official directives to residents, such as "cover your face" and "maintain your space". *See e.g.* **Plaintiffs' J-11:**



The Defendant's misleading "Cover Your Face" campaign demonstrates precisely why the Court should grant the Motion for Temporary Injunction immediately. *See also*: **Plaintiffs' J-8** (Defendant falsely claims to "be wise" or "be safe", people must wear a facial cover); *See also* **Plaintiffs J-9** ("Palm Beach County Emergency Order 2020-012 has been issued requiring face coverings in Palm Beach County . . . ."). Defendant Palm Beach County even created hashtags like #MaskOnPBC and #PBCMask to help promote its unlawful Mask Mandate. *See also* **Plaintiff's Exhibit J-10** (Image of adult masking child with caption stating, "cloth face coverings or a face mask on adults & kids over 2 years old can help slow the spread of #COVID19").

Removal of "Exempt" Plaintiff From Public Meeting Demonstrates Irreparable Harm

The unlawfulness of Defendant's Mask Mandate is exemplified by the July 7, 2020 televised meeting held by the Defendant's Board of County Commissioners, where Defendant

Palm Beach County's Mayor Kerner threatened arbitrarily-selected individuals not wearing masks with removal from the meeting, stating, "it's the law." *See* **Plaintiffs' Exhibit J-6 and J-7**. The video shows at approximately 10:31 A.M., Plaintiff Karen Holme—who is exempt from wearing a mask—being shamed and publicly humiliated by the Defendant's Mayor for not wearing the mask, despite the fact other officials like Commissioner McKinlay were also unmasked at that very moment. *Id.* After abruptly and unnecessarily halting the meeting to humiliate Plaintiff, Defendant's Mayor threatened, "I am going to ask you to leave the chambers or put your mask on." After Plaintiff did not comply with the unlawful directive, Kerner directed law enforcement personnel to remove her from the public meeting, stating, "Please remove yourself from the chamber…You are not to return for 24 hours." The embarrassing incident was widely reported and has caused irreparable harm to Plaintiff. *See* WPTV West Palm Beach, *"Woman removed from Palm Beach County meeting for not wearing mask"* available online at *https://www.msn.com/en-us/video/other/woman-removed-from-palm-beach-county-meeting-for-not-wearing-mask/vi-BB16rByA*; *See also* **Plaintiffs' Exhibit "O-2", Affidavit of Plaintiff Karen Holme.**

It should be noted that Defendant conveniently omitted from its filings in this case video of Defendant's officials shaming Palm Beach County residents for exercising constitutional rights. Defendant also omitted a June 16, 2020 public meeting where the Defendant's **unmasked** health department director admitted she doesn't believe COVID-19 can be transmitted by asymptomatic carriers. *See* June 16, 2020 Statement of Florida Department of Health Director for Palm Beach County Dr. Alina Alonso at approximately 10:13 AM: "**It's not likely that a person who is asymptomatic, I've never believed that it's likely that an asymptomatic person would transmit the virus**." filed as **Plaintiffs' Exhibit L-4.** Ironically, like Dr. Alonso, many of Defendant's Commissioners who voted to mandate masks were also not wearing masks at all times

during Defendant's public meetings and were not expelled like Plaintiff Karen Holme was. Commissioners Melissa McKinlay, Robert Weinroth, Gregg Weiss, Hal Valeche, Mack Bernard, as well as Dr. Alonso, have all been recorded at multiple meetings unmasked and not social distancing, while hypocritically promoting their new edict. It is unknown why Defendant's Officials weren't required to wear masks at all times, like everyone else. *See* **Plaintiffs' Exhibit J-6**; *see also* **Plaintiffs' Exhibit L-4.**

Masks are "Medical Devices" and "Medical Treatments" as a Matter of Law

Defendant cannot possibly dispute that masks are "medical devices" under federal law. Defendant also cannot dispute that masks are a "medical treatment" when used to prevent COVID-19. In 1972, the Food and Drug Administration ("FDA") became the agency that regulated biological products licensed under the Public Health Service Act and the Food, Drug, and Cosmetic Act (hereinafter "FDCA"). The FDCA is the foundation for FDA's authority and responsibility to protect and promote the public health by, among other things, ensuring the safety and effectiveness of medical devices. It is unquestionable that the FDA has the authority to deem and regulate medical devices, including masks, in Palm Beach County. The FDA clearly states on its website that a mask is a medical device, stating, "**Face masks, when they are intended for a medical purpose such as source control (including uses related to COVID-19) and surgical masks are medical devices.**" (emphasis added). *See* **Plaintiffs' Exhibit I-1**.

