

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

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

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INTRODUCTION

We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.

...

[A] public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

Calvary Chapel Dayton Valley v. Sisolak, __ S. Ct. __, 2020 WL 4251360, *1, *2 (U.S. July 24, 2020) (Alito, J., joined by Thomas & Kavanaugh, JJ., dissenting).

The trial court's decision to apply rational-basis review to Palm Beach County's (the "County's") emergency order requiring the use of face coverings outside the home was inconsistent with its duty to defend the U.S. and Florida constitutions. As a matter of legal definition, face coverings of the type mandated by the County are a kind of medical device. The face-covering mandate thus infringes upon the well-enshrined constitutional right against forced medical treatment, therefore necessitating judicial application of strict scrutiny. The trial court should have applied strict scrutiny and ascertained whether the law is narrowly tailored to a compelling interest of the County.

As such, this Court should remand to the trial court with instructions to measure the constitutionality of the face-covering mandate under strict scrutiny.

STATEMENT OF THE CASE AND FACTS

On June 24, 2020, the Palm Beach County Board of County Commissioners passed Emergency Order Number 12 (“EO-12”) imposing the wearing of face coverings in businesses and establishments, public places, county and municipal government facilities, and public transportation. The full text of EO-12 may be found at pages 70 through 77 of the Appendix¹ and below:

EMERGENCY ORDER NUMBER 12 PALM BEACH COUNTY COVID-19 ADDITIONAL DIRECTIVE ON WEARING OF FACIAL COVERINGS

WHEREAS, COVID-19, a respiratory illness caused by a virus that spreads rapidly from person to person and may result in serious illness or death, constitutes a clear and present threat to the lives, health, welfare, and safety of the people of Palm Beach County; and

WHEREAS, on March 9, 2020, Governor Ron Desantis, issued Executive Order 20-52 declaring a state of emergency for the State of Florida as a result of COVID-19; and

WHEREAS, on March 13, 2020, pursuant to Section 252.38(3)(a)(5), Florida Statutes, Palm Beach County declared a local State of Emergency due to the Coronavirus pandemic, which has since been extended in accordance with applicable law; and

WHEREAS, on March 24, 2020, Governor Ron DeSantis also issued Executive Order 20-83 directing the State Surgeon General and the State Health Officer to issue a public health advisory for senior persons and persons that have a serious underlying

¹ Citations of the Appendix are to “App.”

medical condition that places them at a high risk of severe illness from COVID-19 to stay at home. Such conditions include, but are not limited to, chronic lung disease or moderate to severe asthma, serious heart conditions, immunocompromised status, including those in cancer treatment, and severe obesity; and

WHEREAS, Governor Ron DeSantis has issued a number of subsequent Executive Orders in response to the COVID-19 pandemic, including Executive Order 20-112, a Phase 1: Safe Smart Step-by-Step Plan for Florida's Recovery, under which the Governor re-opened certain businesses, and Executive Order 20-120 which, among other things, served to include Palm Beach County under Phase 1, and Executive Order 20-123, in which the Governor extended and brought all Florida counties into Full Phase 1; and

WHEREAS, the County Administrator pursuant to the authorities cited below has issued various Emergency Orders including Emergency Order 2020-004, Directive to Wear Facial Covers, effective on April 13, 2020; and

WHEREAS, on May 16, 2020, the County Administrator issued Emergency Order 2020-008, amending Emergency Order 2020-004, Directive to Wear Facial Covers, to add

a mandatory requirement for persons utilizing the County's Palm Tran transit services to wear facial coverings at all times when entering, riding, or exiting the bus or transit vehicle; and

WHEREAS, on June 4, 2020, the County Administrator issued an additional directive in Emergency Order 2020-010 mandating the wearing of facial coverings within County-owned and operated buildings including, but not limited to, office buildings, service centers, and libraries; and

WHEREAS, on June 16, 2020 and June 23, 2020, during meetings of the Board of County Commissioners, the Florida Department of Health's Palm Beach County Director, Dr. Alina Alonso, continued to stress the importance of social distancing and

wearing facial coverings as the best methods to reduce the spread of Coronavirus in the absence of a vaccine against the disease; and

WHEREAS, the Centers for Disease Control and Prevention (CDC) also continue to encourage the use of cloth face coverings to help slow the spread of Coronavirus; and

WHEREAS, Palm Beach County has experienced a sharp increase in the number of positive cases of COVID-19 in late May and June 2020. The Board of County Commissioners has determined that additional measures are needed to minimize the spread of COVID-19 and has directed the County Administrator to issue an additional order mandating the wearing of facial coverings in all businesses and establishments and in outdoor public spaces where social distancing is not possible.

