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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

GERALD E. CARROLL,
Plaintiff,

vs. Case No. 20-542-CA

GADSDEN COUNTY, a political sub-division of the State of Florida,
Defendant.
_____/

FINAL JUDGMENT

This cause came before the Court on August 21, 2020 for non-jury trial and the Court having heard the evidence and argument of the parties, reviewed the case file, and being otherwise fully advised in the premises, finds

The legal tenets that will guide the ruling in this case developed as early as 1824 when United States Supreme Court Chief Justice Marshall described the powers retained by the states after the ratification of our federal Constitution, which include:

> [E]very thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, ... are component parts of this mass.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 78, 6 L.Ed. 23 (1824).

These state powers are commonly referred to as a state governments' "police powers." "Police power is the sovereign right of the state to enact laws for the protection of lives, health, morals, comfort and general welfare. It is a generally accepted ground that the state is the primary judge of and may, by statute or other appropriate means, regulate any enterprise, trade, occupation or profession if necessary to protect the public health, welfare or morals. Legislative action exercised under the state's police power is valid if such exercise is confined to those acts which may reasonably be construed as expedient at least for the protection of public safety, public welfare, public morals or public health. A great deal of discretion is vested in the Legislature to determine public interest and measures for its protection." *Newman v. Carson*, 280 So.2d 426, 428 (Fla. 1973).

This is not to say that there are no bounds to a state or local government's police powers. Individual rights are not erased and must be guarded, even in times of emergencies. Legislative enactments that are, "clearly erroneous, arbitrary, or wholly unwarranted" will not stand if

challenged. *Patronis v. United Ins. Co. of America*, No. 1D18-2114, 2020 WL 2897023, at *2 (Fla. 1st DCA June 3, 2020) (citations omitted).

The core question in this case is whether the ordinances at issue are a proper exercise of Gadsden County's police powers or an unconstitutional overreaching.

Procedural History

In July 2020, a Centers for Disease Control and Prevention ("CDC") internal government document designated Gadsden County, Florida a COVID-19 virus hotspot based on it being one of ten U.S. counties reporting the highest number of cases per 100,000 over a two-week period.

On July 17, 2020, the Gadsden County Board of County Commissioners ("County") passed Resolution 20-39 which mandated the wearing of masks in certain places and a curfew. *See* ordinances attached.[1]

On July 27, 2020, plaintiff Gerald Carroll ("Carroll"), the owner of a small electrical contracting company in Havana, Florida filed a lawsuit challenging Resolution 20-39 , Gadsden County's mask and curfew ordinances.

Carroll asks this Court to strike down these laws as unconstitutional because they violate Florida's Constitution. Specifically, he asserts that the ordinances deny his constitutional rights to privacy and substantive due process of law. Carroll pursues "facial" and "as applied" challenges to the ordinances. He seeks a declaratory judgment that the ordinances are unconstitutional and an emergency injunction to halt their operation and enforcement.

On August 7, 2020, the Court convened a case management conference. At the hearing, the parties agreed to set the trial on the request for temporary injunction and the declaratory judgment action for the same day, August 21, 2020. The parties also agreed on all pretrial and trial procedures to include the deadline for defendant's response to the complaint, limited discovery, the disclosure of witnesses, and the procedure for exhibits. The only objection to pretrial or trial procedure was defendant's *ore tenus* motion at trial to strike or limit plaintiff's expert due to his disclosure being one day late. The motion was denied.

The trial was conducted on August 21, 2020 as set. Two witnesses testified – Carroll's expert witness, Dr. Boscom, and Carroll.

"As Applied" or "Facial"

Carroll has filed a challenge to the constitutionality of two local ordinances based on alleged deprivations of two State of Florida Constitution provisions – Article I Sections 9 and 23.

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[1] At trial, and to expedite matters by avoiding a re-do, the parties stipulated on the record that the specific resolution to be addressed by the Court is the currently effective resolution 20-44 (August 21, 2020). The current resolution differs only slightly from the resolution named in the complaint. The main relevant difference is that the penalty for violations is now civil citation only. For ease of formatting, an unsigned MS Word copy of the fully executed resolution is attached.

Claims arising in Gadsden County and based on the state Constitution are properly before this Court. *Henry v. DeSantis*, No. 20-CV-80729, 2020 WL 2479447, at *6 (S.D. Fla. May 14, 2020) ("In the rare cases where a federal court is asked to strike a state's use of its police-power authority, the court has correctly declined the invitation."). The first step is to determine whether Carroll's claims are "as applied" or "facial."