Defendant improperly asks the Court to disregard federal law and deny Plaintiffs' Motion based upon merely three cases involving different emergency orders, different facts, different evidence and different law. Defendant's distinguishable case rulings, which neglect the Constitution and may be subject to appeal, are certainly not binding on this Court. Defendant's reliance on inapposite case rulings is also improper by asking this Court to enter an order directly

conflicting with the U.S. and Florida Constitutions, and both Florida and federal statutory law—which the Court **must** take judicial notice of pursuant to Rule 90.201 of the Florida Evidence code—establishing masks, as matter of law, are in fact medical devices.

Unlike the Defendant, the FDA is the government agency that has the statutory authority to regulate and define medical treatment and medical devices in Palm Beach County. *Id.* According to the FDA and per Section 201(h) of the FDCA, a "medical device" is "[a]n instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory which is . . . intended for use in the diagnosis of disease or other conditions, or in the cure, **mitigation, treatment, or prevention of disease**. . . ." (emphasis added) *See* **Plaintiffs' I-6.**

The Defendant's Mask Mandate is clearly intended for masks to be used as a source control and for uses relating to Coronavirus. *See* Exhibit "D" of the Complaint, page 2. ("WHEREAS . . . [Dr. Alonso] continued to stress the importance of social distancing and wearing facial coverings as the best methods **to reduce the spread of the Coronavirus**… [CDC] also continue to encourage the use of cloth face coverings **to help slow the spread of Coronavirus** . . . .") (emphasis added). Despite the truth of the matter, Defendant attempts to mislead the Court and public by pretending masks are not medical devices or treatment when ordered by the Defendant to "reduce the spread" of COVID-19. *See Id.*; **Plaintiffs' Exhibit I-1; Plaintiffs' Exhibit H-3**.

There are countless other cases similar to this matter and analogous legal actions throughout the United States which the Court should follow, including the cases filed as **Plaintiffs' Exhibits N1-N13**. In furtherance of Defendant's efforts to mislead the Court, Defendant also filed self-serving affidavits from purported "experts" who claim wearing a facial covering is not a "medical treatment" because it does not "treat" any medical condition, nor is it "directed by a

medical professional for a specific patient." While it is true that no public health official authorized under state or federal law—including the U.S. Surgeon General and/or the Florida State Surgeon General—has required citizens in Palm Beach County to wear facial coverings, the Defendant and its Commissioners apparently believe they have the authority to do so, despite having no license to practice medicine. Moreover, Defendant and its purported "experts"—who haven't been subjected to cross-examination or scrutiny by this Court and may not qualify as experts under the Rules of Evidence—ignore the medical dictionary definition of the word "treatment", which includes **"the combating of a disease**" (emphasis added). *See* **Plaintiffs' Exhibit I-3.**

Because it is an indisputable fact that Defendant's Mask Mandate forces Plaintiffs and other "non-exempt" Palm Beach County residents and visitors to wear masks to prevent disease, which is thus a "treatment" as defined and regulated by the federal government, any scandalous pleadings claiming otherwise, filed by Defendant or any non-parties, should be stricken under Rule 1.140(f) of the Florida Rules of Civil Procedure. Notwithstanding Defendant's continued efforts to misrepresent the facts and law, including Florida's Constitution, the binding cases applying strict scrutiny to governmental infringements upon fundamental rights remain well-settled. Defendant's Mask Mandate is clearly unconstitutional and does not survive strict scrutiny.

Fundamental Rights Protected By The Florida Constitution

"**Right of privacy.**—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." Fla. Const. Art. I, § 23. *See* **Plaintiffs' Exhibit "G-5"**. "The concept of privacy or right to be let alone is deeply rooted in our heritage and is founded upon historical notions and federal constitutional expressions of ordered liberty . . . The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued

by civilized men." *Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation*, 477 So. 2d 544, 546 (Fla. 1985). While Defendant Palm Beach County may not believe that the Plaintiffs, or countless other Floridians have a right to be free from a government forcing them to cover their noses and mouths, there is no more fundamental of a right than the right to breathe fresh air.