NOW, THEREFORE, IT IS HEREBY ORDERED pursuant to Palm Beach County Code Chapter 9, Article II, Section 9-35, as well as the authorities granted to me by Declaration of Emergency issued by Governor DeSantis in Executive Order 20-52, by Chapter 252, Florida Statutes, by the Board of County Commissioners, by the Palm Beach County Comprehensive Emergency Management Plan, and as otherwise provided by law, hereby order as follows:

1. The foregoing recitals are hereby incorporated herein by reference.
2. **Palm Beach County Emergency Orders 2020-004, 2020-008 and 2020-010 are hereby repealed and replaced with this Order 2020-012.**
3. This Order applies in all incorporated and unincorporated areas of Palm Beach County.
4. **Facial Coverings**
 - a. **Businesses and Establishments - Facial Coverings Required.** Facial coverings must be

worn by all persons, other than those specifically exempted in Section 4e. while obtaining any good or service or otherwise visiting or working in any business or establishment, including entering, exiting, and otherwise moving around within the establishment. Businesses or establishments of any type, including but not limited to, those permitted to operate under Executive Order of the Governor or any Palm Beach County Emergency Order are subject to this provision. Such businesses and establishments include, but are not limited to, restaurants, retail establishments, hotels, grocery stores, gyms, pharmacies, indoor recreational facilities, and vehicles for hire.

- b. Public Places – Facial Coverings Required.** Facial coverings must be worn by all persons in public places where social distancing in accordance with CDC guidelines is not possible or not being practiced. For purposes of this provision, public places shall include any outdoor areas that are open and regularly accessible, including, but not limited to, common areas within private communities accessible to more than one housing unit.
- c. Palm Tran – Facial Coverings Required.** All persons utilizing the County's Palm Tran transit services including fixed route, Palm Tran Connection, Go Glades, and any other transit service provided by Palm Tran, shall wear facial coverings at all times when entering, riding, or exiting the bus or transit vehicle, unless a medical accommodation is arranged in advance by contacting Palm Tran at (561) 841-4287.

d. County and Municipal Governmental Facilities - Facial Coverings Required. All persons accessing governmental buildings for the purposes of conducting public business, visitation, contracting and maintenance, delivery, or any other activity requiring a presence in a governmental building shall wear facial coverings as defined by the CDC at all times while present in the building. For purposes of this section, governmental buildings shall mean any Palm Beach County or municipal-owned and operated buildings including, but not limited to, office buildings, service centers, and libraries.

e. Exemptions - Facial Coverings Not Required. Facial coverings are not required for the following persons:

1. Children under two (2) years of age and any child while under the custody of a licensed childcare facility, including daycare centers;

2. Persons prohibited from wearing facial coverings by Federal or State safety or health regulations;

3. Public safety, fire, or other life safety personnel that have personal protective equipment requirements governed by their respective agencies;

4. Individuals while actively engaged in exercise and maintaining social distancing in accordance with CDC guidelines;

5. Persons receiving goods or services from a business or establishment for the shortest practical period of time during which the receipt of such goods or services necessarily precludes the wearing

of a facial covering such as, but not limited to, consuming food or beverage or receiving a facial grooming or treatment;

6. Persons who have a medical condition that makes the wearing of a facial covering unsafe such as, but not limited to, asthma, COPD, other conditions that reduce breathing or lung capacity;

7. Persons for whom wearing a facial covering conflicts with their religious beliefs or practices; and

8. Facial coverings may be removed temporarily while assisting persons who are hearing impaired or who rely on reading lips in order to communicate.

5. A facial covering includes any covering which snugly covers the nose and mouth, whether store bought or homemade, mask or clothing covering including but not limited to, a scarf, bandana, handkerchief, or other similar cloth covering and which is secured in place. Examples of compliant homemade facial coverings may be found on the CDC website: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>. Persons wearing face coverings should review the CDC and Florida Department of Health guidelines regarding safely wearing, removing, and cleaning facial coverings. Persons should not procure N95-rated masks for general use as those are critical supplies for health care workers, law enforcement, fire-rescue, emergency management, or other persons engaged in life and safety activities. In addition, in lieu of a facial covering as defined in this section, persons may wear clear, plastic face shields, consisting of a piece of rigid, clear plastic attached to a headband that extends below the chin, whether store or homemade. For persons who are unable to safely utilize face coverings, businesses shall offer accommodation

when required by the Americans with Disabilities Act which may include, but is not limited to, offering curbside service or any other reasonable accommodation.