An "as applied" challenge to the constitutionality of a law is what it sounds like. The law as written is not being challenged, only the application of the law to the particular plaintiff. "An as-applied challenge … is an argument that a law which is constitutional on its face is nonetheless unconstitutional as applied to a particular case or party, because of its discriminatory effects; in contrast, a facial challenge asserts that a statute always operates unconstitutionally." *Miles v. City of Edgewater Police Dep't/Preferred Governmental Claims Solutions*, 190 So.3d 171, 178 (Fla. 1st DCA 2016).

Carroll testified that "[his] freedoms have been removed." When asked to explain, he stated that he was unable to get people to work at his office because "no one wants to work with a mask on." Important here is that Carroll did not identify any specific persons who declined a job offer or left his employ because of the mask requirement and there is no record evidence establishing this allegation. Nor was he able to point to any loss of revenue that could be attributed to this. In fact, Carroll admitted during examination by defense counsel that his earnings were up slightly since the effective date of the ordinances.

Defense counsel asked Carroll if he had told commissioners during a meeting that he was "ignoring your mask requirement," and if he in fact was refusing to wear a mask. Carroll confirmed both. Defense counsel then asked how he was harmed by a requirement to wear a mask if he was not wearing a mask. Carroll replied that the indirect effect of the ordinance was to limit his travel to Quincy, a Gadsden County city next to Havana, because he had heard that law enforcement officers were giving people citations. When asked how that could happen when the citation forms had not yet even been printed, and would he be surprised to know that there had not been a single citation issued, Carroll replied, "I don't know, I'm not the police."

Carroll has not offered any facts that would tend to prove the application of the subject ordinances to him was any more stringent or different that the application to Gadsden County residents as a whole.[2] Carroll's claims, therefore, are a "facial" challenge to the ordinances.

Florida's First District Court of Appeal has recently provided a very instructive outline on the nature and contours of a proper facial challenge to legislative enactments:

> The theory of the insurers' case is that the three challenged portions of the 2016 act are facially unconstitutional under the state due process clause, meaning they have no possible lawful applications. Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 243 So. 3d 894, 897 (Fla. 2018) ("To succeed on a facial challenge, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally valid."); Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) (a

[2] There is a question whether the facts of this case, as alleged by Carroll, meet the minimum requirements for standing to challenge this ordinance. However, standing will be assumed for the purposes of the mask ordinance.

> facial challenge "must fail unless no set of circumstances exists in which the statute can be constitutionally applied"). Stated differently, if a challenged portion has any lawful application, the insurers' facial challenge fails as to that portion. Showing that a statute "might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face," which explains why a "facial challenge to a statute is more difficult than an 'as applied' challenge" as a general matter. Ogborn v. Zingale, 988 So. 2d 56, 59 (Fla. 1st DCA 2008) (quoting Cashatt, 873 So. 2d at 434); see also Abdool v. Bondi, 141 So. 3d 529, 538 (Fla. 2014) (statute "will not be invalidated as facially unconstitutional simply because it could operate unconstitutionally under some hypothetical circumstances"). Moreover, courts do not overturn statutes casually. That's because "statutes come clothed with a presumption of constitutionality" and "must be construed whenever possible to effect a constitutional outcome." Brinkmann v. Francois, 184 So. 3d 504, 507–08 (Fla. 2016) (citations omitted). The presumption of constitutionality is overcome only upon a showing of invalidity "beyond reasonable doubt," meaning that the presumption "applies unless the legislative enactments are clearly erroneous, arbitrary, or wholly unwarranted." State v. Hodges, 506 So. 2d 437, 439 (Fla. 1st DCA 1987) (citing State v. State Bd. of Educ. of Fla., 467 So.2d 294 (Fla. 1985). "All doubts as to validity must be resolved in favor of constitutionality, ... and if a constitutional interpretation is available, the courts must adopt that construction." Hodges, 506 So. 2d at 439 (internal citation omitted).

Patronis v. United Ins. Co. of America, No. 1D18-2114, 2020 WL 2897023, at *2 (Fla. 1st DCA June 3, 2020).

The merits of Carroll's facial challenge to the subject ordinances are the same as the merits of his substantive due process challenge, which are discussed below.

Right to Privacy Claim

"The right of privacy is a fundamental right which we believe demands the compelling state interest standard." *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So.2d 544, 547 (Fla. 1985); see also *Weaver v. Myers*, 229 So.3d 1118, 1130 (Fla. 2017).

Florida's right to privacy, however, is not absolute. The Florida Supreme Court has ruled, "Although we choose a strong standard to review a claim under article I, section 23, 'this constitutional provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual.' The right of privacy does not confer a complete immunity from governmental regulation and will yield to compelling governmental interests." *Winfield* at 547.

