IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT OF FLORIDA

JOSIE MACHOVEC, CARL HOLME, KAREN HOLME, RACHEL EADE, and ROBERT SPREITZER,	)	APPELLATE CASE NO. 4D20-1765
Appellants,	)	LOWER TRIBUNAL NO. 502020CA006920XXXXMB
vs.	)	
PALM BEACH COUNTY,	)	
Appellee.	)	

APPELLANTS' REPLY BRIEF

Jared H. Beck
Fla. Bar No. 020695
jared@beckandlee.com
Elizabeth Lee Beck
Fla. Bar No. 020697
elizabeth@beckandlee.com
Victor Arca
Fla. Bar No. 1014225
victor@beckandlee.com

BECK & LEE TRIAL LAWYERS
Corporate Park at Kendall
12485 SW 137th Ave., Ste. 205
Miami, FL 33186
Telephone: 305-234-2060
Facsimile: 786-664-3334
Counsel for Appellants

[Additional counsel follows]

FLORIDA CIVIL RIGHTS COALITION, P.L.L.C.
4171 W. Hillsboro Blvd., Ste. 9
Coconut Creek, FL 33073
Telephone: 561-714-9126
info@floridacivilrights.org

LOUIS LEO IV, ESQ.
Fla. Bar No. 83837
louis@floridacivilrights.org

JOEL MEDGEBOW, ESQ.
Fla. Bar No. 84483
4171 W. Hillsboro Blvd., Ste. 9
Coconut Creek, FL 33073
Telephone: 954-478-4223
joel@medgebowlaw.com

MELISSA MARTZ, ESQ.
Fla. Bar No. 121415
1128 Royal Palm Blvd., 125
Royal Palm Beach, FL 33411
Telephone: 561-445-3294
melissamartzesq@gmail.com

CORY C. STROLLA, ESQ.
Fla. Bar No. 137480
777 S. Flagler Dr.
West Tower, Ste. 800
West Palm Beach, FL 33401
Telephone: 561-802-8987
strollalaw@yahoo.com

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INTRODUCTION AND SUMMARY OF ARGUMENT ON REPLY

> Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. **But even in a pandemic, the Constitution cannot be put away and forgotten.**

Roman Catholic Diocese of Brooklyn v. Cuomo, __S. Ct. __, 2020 WL 6948354, *3 (Nov. 24, 2020) (granting preliminary injunction against New York Governor's executive order imposing occupancy restrictions on houses of worship during Covid-19 pandemic) (emphasis added).

> Why have some mistaken this Court's modest decision in *Jacobson* [*v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905)] for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, **we may not shelter in place when the Constitution is under attack. Things never go well when we do.**

Id. at *6 (Gorsuch, J., concurring). (emphasis added).

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The instant appeal concerns the appropriate level of constitutional review to apply when a county's "emergency" order – for the past five months and counting – has required people to strap a medical device over their nose and mouth in order

to combat an airborne respiratory disease.[1] Appellee[2] defends the trial court's use of rational-basis review, contending that Palm Beach County's order implicates "[n]o viable constitutional claim." Answer Br. at 1. Appellee also argues that the trial court's denial of injunctive relief was proper because Appellants have failed to challenge the trial court's finding an injunction would not be in the public interest.

Both claims lack merit. Any common-sense understanding of the right to privacy should conclude that it encompasses the right not to have the long arm of the state forcibly reach into one's face and secure a mask over one's nose and mouth. On appeal, Appellee cannot even defend the tortured reasoning of the trial court and, instead, relies on the affidavits of two "medical experts" proffered for the opinion that the County's mask mandate does not entail medical treatment. Not only are these expert opinions irrelevant to the issue of whether an individual has a reasonable expectation of privacy extending to the right not to have a medical device strapped to one's face, they are facially absurd and, if adopted, would

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[1] On October 21, 2020, Palm Beach County extended Emergency Order Number 12 for an additional 31-day period (*i.e.*, until November 21, 2020), marking the fifth such extension since it was originally entered on June 24, 2020. And on November 20, 2020, the County entered yet a sixth extension, now making the facemask directive effective until December 21, 2020, *i.e.* nearly six months since the "emergency" measure was first approved.