"The United States Supreme Court has fashioned a right of privacy which protects the decision-making or autonomy zone of privacy interests of the individual." *Id.* The Florida constitutional "privacy right includes the right to liberty and self-determination." *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004). Moreover, according to the Florida Supreme Court:

> Article I, section 23, of the Florida Constitution, added by Florida voters in 1980, has remained unchanged since it was adopted. This Court has broadly interpreted that right, stating: The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

See Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1252 (Fla. 2017).

Defendant's Mask Mandate Violates Plaintiffs' Right to Medical Self-Determination

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

Everyone in Florida, including the Plaintiffs in the above-captioned action, and more than a million other similarly situated Palm Beach County residents, possess the fundamental right to the sole control of his or her person. *See In re Guardianship of Browning*, 568 So. 2d 4, 10-11 (Fla. 1990)("[A] competent person has the constitutional right to choose or refuse medical treatment, **and that right extends to all relevant decisions concerning one's health**.")(emphasis added). Defendant's Mask Mandate has stripped the Plaintiffs in this case and countless other Floridians of their constitutional rights to make relevant decisions concerning their health.

Defendant's Mask Mandate Fails Strict Scrutiny and is Presumptively Unconstitutional

The right of privacy is a fundamental right. *Gainesville Woman Care, LLC*, 210 So. 3d at 1252. "Florida's right of privacy is a fundamental right warranting strict scrutiny." *N. Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003) "A fundamental right is one which has its source in and is explicitly guaranteed by the federal or Florida Constitution." *J.P.*, 907 So. 2d at 1109.

Florida courts must apply strict scrutiny to any law that implicates the fundamental right of privacy. *See Gainesville Woman Care, LLC*, 210 So. at 1253. "Florida courts consistently have applied the 'strict' scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity." *State v. J.P.*, 907 So. 2d at 1109. "When analyzing a statute that infringes on the fundamental right of privacy, the applicable standard of review requires that the statute survive the highest level of scrutiny." *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998). "For an ordinance to withstand strict scrutiny, it must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest." *State v. J.P.*, 907 So. 2d 1101, 1122 (Fla. 2004). Defendant's Mask Mandate does not withstand strict scrutiny.

Defendant's Mask Mandate implicates the right of privacy and is thus presumptively unconstitutional. *See Gainesville Woman Care, LLC*, 210 So. 3d at 1256. *See also N. Florida Women's Health & Counseling Services, Inc.*, 866 So. 2d at 626 ("It is well settled that if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution it is presumptively unconstitutional.").

Because Defendant's Mask Mandate infringes upon the fundamental right of privacy, the burden of proof shifts to Defendant to justify an intrusion on privacy, which Defendant cannot do. *See Gainesville Woman Care, LLC*, 210 So. 3d at 1252. "Any law that implicates the right of privacy is presumptively unconstitutional, and the burden falls on the State to prove both the existence of a compelling state interest and that the law serves that compelling state interest through the least restrictive means." *Id.* at 1256. "[A] petitioner need not present additional evidence that the law intrudes on her right of privacy if it is evident on the face of the law that it implicates this right." *Id.* at 1255. The Court should apply strict scrutiny to Defendant's Mask Mandate without requiring in-depth factual findings about the extent of the burden imposed by the law. *See Id.* Despite what the Defendant may like the Court to believe, legislative statements of policy and fact do not obviate the need for judicial scrutiny. *See N. Florida Women's Health & Counseling Services, Inc.*, 866 So. 2d at 628.

Defendant's baseless claims, much like its unlawful Mask Mandate, disregard well-established constitutional rights and are completely incompatible with Florida's Constitution. Defendant absurdly argues Plaintiffs and countless other citizens do not have "recognized" constitutional right "not to wear a facial covering in public locations", as if Floridians no longer have the right of bodily autonomy. Defendant has also attempted to justify its unlawful mandate by wildly claiming in its court filings that by not wearing masks Plaintiffs and countless other

Americans who do not wear masks will "expose other citizens of the county to a contagious and potentially lethal virus". Given COVID-19's reported survival rate of 99.6%, Defendant's unsubstantiated and paranoid delusions certainly do not satisfy Defendant's burden of proof or strict scrutiny. *See* Plaintiffs' **Exhibit K-3.** *See also* Plaintiffs' **Exhibit K-2** (July 10, 2020 CDC Report indicating the percentage of **deaths attributed to** pneumonia, influenza or **COVID-19 decreased . . . representing the eleventh week of a declining percentage of deaths . . . The percentage is currently below the epidemic threshold** . . . ." (emphasis added)).