To state a claim for a denial of the right to privacy, a plaintiff must establish that there is "a reasonable expectation of privacy" for the specific conduct at issue. "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 [a] Mask Ordinance applies." *Josie Machovec, et al. v. Palm Beach County*, Case No. 2020CA006920AXX, In the Circuit Court of Palm Beach County, Florida (July 27, 2020) (emphasis in the original), citing *Winfield* at 547; see also *Picou v. Gillam*, 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.").[3], [4]

The facts as alleged and proven at trial in this case do not frame a cognizable action based on the denial of Florida's right to privacy. The right is fundamental, but not at issue in the present lawsuit.

Substantive Due Process – Rational Relationship – Mask Ordinance

Carroll claims the County has exceeded its legislative power by enacting a law that has no rational relation to the stated interest of the County. In other words, he claims the ordinance does not help protect Gadsden County residents from the devastation of the current pandemic. Because Carroll has not set forth or identified a "fundamental" constitutional right that has been denied, the standard to apply here is the rational basis test, not strict scrutiny.[5]

"[T]he Florida Supreme Court adopted a substantial body of law governing the rational basis test. This body of law focuses on five essential principles: (1) "reasonable" means "fairly debatable"; (2) the party challenging the constitutionality of a law bears the burden of proof; (3) legislative findings are not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data; (4) legislation can be based on nothing more than experiment; and (5) the Constitution does not prohibit the legislature from enacting unwise or unfair laws." *Silvio Membreno & Fla. Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So.3d 13, 19 (Fla. 3d DCA 2016).

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[3] Although not addressed at trial, the complaint references "medical privacy" without elaboration or authorities. Mask requirements and curfews are safety precautions, not invasive medical procedures that would raise privacy issues. This ground is wholly without merit and needs no further attention.

[4] This Court's rationale here is the same as that stated in the well written ruling of my learned colleague, Circuit Judge Kastrenakes, in *Machovec*. Indeed, at least four other courts have rejected challenges to local Florida mask ordinances that are stated exactly as stated in the present case. This begs the question, when is enough enough? The Court's ruling in this case should not be considered a criticism of Mr. Carroll, nor a minimization of his concerns. Mr. Carroll is authentically offended by the ordinances and seeks to vindicate important individual rights. However, his counsel, Mr. Sabatini, is the attorney who filed the same claims in the other four lawsuits, possibly more now, to include one in this very circuit. The Court urges Mr. Sabatini to reflect on the possibility that, at some point, he could be sanctioned for filing frivolous lawsuits. Once the law on a particular subject is well established, a lawsuit based on consistently rejected grounds will be frivolous unless there is, "*a reasonable argument* for the extension, modification, or reversal of existing law." *Visoly v. Sec. Pac. Credit Corp.*, 768 So. 2d 482, 491 (Fla. 3d DCA 2000) (emphasis added).

[5] The generalized opportunity to "maintain a business or earn a profit" is not "a fundamental right" for substantive due process purposes. *Support Working Animals, Inc. v. DeSantis*, No. 4:19CV570-MW/MAF, 2020 WL 1991479, at *18 (N.D. Fla. Apr. 27, 2020), citing *Fraternal Order of Police, Metro. Dade Cty., Lodge No. 6 v. Dep't of State*, 392 So. 2d 1296, 1301–1302 (Fla. 1980) ("The right to earn a livelihood by engaging in a lawful occupation or business is subject to the police power of the state to enact laws which advance the public health, safety, morals or general welfare.").

The evidence presented by Carroll to prove that the mask requirement is not rationally related to the stated purpose of promoting public health in Gadsden County boils down to one publication and the testimony of his expert, Dr. Bostom.

According to his recently published article, "Maskerade: COVID-1984 and Evidence-Free Compulsory Masking," in *Conservative Review*, Andrew Bostom, M.D., M.S., is an associate professor of family medicine (research) at the Warren Alpert Medical School of Brown University.[6]

The publication that Carroll relies upon, that Dr. Bostom incorrectly referred to as a "CDC study," was a "…systematic review" of ten reported estimates of the effectiveness of face masks in reducing laboratory-confirmed influenza virus infections in the community from literature published during 1946–July 27, 2018." Xiao J., Shiu E.Y., Gao H., Wong J.Y., Fong M.W., Ryu S. Nonpharmaceutical measures for pandemic influenza in nonhealthcare settings-personal protective and environmental measures. Emerg Infect Dis.2020;26 doi: 10.3201/eid2605.190994.

Dr. Bostom testified that the takeaway from this review is that there is no reliable evidence that masks reduce the transmission of viruses such as COVID-19.