6. **Compliance.** All businesses and establishments as provided for in Section 4 of this Order shall ensure compliance with the provisions of this Order and shall establish a process for verification of compliance upon customer entry into the establishment. A failure to establish and ensure such compliance may result in fines, penalties, and/or any other enforcement measures against the business as set forth in this order and as otherwise authorized by law.
7. **Signage:** All businesses and establishments as provided for in Section 4 of this Order shall conspicuously post signage as follows:
 - a. All restaurants and food service establishments shall post the signage attached hereto as Exhibit 1, designated "Restaurants and Food Service Establishment Required Signage". Signs are available in multi-languages at:
<https://discover.pbcgov.org/pdf/covid19/Restaurant-Mask-Poster.pdf>
<https://discover.pbcgov.org/pdf/covid19/RestaurantSpanish-Mask-Poster.pdf>
<https://discover.pbcgov.org/pdf/covid19/RestaurantCreole-Mask-Poster.pdf>
 - b. All retail and other establishments shall post the signage attached hereto as Exhibit 2, designated "Retail and Other Establishments Required Signage". Signs are available for download in multi-languages at
<https://discover.pbcgov.org/pdf/covid19/Retail-Mask-Poster.pdf>
<https://discover.pbcgov.org/pdf/covid19/RetailSignage.pdf>

panish-Mask-Poster.pdf
<https://discover.pbcgov.org/pdf/covid19/RetailCreole-Mask-Poster.pdf>

- c. Signage required in subsections a. and b. above must be at least 8 ½" x 11" in size and printed in color if possible.
 - d. Signage shall be posted in multiple languages including English, Spanish and Creole.
 - e. Signage must be posted conspicuously for easy visibility at all entry points.
8. **Enforcement:** The Sheriff of Palm Beach County, other law enforcement agencies including municipal law enforcement agencies, and any other personnel authorized by law, including but not limited to, the personnel described in Section 9-37 of the Palm Beach County Code of Ordinances, are authorized to enforce this Order. Compliance and enforcement processes shall include the provision of a warning and opportunity to correct before citations resulting in fines are issued. Authorized personnel may issue civil citations resulting in fines not to exceed two hundred fifty dollars (\$250) for the first violation and five hundred dollars (\$500) for each additional violation. Each incident of a continuing violation shall be deemed a separate additional violation. A fine schedule specific to individuals and businesses will be established by Board of County Commissioners resolution for implementation of this section.
9. Any provision(s) within this Order that conflict(s) with any state or federal law or constitutional provision, or conflict(s) with, or are superseded by, a current or subsequently-issued Executive Order of the Governor or the President of the United States, shall be deemed inapplicable and deemed to be severed from this Order,

with the remainder of the Order remaining intact and in full force and effect. To the extent application of some or all of the provisions of this Order is prohibited on the sovereign land of a federally or state recognized sovereign or Indian tribe, such application is expressly excluded from this Order. The provisions of this Order shall supersede the specific provisions of any previously issued County Emergency Order that is contrary to or in conflict with this Order.

10. This Order shall be effective as of 12:01 a.m. on June 25, 2020 and shall automatically expire at 12:01 a.m. on July 24, 2020, unless extended by subsequent order or Board of County Commissioner action. In addition, this Order may be terminated at any time by subsequent order or Board of County Commissioners action.

EO-12 also requires Palm Beach County businesses and establishments to conspicuously post a sign at all entry points in the following form:

BY ORDER OF PALM BEACH COUNTY

Facial Coverings Required

Absent a legal exception, all patrons must wear facial coverings except while actively consuming food or beverage. This means you must wear a facial covering when entering, exiting, or otherwise away from your assigned table, including when visiting the restroom.

Staff must wear facial coverings during all in-person interactions with the public.

Social Distancing

Even while wearing facial coverings, **patrons must, wherever possible, maintain six feet of social distancing**, including while waiting to be seated.