Defendant's Mask Mandate is Not Narrowly Tailored

For Defendant's Mask Mandate to be "narrowly tailored" there must be a sufficient nexus between the stated government interest and the classification created by the mandate. *J.P.*, 907 So. 2d at 1117 (invalidating a curfew that included "within its ambit a number of innocent activities which are constitutionally protected" and thus did not satisfy the narrowly tailored aspect of strict scrutiny.") "Even a clear, precise ordinance may be 'overbroad' if it prohibits constitutionally protected conduct." *Smith v. Avino*, 91 F.3d 105, 108 (11th Cir. 1996). Defendant's Mask Mandate is not clear, but rather vague and confusing, and is not narrowly tailored to any legitimate government interest. In fact, Defendant's Mask Mandate, on its face, suffers from so many constitutional failings it is presumptively invalid and can never survive true strict scrutiny.

Defendant Has No Compelling Interest to Violate Constitutional Rights

"Where legislation is intended to serve some compelling interest, the government must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *J.P.*, 907 So. 2d at 1116-17 (finding ordinance unconstitutional despite cities claiming it served several compelling interests, including reducing

crime and protecting citizens); *See also On Fire Christian Ctr., Inc. v. Fischer*, 3:20-CV-264-JRW, 2020 WL 1820249, at *9 (W.D. Ky. Apr. 11, 2020)("If sitting in cars did pose a significant danger of spreading the virus, Louisville would close all drive-throughs and parking lots that are not related to maintaining public health, which they haven't done.").

Plaintiffs Have Demonstrated Irreparable Harm

Plaintiffs have demonstrated irreparable injury because their loss of freedom of speech, for even minimal periods of time, unquestionably constitutes irreparable injury. *Gainesville Woman Care, LLC*, 210 So. 3d at 1263–64. "[B]oth the federal courts and Florida district courts of appeal have presumed irreparable harm when certain fundamental rights are violated." *Gainesville Woman Care, LLC*, 210 So. 3d at 1263–64. *See* e.g., *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988) (irreparable harm presumed in Title VII cases); *Cunningham v. Adams*, 808 F.2d 815, 822 (11th Cir. 1987) (stating that the injury suffered by the plaintiff is irreparable only if cannot be undone through monetary remedies); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) (irreparable injury presumed from violation of First Amendment rights "for even minimal periods of time"); *see also Tucker v. Resha*, 634 So.2d 756, 759 (Fla. 1st DCA 1994) (finding no legislative waiver of sovereign immunity as to the privacy provision of the Florida Constitution and therefore concluding that money damages are not available for violations of that right); *Thompson v. Planning Comm'n of Jacksonville*, 464 So.2d 1231, 1237 (Fla. 1st DCA 1985) (where calculation of damages is speculative, legal remedy is inadequate)." *Gainesville Woman Care, LLC*, 210 So. 3d at 1263–64. "The deprivation of personal rights is often equated with irreparable injury and serves as an appropriate predicate for injunctive relief." *Hitt v. N. Broward Hosp. Dist.*, 387 So. 2d 482 n. 3 (Fla. 4th DCA 1980); *see also On Fire Christian Ctr., Inc.*, 3:20-

CV-264-JRW, 2020 WL 1820249, at *9; *see also Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163, 165 (Fla. 1st DCA 2014).

Moreover, Plaintiffs have proven intent by Defendant to engage in conduct that violates constitutional rights and there exists a credible threat of prosecution. *See Robinson v. Attorney Gen.*, 957 F.3d 1171, 1177 (11th Cir. 2020) ("[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.").

Plaintiffs Have Demonstrated Likelihood of Success on the Merits

Defendant's Mask Mandate should be enjoined immediately because it facially infringes on the constitutional right of privacy. *Gainesville Woman Care, LLC*, 210 So. 3d at 1246. The Plaintiffs have demonstrated a substantial likelihood of success on the merits and thus a temporary injunction should be granted immediately. *Id.*; *see also Robinson,* 957 F.3d at 1176. Defendant's Mask Mandate violates the constitutional right of privacy, bodily self-determination, and freedom of speech, and thus is of great public importance, is capable of repetition, and an injunction is necessary to prevent violation of constitutional rights. See *In re Guardianship of Browning*, 568 So.2d at 8 n. 1; *In re T.W.*, 551 So.2d 1186 (Fla. 1989); *Matter of Dubreuil*, 629 So.2d 819 (Fla. 1993); *See also Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020)(holding it's always in public interest to prevent violation of constitutional rights).