The authors of the review did, however, warn readers of the limited reliability of their face mask conclusions. "Most studies were underpowered because of limited sample size, and some studies also reported suboptimal adherence in the face mask group." *Id*. Moreover, the conclusions as stated in the review itself do not appear completely consistent with Dr. Bostom's overall, generalized opinion:

> In lower-income settings, it is more likely that reusable cloth masks will be used rather than disposable medical masks because of cost and availability. There are still few uncertainties in the practice of face mask use, such as who should wear the mask and how long it should be used for. In theory, transmission should be reduced the most if both infected members and other contacts wear masks, but compliance in uninfected close contacts could be a problem. Proper use of face masks is essential because improper use might increase the risk for transmission. Thus, education on the proper use and disposal of used face masks, including hand hygiene, is also needed.

Id. The reference to "low income settings" is significant, see discussion below.

Even assuming the authors of the Xiao, et al. review intended to convey the message that masks do not help, as Dr. Bostom basically opines, the notion has been overshadowed by the legion of recent studies that conclude masks do indeed help reduce the transmission of COVID-19, specifically. For just some examples, see:

> Centers for Disease Control and Prevention Online Newsroom | *CDC calls on Americans to wear masks to prevent COVID-19 spread; JAMA editorial reviews latest science - case*

[6] During cross examination, Dr. Bostom was asked why there was a mask requirement at his place of employment, Brown University. His response was that he could not say. He was "baffled" by it.

study shows masks prevented COVID spread, Tuesday, July 14, 2020, , Press Release, For Immediate Release: Tuesday, July 14, 2020, https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html

CDC Editorial in JAMA: Brooks JT, Butler JC, Redfield RR. *Time for universal masking and prevention of transmission of SARS-CoV-2*, JAMA. Published online July 14, 2020. doi:10.1001/jama.2020.13107 https://jamanetwork.com/journals/jama/fullarticle/10.1001/jama.2020.13107

McMaster University. "*Evidence supports physical distancing, masks, and eye protection to help prevent COVID-19*: The systematic review and meta-analysis was commissioned by the World Health Organization." ScienceDaily. ScienceDaily, 1 June 2020. www.sciencedaily.com/releases/2020/06/200601194159.htm

Chughtai AA, Seale H, Macintyre CR. *Effectiveness of cloth masks for protection against severe acute respiratory syndrome coronavirus 2*, Emerg Infect Dis., Original Publication Date: July 22, 2020, https://doi.org/10.3201/eid2610.200948.

Emma P. Fischer, Martin C. Fischer, David Grass, Isaac Henrion, Warren S. Warren, Eric Westman. *Low-cost measurement of facemask efficacy for filtering expelled droplets during speech*, Science Advances, August 7, 2020; DOI: 10.1126/sciadv.abd3083

Siddhartha Verma, Manhar Dhanak, John Frankenfield. *Visualizing the effectiveness of face masks in obstructing respiratory jets*, Physics of Fluids, 2020; 32 (6): 061708 DOI: 10.1063/5.0016018

Texas A&M University. "*Face masks critical in preventing spread of COVID-19: Study found that wearing a face mask stopped person-to-person spread of the virus*." ScienceDaily. ScienceDaily, 12 June 2020. <www.sciencedaily.com/releases/2020/06/200612172200.htm>.

And then there is:

Travel Med Infect Dis. 2020 May 28 : 101751, doi: 10.1016/j.tmaid.2020.101751 [Epub ahead of print], PMCID: PMC7253999, PMID: 32473312, *Efficacy of face mask in preventing respiratory virus transmission: A systematic review and meta-analysis* ***Important here is the conclusion – "this study adds additional evidence of the enhanced protective value of masks" and the fact that the Xiao, et al. review relied upon by Dr. Bostom is included in the analysis.***

Dr. Bostom attempted to buttress his opinion with his conclusion that there have been no "randomized clinical trials" regarding the efficacy of masks, so there is nothing to really consider because "observational studies" are not reliable and do not constitute real evidence.

Dr. Bostom did not explain why observational studies would not at least be persuasive or helpful if not conclusive. More importantly, it appears that there have been randomized clinical

trials on the efficacy of masks. C. Raina MacIntyre, Abrar A. Chughtai, Holly Seale, Dominic E. Dwyer, and Wang Quanyic, *Human coronavirus data from four clinical trials of masks and respirators*, Int J Infect Dis. 2020 Jul; 96: 631–633, Published online 2020 Jun 1. doi: 10.1016/j.ijid.2020.05.092, PMCID: PMC7263249, PMID: 32497810.