[2] We employ the same abbreviations as in the Initial Brief.

produce dangerous, dystopian results. Because the emergency order plainly implicates the right against forced medical treatment, our established constitutional jurisprudence requires it be subject to strict scrutiny. The trial court's erroneous application of rational-basis review buttressed both its finding that Appellants lack a substantial likelihood of success on the merits and its finding that an injunction would not be in the public interest. In assigning error to the level of constitutional review employed, as stated in the Initial Brief and reiterated here, Appellants challenge both of the foregoing findings in the trial court's order and respectfully request that the cause be remanded for further proceedings on Appellants' motion for injunctive relief.

REPLY TO APPELLEE'S STATEMENT OF THE CASE AND FACTS

During the pendency of this appeal, evidence has continued to mount tending to disprove the effectiveness of face masks in stopping Covid-19, while other recent evidence demonstrates that face masks pose significant health risks for the wearer. *See* Supplemental Appendix on Reply.

ARGUMENT IN REPLY TO APPELLEE

I. Forcing Us To Cover Our Nose And Mouth With A Mask Infringes Our Reasonable Expectation Of Privacy Including The Right To Refuse Medical Treatment

The Florida Supreme Court has explicitly recognized "the right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health." *In re Browning*, 568 So. 2d 4, 11 (Fla. 1990). The right to refuse medical treatment is part and parcel of the right to privacy. *Id.* at 13. "In deciding whether this constitutional right [to privacy] is impacted, the courts consider both the individual's subjective expectation and the values of privacy that our society seeks to foster." *G.P. v. State*, 842 So. 2d 1059, 1062 (Fla. 4th DCA 2003).

> Before the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist. . . . Although a person's subjective expectation of privacy is one consideration in deciding whether a constitutional right attaches, the final determination of an expectation'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.

Jackson v. State, 833 So. 2d 243, 245 (Fla. 4th DCA 2002) (internal quotation marks and citations omitted). As such, the question of whether a certain forced activity infringes on constitutionally protected territory, including the right to privacy as embodied in the right to refuse medical treatment, cannot rise or fall on the views of experts; it is, by law, a determination that the court must make with reference to the "subjective expectation of privacy" but within the larger context of "the values that society seeks to foster."

Because the individual's subjective expectation and the values of society at large are dispositive of the issue, the question of what constitutes medical treatment is a matter of ordinary language and not the specialized jargon of doctors (as Appellee urges instead).[3] And where ordinary linguistic usage guides a court's inquiry into the meaning of a term, dictionaries – not expert testimony – are the proper reference tool. *See Green v. State*, 604 So. 2d 471, 473 (Fla. 1992) ("If necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary."). Here, as detailed in Appellants' Initial Brief, the ordinary dictionary definitions for the terms "medical treatment" and "treatment" utilized by courts uniformly, indisputably cover the application of a medical device[4] to the face for purposes of addressing an illness. *See* Initial Br. at 16-17;

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[3] Notably, unlike Appellee, the trial court eschewed reliance on expert medical opinion in considering the definition of "medical treatment or procedure," coming to its own (albeit unreasonable) definition of the terms based on ordinary linguistic understanding. *See* App. at 328 ("A mask is no more a 'medical procedure' than putting a Band-Aid on an open wound."). Indeed, the trial court's definition of "medical procedure" is in direct conflict with the expert opinions proffered by Appellee, which would clearly consider application of a Band-Aid to an open wound to be an exemplary "medical procedure" given that dressing a wound both treats a medical condition and is often directed by medical professionals for treating specific patients.

[4] In its Answer Brief, Appellee no longer disputes that face masks constitute a type of medical device and now affirmatively concedes that "PPE" (*i.e.*, personal

Definition of *treatment*, Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/treatment ("the action or way of treating a patient or a condition medically or surgically[;] management and care to prevent, cure, ameliorate, or slow progression of a medical condition"). As such, Appellee's reliance on a definition of "medical treatment" provided only through expert testimony – and not supported by any dictionary definition of the term – is irrelevant to the issue before the Court.