The order may be extended indefinitely and has already been extended thrice: until August 23, 2020, via Emergency Order Number 16 dated July 24,

2020; until September 22, 2020, via Emergency Order Number 20 dated August 21, 2020; and until October 22, 2020, via Emergency Order Number 26 dated September 21, 2020.

On June 30, 2020, Plaintiffs Josie Machovec, Carl Holme, Rachel Eade, and Robert Spreitzer filed a complaint against the County, seeking a declaratory judgment and injunction on the basis that EO-12 is unconstitutional on various grounds – that it exceeds the County’s authority; deprives County residents of their personal liberty rights; violates due process; violates their constitutional right to privacy; violates equal protection; is void for vagueness; and violates free speech. The complaint was subsequently amended to add Plaintiff Karen Holme.

The Plaintiffs also filed their Verified Emergency Motion for Temporary Injunction (“Injunction Motion”) on June 30, 2020 against enforcement of EO-12, which the trial court heard on July 21, 2020. As of the hearing, the following evidence, *inter alia*, was proffered into the record:

- On June 8, 2020, the World Health Organization stated, “[f]rom the data we have, it still seems to be rare that an asymptomatic person actually transmits onward to a secondary individual,” App at 223;
- The Occupational Safety and Health Administration website states that surgical or cloth face masks “[w]ill not protect the wearer against airborne transmissible infectious agents due to loose fit and lack of seal or inadequate filtration,” App. at 229;

- There is a lack of reliable scientific data establishing a conclusive relationship between the use of facial coverings and protection against transmission of influenza, App. at 252;
- “Face mask use in health care workers has not been demonstrated to provide benefit in terms of cold symptoms or getting colds,” App. at 257;
- A May 2020 study of healthcare workers found that 81% developed headaches from wearing a face mask, App. at 259;
- An April 2008 study found that the wearing of surgical masks by doctors during surgery significantly reduces blood oxygen levels, which reduction increases the longer the mask is worn, App. at 274;
- A March 13, 2020 study found that, “There were no statistically significant differences in preventing laboratory-confirmed influenza [], laboratory-confirmed respiratory viral infections [], laboratory-confirmed respiratory infection [], and influenza-like illness [] using N95 respirators and surgical masks,” App. at 276;
- A February 2013 study stated that face masks could result in “significantly higher levels of CO2 rebreathing,” App. at 285-86;
- A June 2005 study concluded, “Wearing N95 masks results in hypooxygenemia and hypercapnia which reduce working efficiency and the ability to make correct decision [D]izziness, headache, and short of breath are commonly experienced by the medical staff wearing N95 masks. The ability to make correct decision may be hampered, too,” App. at 292; and
- According to a November 2014 study, wearing a facemask may cause physiological changes to the nasal cavity and statistically significant heart rate and thermal stresses, App. at 299.

The trial court entered its July 27, 2020 Order denying Plaintiffs’ Injunction Motion (“Order”). 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.

Plaintiffs appealed to this Court on August 10, 2020.

SUMMARY OF THE ARGUMENT

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. But the trial court applied minimal-level rational-basis review because it erroneously concluded that EO-12 does not infringe the constitutional right against forced medical treatment. As discussed in further detail below, the Court should find that the trial court applied the wrong constitutional framework to the motion to enjoin EO-12, and should thus remand with instructions to apply strict scrutiny in determining whether EO-12 is constitutional.

STANDARD

“The standard of review of trial court orders on requests for temporary injunctions is a hybrid. To the extent the trial court's order is based on factual findings, we will not reverse unless the trial court abused its discretion; **however,**

any legal conclusions are subject to de novo review.” *Fla. High School Athletic Ass’n v. Rosenberg*, 117 So.3d 825, 826 (Fla. 4th DCA 2013) (quoting *Foreclosure FreeSearch, Inc. v. Sullivan*, 12 So.3d 771, 774 (Fla. 4th DCA 2009) (internal quotation marks omitted) (emphasis added)).

ARGUMENT

The trial court applied the wrong level of scrutiny, opting for rational-basis review when it should have applied strict scrutiny. Requiring the general population to use face coverings abridges the constitutional right to refuse medical treatment. Accordingly, the County’s order must be tested by the most rigorous degree of constitutional analysis. This Court should remand with instructions to decide the motion for temporary injunction under strict scrutiny.