After being prodded during cross examination, Dr. Bostom reluctantly conceded that any analysis of the transmission of the COVID-19 virus in a rural county with little resources, like Gadsden County, should take local factors into consideration.

Gadsden County's profile and demographics make it exceptionally vulnerable to the devastation of COVID-19. This includes: nearly a quarter of the residents in the state's only majority-minority county have diabetes, heart disease and cancer plague the County, the County has a sprawling geography, and there is a lack of transportation and medical facilities. Nada Hassanein, Tallahassee Democrat, *Distanced from assistance: Rampant health problems in Gadsden mirror coronavirus risk* factos, August 21, 2020, https://www.tallahassee.com/story/news/2020/08/21/coronavirus-magnifies-gadsden-county-health-disparities/5615366002/. Simply put, "The virus has magnified deep-seated systemic health-care inequities, including access to services, which have put minority communities like Gadsden at greater risk for health complications." *Id.*

According to state health department statistics, 29 Gadsden County residents have died from the COVID-19 virus, the same death toll as Leon County. Leon County has a population of almost 300,000. Gadsden County has a population of approximately 46,000.

Following the above, mostly good news about masks, and mostly bad news about the condition of the County, commissioners enacted a mask ordinance, pursuant to their inherent police powers and emergency management under Sections 252.31-252.90, Florida Statutes. The commissioners meet every week to review emergency ordinance and monitor the situation.

It is Carroll's burden to prove that the basis underpinning the County's mask ordinance was *less than* "rational speculation unsupported by evidence or empirical data." *Silvio Membreno & Fla. Ass'n of Vendors, Inc.* at 19. It was more. So much more that the enactment of the ordinance would pass the strict scrutiny analysis, were that the standard, because it is necessary to promote a compelling governmental interest and is narrowly tailored to advance that interest.

The County's mask ordinance is logically related to the objective of promoting the health and welfare of Gadsden County residents during a pandemic. It was readily available, consistent with CDC guidelines, and reasonably expected to reduce hospitalizations and death. The ordinance passes constitutional muster.

Substantive Due Process – Vagueness – Mask Ordinance

To survive a constitutional vagueness challenge, "a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct." *State v. Catalano*, 104 So.3d 1069, 1076 (Fla. 2012). "To withstand constitutional scrutiny, however, statutes do not have to set determinate standards or provide mathematical certainty." *Id.* "The

legislature's failure to define a statutory term does not in and of itself render a provision unconstitutionally vague." *Davis v. Gilchrist Cty. Sheriff's Office*, 280 So.3d 524, 532 (Fla. 1st DCA 2019) (citation omitted).

Carroll challenges the following phrases as unconstitutionally vague: "anyone who has trouble breathing," and "where other social distancing measures are difficult to maintain." Complaint at 7.

The Court does not believe that "persons of common intelligence" in Gadsden County would be so flummoxed by these two phrases that they would have to guess at what they mean. The phrases are not so vague that they render the mask ordinance unconstitutional.

Substantive Due Process – Rational Relationship -- Curfew Ordinance[7]

Carroll asserts that the County's curfew ordinance is constitutionally infirm because it denies him substantive due process in that, "The nightly curfew contained within Resolution 20-39 bears to (sic) rational relationship to any legitimate government interest…." Complaint at 6.

The Florida Supreme Court has provided the minimum requirements for standing in a constitutional challenge case. "First, a plaintiff must demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.' Second, a plaintiff must establish 'a causal connection between the injury and the conduct complained of.' Third, a plaintiff must show 'a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact.' *State v. J.P.*, 907 So.2d 1101, 1113 (Fla. 2004) (citations omitted). The standing requirement applies to facial constitutional challenges. *Guest v. Dep't of Juvenile Justice*, 786 So.2d 677 (Fla. 1st DCA 2001).

Although minimal and perilously close to being deemed insufficient for standing purposes, Carroll did outline the activities of his business life that he believed were being harmed by the mask ordinance. He did not do so regarding the curfew ordinance. He did not testify that he was required to be out past the curfew for his business, thus, susceptible to being cited. He did not testify that he refrains from going out after curfew because of a fear he will be cited. He has not alleged an injury sufficient to meet the standing requirement and, thus, cannot challenge the curfew ordinance.