Aside from being immaterial, the County's expert definition is illogical; adopting it into law would have terrifying, dystopian repercussions. Both expert physicians opine that "medical treatment" should be defined as "a treatment directed by a medical professional to specific patient to treat a medical condition"; so, goes the County's argument, "a facial covering is not a 'medical treatment' in the context of EO-12 because a facial covering does not treat a medical condition and its use is not being directed by a medical professional to a specific patient." Answer Br. at 9. On its face, the County's argument contradicts the plain text of EO-12, as the "whereas" clauses of the ordinance make it abundantly clear that the whole purpose of the face-mask mandate is to slow the spread of Covid-19 in the

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protection equipment, of which face masks are one example) constitute "medical devices." *See* Answer Br. at 11.

general population. *See, e.g.*, App. at 71 ("the Centers for Disease Control and Prevention (CDC) . . . continue to encourage the use of cloth face coverings to help the slow the spread of Coronavirus"). But putting aside this glaring flaw for the moment, the inherent absurdity of the County's definition should also be readily apparent: to wit, if something can be "medical treatment" only if its use is "directed to a specific patient," then **no procedure** – however invasive – can be said to violate the right to privacy so long as it is imposed by a law of general applicability, that is, directed without reference to a specific patient. In other words, on the logic of the County and its medical experts, the state could compel its residents to undergo (1) a brain transplant; (2) a heart transplant; and (3) gender reassignment surgery, and none of this would constitute "medical treatment" or an invasion of privacy for constitutional purposes so long as the general population, and not "specific patients," were targeted. Only those favoring the absolute power of technocrats over the constitutional rights of citizens could applaud such a result; it is surely not something this Court should endorse or facilitate.

The County's critique of Appellants' definition of "medical treatment" – which, again, is based on the ordinary dictionary definition of the term – fares no better. First, the County claims that "Appellants' entire argument has at its foundation the faulty premise that because a facial covering is effective in slowing

the spread of a disease, a facial covering is, by definition, a medical treatment[.]" Answer Br. at 9. This is completely untrue. Face masks may be effective or they may be useless at combating Covid-19 as mounting evidence suggests; what matters to the constitutional analysis, however, is whether they comprise a type of medical treatment. Face masks entail a type of medical device which is being forced upon the general population for the express purpose of addressing Covid-19 and its spread.[5] The "effectiveness" of face masks is totally irrelevant to the question before the Court, *i.e.*, does EO-12 mandate a form of medical treatment? To be sure, under the constitutional right to privacy, we have the right to choose or refuse "medical treatment" full stop – regardless of whether the treatment is effective or not.

Second, the County argues rational-basis scrutiny is the appropriate standard, in spite of the constitutional right to make "all relevant decisions concerning one's health," because there is "no authority to support a conclusion that [Appellants] possess the 'right' to make decisions that affect another's health." Answer Br. at 10. But this gets the required constitutional analysis 180 degrees

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[5] By contrast, avoiding crowded indoor places, coughing into one's sleeve, and washing one's hands obviously do not entail medical treatments (*see* Answer Br. at 10) because none of these things involve strapping a medical device – or any other kind of device, for that matter – over one's mouth and nose.

backward. Strict scrutiny means that the individual's right against forced medical treatment is protected from intrusion by the state "unless the state has a compelling interest great enough to override this constitutional right. The means to carry out any such compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual." *Browning*, 568 So. 2d at 14. "Compelling interests" to be weighed against an individual's right to refuse medical treatment include "the preservation of life, the protection of innocent third parties, the prevention of suicide, and maintenance of the ethical integrity of the medical profession[.]" *Id.*; *see also Singletary v. Costello*, 556 So. 2d 1099, 1105 (Fla. 4th DCA 1996).

Thus, strict scrutiny does not mean an individual has an unfettered right to "affect another's health"; quite the contrary, the analysis takes direct account of, *inter alia*, the preservation of life and the protection of innocent third parties, and weighs those interests against the individual right being protected, in this case, the right to refuse medical treatment. The constitutional analysis explicitly recognizes and affirms the state's interest in protecting the health of the general population, but it must do so while adequately safeguarding each individual's right to refuse medical treatment – and this balancing act is where courts can and must draw lines. The County's suggestion that any mode of judicial scrutiny above the lowest level,

i.e., rational-basis review, hampers its ability to legislate public health measures is simply incorrect and inconsistent with our sacrosanct constitutional tradition.