Defendant Palm Beach County's Fallacious Arguments

In a concerted effort to mislead the Court, Defendant, along with its cohorts from the Florida Association of Counties[2] have concocted a great deal of smoke and mirrors to justify a

[2] Defendant's Commissioner Melissa McKinlay is President of the Florida Association of Counties (FAC), which could explain why other FAC members, like Alachua County, have also enacted similarly unconstitutional mandates.

mass deprivation of well-established constitutional rights under the guise of disease prevention. But the Defendant, and its partners in defacing the Constitution, cite only inapplicable and non-binding case precedent that goes hand-in-hand with their fallacious and absurd arguments devoid of logic, as well as science. The fallacies Defendant has conjured up to usurp not only Florida's legislative process, but the Florida Constitution include comparing mask mandates to seatbelt laws, helmet laws, smoking laws, as well as criminal laws against torts like battery. But a closer look at each argument reveals Defendant is merely grasping at straws and also misrepresenting the law.

Distinguishing *Jacobson* and Other Dissimilar Analogies

In attempting to justify unlawful medical tyranny, the Defendant—in addition to pretending masks aren't medical devices or treatment—cites primarily to a 115-year-old, U.S. Supreme Court decision that involved a mandatory medical treatment (small pox vaccination) but notably that case did not involve Florida constitutional law or the right of privacy shared by all Floridians today. In fact, the inapplicable and non-binding *Jacobson* decision preceded Florida's current Constitution—enacted in 1968—by over half a century.

The Defendant's reliance on *Jacobson* in defense of its blatantly unconstitutional order forcing citizens to wear medical devices is as ridiculous as Defendant relying upon *Dred Scott,* another terrible ruling from ancient times, since, after all, many American slaves were forced to wear masks. That analogy isn't exaggerative given the fact *Jacobson* was written by a Supreme Court Justice born into a prominent, slave-holding family. Much has changed since Justice Harlan's misguided opinion in *Jacobson*, including Florida's constitutional protections, which is why ancient rulings like *Jacobson* and *Dred Scott* should be taught but not repeated, and should not be cited as if they are gospel.

Furthermore, the plaintiff in *Jacobson* was not forced to be vaccinated, but merely had to pay a $5 fine. Much has happened in the last 115 years since the often-misinterpreted *Jacobson* decision—from the cessation of use of the small pox vaccination in the United States due to its dangers—to the establishment of the 1986 National Childhood Vaccine Injury Act and National Vaccine Injury Compensation Program, which to date, has paid more than $4.3 billion in compensation to victims of many different CDC-recommended vaccination in the United States. *See* **Plaintiffs' Exhibit K-7**; *see also* **Plaintiffs' Exhibit M-18** ("*Unanswered Questions from the Vaccine Injury Compensation Program: A Review of Compensated Cases of Vaccine-Induced Brain Injury"*, 28 Pace Envtl. L. Rev. 480 (2011)). Had the *Jacobson* court had the benefit of computers, the Internet, modern day statistical analysis or been presented with overwhelming evidence of the widespread injuries and deaths caused by vaccination, perhaps the Supreme Court would have decided against upholding the $5 fine contested by the plaintiff in *Jacobson*.

The Court should also take notice of the fact that *Jacobson* was also decided over a century before Johns Hopkins University determined medical errors[3] are the third leading cause of death in the United States, killing over 250,000 Americans each year. *See* **Plaintiffs' Exhibit M-17**. *Jacobson* also preceded, by more than a century, the August 27, 2014 revelations of CDC Scientist William W. Thompson, who admitted to committing research fraud which may very well have led to the autism epidemic plaguing American children and families throughout the United States. *See* **Plaintiffs' Exhibit K-5**; *see also* **Exhibit K-6** (Congressman Bill Posey asks U.S. House of

[3] It has been widely reported that countless labs have misreported COVID-19 positivity rates, including Orlando Health, whose positivity rate is only 9.4% as opposed to the 98% reflected in the Florida Department of Health's daily coronavirus testing report. *See* July 13, 2020 article entitled "Hospital confirms mistakes in Florida's COVID-19 report" located at https://www.fox35orlando.com/news/fox-35-investigates-hospital-confirms-mistakes-in-floridas-covid-19-report. Non-human animals and fruit also falsely tested "positive" for coronavirus, raising many questions about the validity and accuracy of Coronavirus tests. *See* https://www.theguardian.com/global-development/2020/may/19/tanzanias-president-shrugs-off-covid-19-risk-after-sending-fruit-for-tests.