Separation of Powers

There is an important purpose behind the law discussed above. The strong deference courts give legislative action is to honor the principle of separation of powers, an essential doctrine that is one of the engines that keeps our democracy driving safely. Elected leaders have the heavy burden of deliberating and enacting laws that protect the people in their districts. If residents of a county disagree with the policy or law promulgated by the county commission, they have the right to attend meetings and seek redress, and if that does not work, there is always the ballot box. Courts do not pick policy winners and losers; they only intercede when legislative

[7] Carroll does not challenge the curfew ordinance on vagueness grounds.

action exceeds the bounds provided in the federal and Florida Constitutions. That has not happened here.[8]

Conclusion

Foregoing certain comforts for the greater good is not new for Americans. Laws and regulations rationed food and fuel during World War II. Smokers have been prohibited from enjoying cigarettes in closed public spaces. And, more recently, Florida residents have been told they may not text while driving.

Gadsden County residents are temporarily required to put a piece of cloth over the lower portion of their faces for short periods of time.

County commissioners had deliberated and decided it was not too much to ask. They considered the devastating effects of COVID-19 on their county and the evidence provided by medical professionals and institutions across the country. They are performing their solemn responsibility to enact laws that promote the safety and wellbeing of their constituents.

At the end of the day, commissioners were asked to choose between sparing residents the miniscule inconvenience of wearing a mask and saving lives. They chose saving lives. And they did so in conformity with the Florida Constitution.

Accordingly, it is ORDERED and ADJUDGED that plaintiff's complaint for declaratory judgment and injunctive relief is DENIED, and judgment is ENTERED in favor of defendant against plaintiff.

DONE in Quincy, Gadsden County, Florida on August 24, 2020.

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DAVID FRANK
CIRCUIT JUDGE

[8] "Under this same modern understanding of the proper separation of powers, however, courts' power and responsibility to determine whether a law violates substantive due process and equal protection are at their absolute minimum concerning laws, such as business and economic regulations, that do not establish suspect classes and do not infringe fundamental rights. In these areas, courts have little or no guidance from pre-existing constitutional rules and constitutional policies as to whether to replace a legislative choice with a judicial choice. For such laws, courts undertake only a limited review that is highly deferential to the legislature's choice of ends and means. This review is the rational basis test. … This framework for the separation of powers was the product of over a half-century of conflict between the judicial and political branches of government." *Silvio Membreno & Fla. Ass'n of Vendors, Inc.* at 21–22 (citation omitted).

RESOLUTION NO. 20-44

WHEREAS, in order to fully and effectively respond to the developing threats posed by the novel coronavirus and its associated disease (COVID-19), and in coordination with ongoing emergency actions by the state and federal governments, the Gadsden County Board of County Commissioners passed Resolutions 20-12 through 20-21, 20-23, 20-24, 20-28, 20-29, 20-37, 20-38, 20-39, 20-40, 20-41, 20-42 and 20-43. These Resolutions declared a local state of emergency in Gadsden County, and subsequently such extensions of these resolutions have been deemed necessary to have been issued; and

WHEREAS, it is necessary, appropriate and prudent to take action to ensure that the spread of COVID-19 is slowed, and that residents and visitors in Florida remain safe and secure; and

WHEREAS, conditions presented by COVID-19 continue to pose a threat to public health that requires dynamic emergency response, including the maintenance of existing orders, as well as the imposition of additional directives and orders as conditions require; and

WHEREAS, there is reason to believe that COVID-19 is spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing increased infections to persons, and property loss and damage in certain circumstances; and

WHEREAS, despite the measures taken thus far pursuant to prior Resolutions, as well as existing actions taken by the federal, state, and other municipal governments, new cases of COVID-19 continue to increase in surrounding counties and municipalities, demonstrating that continued prevention, community action and cooperation to socially separate and maintain distance is necessary in within the County; and

WHEREAS, it has become necessary that residents and visitors in Gadsden County do more to avoid close social interaction, including, when possible, remaining in their respective homes, residences, and domiciles, including any apartment, dormitory, hotel, motel, or similar accommodation to slow the spread of COVID-19 and address the unprecedented threat to the public health and welfare posed by COVID-19; and

WHEREAS, the CDC has recommended wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies), especially in areas of significant community-based transmission; and

WHEREAS, it is safer to stay at home and subject to certain exceptions for essential activities and services while allowing minimum business operations that appropriately balance public health, safety, and welfare within the County while promoting the continued delivery of essential infrastructure, services, and functions to residents and visitors in the County. Such exceptions are made consistent with guidance from the Centers for Disease Control and Prevention (CDC) and the President's Coronavirus Guidelines for America; and

WHEREAS, Pursuant to §252.38, Florida Statutes, the County has jurisdictional authority over the entire county for emergency management purposes; and

NOW, THEREFORE, BE IT RESOLVED AND DECLARED by the CHAIRMAN OF THE GADSDEN COUNTY BOARD OF COUNTY COMMISSIONERS on this 21st day of August 2020 that Gadsden County, Florida is hereby declared to be in a State of Emergency.