Third, after finally conceding that a face mask is a type of medical device, the County protests that use of medical device does not necessarily entail medical treatment, citing the example of "medical professionals" who "don 'medical devices' such as PPE without the wearing of such equipment being considered 'medical treatments' for the physician." Answer Br. at 11. But this is beside the point; obviously, any medical device can be deployed in a manner that is not medical treatment, for instance, wearing a mask to protect one's self from dust and debris on a construction site, or to maintain a sterile environment in a hospital. The dispositive and relevant issue (as Appellants have maintained consistently throughout this case) is whether the definition of "medical treatment" is satisfied, and that turns on whether the procedure in question is intended to "prevent, cure, ameliorate, or slow progression of a medical condition," just as the dictionary states. Definition of *treatment*, Merriam-Webster Dictionary, cited *supra*. The fact that some medical devices, including face masks, may have certain uses that

are not medical treatment is of no moment, for it cannot be disputed that the express purpose of EO-12 is to treat Covid-19 in the general population.[6]

For all of these reasons, the trial court's order applying rational-basis scrutiny to EO-12 should be reversed and the cause remanded with instructions to apply strict scrutiny in deciding Appellants' motion for injunctive relief.

II. The Trial Court's Finding Against Appellants On The Public Interest Prong, Like Its Finding On The Merits, Was Premised On The Failure To Apply Strict Scrutiny

As with its finding that Appellants did not have a substantial likelihood on the merits of their claims, the trial court's finding that an injunction would not serve the public interest was predicated on its decision to apply rational basis review, instead of strict scrutiny, to EO-12. *See* App. at 331 ("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 . . . What remains is a *de minimis* right entitled to little protection – the right to not wear a mask in public spaces.

[6] Nor is the characterization of a face mask as a "medical device" critical to Appellant's position. EO-12 could order people to cover their nose and mouth with an old sock instead of a face mask, and it would still constitute forced medical treatment so long as the express purpose of the law remained slowing the spread of Covid-19.

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.").

In their Initial Brief, Appellants explicitly challenged both findings as being based on the wrong level of scrutiny, *i.e.*, rational-basis review. *See* Initial Brief at 12-13 ("In rejecting their request for injunctive relief, the lower court found that Plaintiffs did not have a substantial likelihood of success on the merits of their claims and that an injunction against EO-12 would not be in the public interest. Both findings were predicated on the trial court's application of rational basis review to EO-12 and holding that the ordinance satisfied this bare level of scrutiny. . . . Because Palm Beach County is literally forcing residents to strap a medical device to their face, EO-12's constitutionality must be tested according to the most rigorous level of review, *i.e.* strict scrutiny.").

As such, the County's contention that Appellants' brief provides no basis to overturn the trial court's public interest finding is simply untrue and should be rejected by the Court.

CONCLUSION

For the reasons set forth above, the trial court's order denying the Appellants' motion for temporary injunctive relief should be reversed, and the case

should be remanded for further proceedings consistent with the application of strict scrutiny to Emergency Order Number 12.

DATED: November 30, 2020

RESPECTFULLY SUBMITTED,

/s/ Jared H. Beck

By: Jared H. Beck

BECK & LEE TRIAL LAWYERS
JARED H. BECK
Florida Bar No. 20695
ELIZABETH LEE BECK
Florida Bar No. 20697
Corporate Park at Kendall
VICTOR ARCA
Florida Bar No. 1014225
12485 SW 137th Ave., Suite 205
Miami, Florida 33186
Telephone: (305) 234-2060
Facsimile: (786) 664-3334
jared@beckandlee.com
elizabeth@beckandlee.com
victor@beckandlee.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2020, a true and correct copy of the foregoing

APPELLANTS' REPLY BRIEF

was sent by e-mail to:

Helene C. Hvizd, Esq.
Palm Beach Cty. Attorney's Office
301 North Olive Ave., Ste. 601
West Palm Beach, FL 33401
Telephone: (561) 355-2582
Facsimile: (561) 656-7054
hhvizd@pbcgov.org
lyakovak@pbcgov.org

Rachel Fahey, Esq.
Palm Beach Cty. Attorney's Office
300 N. Dixie Highway, 3rd Floor
West Palm Beach, FL 33401
Telephone: (561) 355-6557
Facsimile: (561) 355-4234
rfahey@pbcgov.org
dfishel@pbcgov.org

Attorneys for Appellee

/s/ Jared H. Beck
Jared H. Beck

CERTIFICATE OF COMPLIANCE

Undersigned hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

/s/ Jared H. Beck
Jared H. Beck