I. Application Of A Face Covering Is A Type Of Medical Treatment, Meaning That The Requirement Infringes Upon The Constitutional Right To Refuse Medical Treatment

The U.S. Supreme Court has construed the Due Process Clause of the Fourteenth Amendment to guarantee a right to privacy that includes the right to refuse medical treatment. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990). The Florida Supreme Court recognizes an even broader right to privacy, and this broader right also encompasses the right to refuse medical treatment. *In re Browning*, 568 So. 2d 4, 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.”).

EO-12 mandates medical treatment, because it requires non-exempt persons in Palm Beach County to wear face coverings. The order's very first “whereas” clause indicates that the requirement is in response to, “COVID-19, a respiratory illness caused by a virus that spreads rapidly from person to person and may result in serious illness or death[.]” It goes on to note that “the Centers for Disease Control and Prevention (CDC) also continue to encourage the use of cloth face coverings to help slow the spread of Coronavirus[.]” Thus, by its own, plain terms, the order requires face coverings as a preventative medical treatment to help slow the spread of Coronavirus.

The unvarnished text of the order shows that face coverings are being required as a preventative medical treatment for Coronavirus and the County understands this to be the case. This salient and indisputable purpose accords with how the law regards and regulates face coverings. The Food and Drug Administration (“FDA”) expressly states that both face masks and face shields constitute “medical devices” pursuant to section 201(h) of the federal Food, Drug & Cosmetic Act when they are intended for “the cure, mitigation, treatment, or

prevention of disease.”² FDA, *Enforcement Policy for Face Masks and Respirators During the Coronavirus Disease (COVID-19) Public Health Emergency* (Revised), at 5, <https://www.fda.gov/media/136449/download> (May 2020). While no reported judicial decisions have applied this definition to face coverings, courts have found items such as surgeons’ gloves, examination gloves, and plain gauze bandages to come within the definition or its statutory predecessor. See *U.S. v. 48 Dozen Packages, More or Less, of Gauze Bandage Labeled in Part Sterilized*, 94 F.2d 641, 642 (2d Cir. 1938); *U.S. v. 789 Cases, More or Less, of Latex Surgeons’ Gloves*, 799 F. Supp. 1275, 1283-84 (D.P.R. 1992).

In spite of the straightforward, commonsense and legally correct conclusion that the application of a medical device to one’s face for the purpose of combating a respiratory illness constitutes medical treatment, the trial court held otherwise. First, the court said that the definition of “‘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.” App. at 328. But whereas courts have yet to specify a definition of “medical treatment” in the context of federal or state

² The Florida Drug & Cosmetic Act has its own definition of medical device that substantially tracks the federal definition in all material respects. Compare § 499.003(15), Florida Statutes, with 21 U.S.C. § 321(h).

constitutional rights to refuse medical treatment, they have taken care to define the term in the commercial context, particularly with respect to insurance policies. See *Francesci v. Am. Motorists Ins. Co.*, 852 F.2d 1217, 1220 (9th Cir. 1988) (“Medical treatment” defined as “[t]he management of illness, by the use of drugs, dieting, **or other means designed to bring relief or effectuate a cure**” (emphasis in original)); *Shanks v. Blue Cross & Blue Shield United of Wis.*, 979 F.2d 1232, 1233 (7th Cir. 1992) (“treatment” defined as “to care for or deal with medically or surgically”). These definitions, based on dictionary entries for the term, show that “medical treatment” is conventionally understood to be broad and encompassing of the application of a medical device where the intent is to address illness.

In denying that the use of a face covering comprises a kind of medical treatment, the trial court also stated that “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.” App. at 328. But the notion that “medical treatment” must necessarily address a medical malady of the treatment’s recipient, as opposed to “safeguard[ing] other citizens,” lacks support under any ordinary understanding of the term or case law applying such an understanding. See *Francesci*, 852 F.2d at 1220; *Shanks*, 979 F.2d at 1233. Indeed, the trial court’s own analogy – that “[a]

mask is no more a ‘medical procedure’ than putting a Band-Aid on an open wound,” App. at 328 – cuts against its own conclusion. The bandaging of an open wound is surely as much of a medical procedure as a bandage is a medical device, which it is as a matter of law. *See 48 Dozen Packages*, 94 F.2d at 642. For this reason alone, it is apodictic that the constitutional right against forced medical treatment would protect one from being required to affix a bandage to an open wound, just as it should protect us from being ordered to strap a medical device to our face.