BE IT FURTHER RESOLVED AND DECLARED that, as long as our County continues to deal with the spread of COVID-19, we must remain focused on the safety, health and well-being of our residents and encourage steps to promote a safe and healthy lifestyle; and

BE IT FURTHER RESOLVED AND DECLARED that, during this State of Emergency continues to exist, the County shall have the power and authority to carry on those activities set forth in Fla. Stat. § 252.38, including but not limited to: appropriate and expend funds; make contracts; obtain and distribute equipment, materials, and supplies for emergency management purposes; provide for the health and safety of persons and property, including emergency assistance to the victim of any emergency; to limit the size of gatherings taking place within the County during this State of Emergency to a maximum of ten (10) individuals; and direct and coordinate the development of the emergency management plans and protocols in accordance with the plans and policies set forth by the Federal and State Emergency Management agencies; and

During this State of Emergency, pursuant to Chapter 2, Article II, Division 2, Section 2-42(f) of the Gadsden County Code of Ordinances, the County may call emergency meetings which bypass the notice conditions required by the Code. Such emergency meetings shall not be required to be held at the normal meeting times as set forth in the Code; and

During this State of Emergency, the Gadsden County Board of County Commissioners hereby empowers the Chairman of the Gadsden County Board of County Commissioners (or his designated representative) with the following powers:

To appoint, employ, remove, or provide, with or without compensation, coordinators, rescue teams, fire and police personnel, and other emergency management workers; and

To establish, as necessary, a primary and one or more secondary emergency operating centers to provide continuity of government and direction and control of emergency operations; and

To assign and make available for duty the offices and agencies of Gadsden County, including the employees, the property or equipment thereof relating to firefighting, engineering, rescue, health, medical and related services for emergency operation services, as the primary emergency management forces of the political subdivision for employment within or outside the political limits of the subdivision; and

To request State assistance or invoke emergency-related mutual-aid assistance by declaring a local State of Emergency in the event of an emergency affecting only one political subdivision. The duration of this State of Emergency declared locally is limited to seven (7) days; it may be

extended (or terminated) as necessary by the Chairman of the Gadsden County Board of County Commissioners (or his designee), in seven-day increments, without further affirmative action from the Board; and

To take any additional action he (or his designee) deems necessary effectuate and promote the continued health and safety of the County while this state of emergency is in effect.

BE IT FURTHER RESOLVED AND DECLARED that, pursuant to Resolutions 20-12 through 20-21, 20-23, 20-24, 20-28, 20-29, 20-34, 20-37, 20-38, 20-39, 20-40, 20-41, 20-42 and 20-43 (as extended), declaring a local state of emergency, we resolve the following "Safe & Healthy Lifestyle During COVID-19 Guidelines" providing the following guidance, requirements and restrictions:

A. IMPLEMENTATION OF GADSDEN COUNTY RE-OPENING PLAN

In conjunction with guidance provided by Governor DeSantis in Executive Order 20-139, the White House, the CDC, the Occupational Safety and Health Administration (OHSA) and the Florida Surgeon General and State Health Officer, Gadsden County hereby adopts the following rules and restrictions governing the re-opening of the County, to wit:

a. All persons in Gadsden County are encouraged to continue to follow appropriate social and personal distancing safety protocols issued by the CDC and OSHA; and
b. The County continues to strongly encourage senior citizens and individuals with significant underlying medical conditions to avoid crowds and take measures to limit the risk of exposure to COVID-19; and
c. All persons who work in long-term care facilities should be tested for COVID-19 on a routine basis; and
d. In-store retail businesses, including gyms and fitness centers are permitted to OPEN and should continue to maintain appropriate social and personal distancing; and
e. All parks within Gadsden County are permitted to OPEN and are permitted to allow camping, provided the following provisions are met:
i. Groups who intend to use camping facilities must maintain adequate social and personal distancing and shall limit camping groups to ten (10) people;
ii. Groups electing to host camping activities using recreational vehicles (and other similar conveyances) are permitted to exceed the ten (10) person restriction, provided all activities exceeding the ten (10) person limitation are conducted within the immediate vicinity of said recreational (or similar) vehicle.
1. "Immediate Vicinity" is defined as the area within a fifteen (15) foot radius of said recreational vehicle or similar conveyance.
f. The Board directs the County Administrator to submit a written request to the Secretary of the Florida Department of Business and Professional Regulation (DBPR) requesting permission to permit the re-opening of pari-mutuel facilities within the County. Pari-mutuel facilities operating within the County shall operate at fifty (50) percent of permitted capacity and observe proper social and personal distancing; and

g. Personal services, including but not limited to tattooing, body piercing, acupuncture, tanning and massage, may operate provided proper social and personal distancing is observed; and

h. Churches, mosques, synagogues and other places of worship are not affected by any restriction herein.