Representatives to enter Dr. Thompson's statement into the Congressional record and investigate the link between autism and CDC-recommended vaccinations).

As the *Jacobson* Court acknowledged, when a law purporting to have been enacted to protect the public health (like Defendant's Mask Mandate) "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *See Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020); *see also Guertin v. State*, 912 F.3d 907, 918–22 (6th Cir. 2019). Even under *Jacobson*, constitutional rights still exist. *See On Fire Christian Ctr., Inc.*, 3:20-CV-264-JRW, 2020 WL 1820249 at 8. "[J]ust as constitutional rights have limits, so too does a state's power to issue executive orders limiting such rights in times of emergency." *Robinson*, 957 F.3d at 1179 (upholding preliminary injunction against order, stating [the *Jacobson*] ruling "was not an absolute blank check for the exercise of governmental power"). *See also* **Plaintiffs' Exhibits N-1-N12** (recent case rulings striking down unconstitutional emergency orders). Defendant's Mask Mandate's effective denial of constitutional rights represents exactly "the type of plain, palpable invasion of rights identified in *Jacobson* as beyond the reach of even the considerable powers allotted to a state in a public health emergency." *See S. Wind Women's Ctr. LLC v. Stitt*, CIV-20-277-G, 2020 WL 1932900, at *7 (W.D. Okla. Apr. 20, 2020). Moreover, unlike the state action at issue in cases like *Jacobson*, Defendant's Mask Mandate expressly restricts freedom of speech and privacy rights of Plaintiffs and countless other Floridians, and thus is presumptively unconstitutional and should be promptly enjoined by this Court.

Mask Mandates Are Not Akin to Criminal Statutes or Motor Vehicle Safety Regulations

Defendant's shameful effort to twist the law and facts goes to great lengths, including fallaciously comparing the Defendant's Mask Mandate to seatbelt or helmet laws, smoking

restrictions, and criminal offenses like battery. However, Defendant's comparison of its unlawful mandate to lawful statutes that actually protect the public from dangerous products like motor vehicles and cigarettes is illogical and inapposite because breathing fresh air is a fundamental right. Operators of dangerous motor vehicles aren't required to wear seatbelts or helmets over their noses and mouths. Moreover, unlike Defendant's Mask Mandate, seatbelt and helmet laws, smoking restrictions, criminal laws against public indecency and battery were all properly enacted through the legislative process—not under the guise of emergency powers to usurp the Florida legislature and create a "law" that infringes upon fundamental constitutional rights.

The purported "science" Defendant has submitted to the Court is more accurately described as "pseudoscience" since it is absent scientific foundation. The information provided by the Defendant is incomplete, lacks rigor, transparency and does not take into account misreporting or false positives due to contamination of testing kits. *See* **Plaintiffs' Exhibit I-4.** In stark contrast, Plaintiffs have submitted credible peer reviewed scientific studies on the harmful effects of masks. *See* **Plaintiffs Exhibits M-1 through M-20.** Defendant has ignored the science and instead has deceived the public, and this Court in its endless campaign to deceptively market facial coverings, which are undoubtedly medical devices that pose a very real risk of harm, including serious health conditions and possibly respiratory infections like the very disease Defendant's Mask Mandate purportedly aims to combat. Defendant's Mask Mandate has not been scientifically proven to prevent disease, however, it has been proven to prevent the Plaintiffs and countless other Americans from exercising constitutional rights, including freedom of speech, bodily autonomy and medical self-determination. Defendant's unconstitutional mandate has resulted in widespread discrimination, civil unrest, inhumanity, and immeasurable irreparable harm to our society.

Like the Sirens of Greek mythology—who lured sailors into shipwrecks—Defendant Palm Beach County is now trying to lure this Court into helping it destroy constitutional and human rights under the guise of disease prevention. This Court can and should avert tragedy by striking down and rendering Defendant's unlawful Mask Mandate null and void ab initio, and prevent ongoing and future irreparable harm to the Plaintiffs and countless other Palm Beach County residents and Floridians who are similarly situated.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant Plaintiffs' Motion for Temporary Injunction and any further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed to all counsel and parties of record using the Florida Courts E-Filing portal system.

DATED this 16th day of July, 2020.

Respectfully Submitted,

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