This leads to the trial court’s final point – that wearing a face covering is “not close to being analogous to the consequential or invasive medical procedures at issue in other cases addressing the right to medical privacy[.]” App. at 328. But courts have **never** articulated such a rule offering protection only from “consequential” or “invasive” medical treatment; rather, the right against forced medical treatment has always been cast in the most expansive terms. *See In re Browning*, 568 So. 2d at 11 (“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)). The fact that legal controversies, and thus published opinions, are more likely to address the most

severe examples of rights violations³ for obvious reasons should not penalize the plaintiffs, who have taken up the mantle to legally challenge an infringement of the right to refuse medical treatment that may be less extreme in any one implementation of the policy but, in its totality, directly affects every resident of the County.

The trial court's reliance on *Quiles v. City of Boynton Beach* – a case in which this Court dismissed a challenge to a municipality's plan to fluoridate its potable water supply – is similarly unpersuasive. There, the Court held that water fluoridation could not constitute “compulsory medication” due to the absence of compulsion: “The city is not compelling [Quiles] to drink it.” *Quiles*, 802 So. 2d 397, 399 (4th DCA 2001). As the Court went on to note, “He is free to filter it, boil it, distill it, mix it with purifying spirits, or purchase bottled drinking water. His freedom to choose not to ingest fluoride remains intact.” *Id.*

Indeed, the situation of *Quiles* is diametrically opposed to the situation of the plaintiffs in this case, who face civil penalties of up to \$500 **per violation** for

³ Then again, the lower court's review of the case law is selective. For example, in a recent opinion not cited by the court, the appellate court applied the right against forced medical treatment to quash an order requiring a woman to take a pregnancy test. *R.C. v. Dep't of Children & Family Servs.*, 150 So. 3d 1277, 1279-80 (Fla. 3d DCA 2014). It is difficult to argue that an ongoing requirement to cover one's face is less “invasive” or “consequential” than a one-time pregnancy test.

failure to comply with the mask mandate.⁴ A state-imposed penalty for failure to engage in certain conduct constitutes compelled behavior as a definitional matter. There was no such penalty for refusing to drink fluoridated water in *Quiles* and thus no forced medical treatment. By contrast, EO-12 mandates the use of medical devices and imposes significant penalties for those who fail to do so, creating a straightforward scenario of compelled medical treatment.

II. Because Emergency Order Number 12 Imposes Medical Treatment, The Trial Court Erred In Failing To Apply Strict Scrutiny

Florida law requires that in order to override the constitutional right to refuse medical treatment, there must be a compelling state interest, and the law must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual. *In re Browning*, 568 So. 2d at 13-14. In other parlance, where a law which infringes upon the right to refuse medical treatment, strict scrutiny applies.

Here, the trial court never applied strict scrutiny to EO-12 because it determined that the forced use of a face covering in response to the Covid-19

⁴ Also, violators of EO-12 may face criminal charges pursuant to section 252.50, Florida Statutes, which establishes that “[a]ny person violating . . . any rule or order made pursuant to [the State Emergency Management Act] is guilty of a misdemeanor of the second degree”

pandemic does not entail medical treatment. Instead, it applied the rational-basis test, ascertaining only that the law “bears a rational relationship to the legitimate government objective of protecting the public health by preventing the spread of COVID-19.” App. at 329-30.

Pandemic or no pandemic, the residents of Palm Beach County are entitled to have their laws adjudicated under the standard that appropriately respects and vindicates their constitutional rights. Because the trial judge erroneously concluded that the compelled wearing of a medical device on one’s face to combat a respiratory illness does not comprise forced medical treatment, he failed to apply strict scrutiny. This Court should reverse and remand with instructions to do just that. *See Van v. Schmidt*, 122 So. 3d 243, 262 (Fla. 2013) (“the proper remedy is for this case to be returned to the trial court for reconsideration of its order in light of the correct legal principles”); *id.* at 262 n.6 (“Usually when a trial court applies the incorrect legal standard, we reverse and remand for a new hearing at which the trial court must reconsider its decision in light of the proper legal standard.” (quoting *Thompson v. Douds*, 852 So. 2d 299, 305 (Fla. 2d DCA 2003))).

CONCLUSION

For the reasons set forth above, the trial court’s order denying the plaintiffs’ 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.

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RESPECTFULLY SUBMITTED,

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I hereby certify that on September 24, 2020, a true and correct copy of the foregoing

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CERTIFICATE OF COMPLIANCE

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

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