B. MANDATORY FACE MASK USAGE

In an abundance of caution, the Gadsden County Board of County Commissioners continues to mandate that: when in public and in closer than six (6) feet proximity to one another based upon prevailing CDC guidance, the wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies), especially in areas of significant community-based transmission. Persons working in grocery stores, restaurants, pharmacies, construction sites, public transit vehicles and vehicles for hire shall wear facial coverings as described in this Order as directed by the CDC at all times while at work. This provision shall be enforced pursuant to Florida Statutes ss. 252.31-252.90.

The County also mandates the use of simple cloth face coverings to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others. Cloth face coverings fashioned from household items or made at home from common materials at low cost can be used as an additional, voluntary public health measure.

Cloth face coverings should not be placed on young children under age 2, anyone who has trouble breathing, or is unconscious, incapacitated or otherwise unable to remove the mask without assistance.

The cloth face coverings recommended are not surgical masks or N-95 respirators. Those are critical supplies that must continue to be reserved for healthcare workers and other medical first responders, as recommended by current CDC guidance.

C. PENALTIES FOR VIOLATIONS & ENFORCEMENT AUTHORITY

Any person violating any provision of ss. 252.31-252.90 or any rule or order made pursuant to ss. 252.31-252.90 is guilty of a misdemeanor of the second degree, punishable by the use of the Gadsden County Mask Citation form, and as follows:

FIRST OFFENSE - $25.00
SECOND OFFENSE - $50.00
ALL SUBSEQUENT OFFENSES - $100.00

The law enforcement agencies of the state and the political subdivisions thereof shall enforce the orders and rules issued pursuant to Florida Statutes ss. 252.31-252.90 as a non-criminal infraction, punishable by the issuance a civil citation for the amounts enumerated above.

Any person violating any provision of ss. 252.31-252.90 or any rule or order made pursuant to ss. 252.31-252.90 is guilty of a misdemeanor of the second degree, punishable as described hereinabove.

Fines collected for violations of this Section shall be remitted to the County if the officer issuing the citation indicates on the citation form that the offense occurred in an unincorporated area of the County that is not a part of a municipality. Fines collected for violations of this Section shall be remitted to the municipality in which the offense occurred, if the officer issuing the citation indicates on the citation form that the offense occurred within the City/Town limits.

D. RESTAURANTS & BARS

Restaurants and other establishments, and bars and other vendors licensed to sell alcoholic beverages for consumption on the premises (as specified for below), may operate at fifty (50) percent of their maximum indoor permitted capacity, excluding on-duty employees, provided such businesses abide by the ten (10) person gathering restrictions as set forth herein and subject to all guidance and orders promulgated by DBPR. Bar areas in such restaurants and establishments mentioned in this Section may open with seated service. All outdoor seating shall maintain appropriate social and personal distancing.

Pursuant to Executive Order 2020-09 issued by the Florida Department of Business and Professional Regulation and Secretary Halsey Beshears, all licensed vendors who derive more than fifty percent (50%) of their gross revenue from sales of alcoholic beverages shall suspend such sales of alcoholic beverages for consumption on the premises. Such vendors may continue to sell alcoholic beverages in sealed containers for consumption off the premises in accordance with Executive Order 20-71, Sections 1 & 2.

Vendors who are licensed as public food service establishments or “restaurants” under Chapter 509, Florida Statutes, may continue to operate for on-premises consumption of food and beverages at tables pursuant to the restrictions set forth in Executive Order 20-139, so long as those vendors derive fifty percent (50%) or less of gross revenue from the sale of alcoholic beverages for on-premises consumption.

Entertainment businesses, including but not limited to movie theaters, concert houses, auditoriums, playhouses, bowling alleys and arcades may operate at fifty (50) percent of their building capacity, with appropriate social and personal distancing between groups and appropriate sanitation protocols.

E. RECOMMENDED SANITATION AND DISINFECTING PROCEDURES

Based on prevailing guidance from the CDC, the County hereby strongly recommends and encourages retail businesses to routinely disinfect their premises. The following guidance is a recommended set of practices promulgated by the CDC to assist businesses in cleaning and disinfecting their facilities:

A. Wear disposable gloves to clean and disinfect;
B. Clean surfaces using soap and water;

C. Practice routine cleaning of frequently/highly touched surfaces;
D. High touch surfaces include tables, doorknobs, light switches, countertops, handles, desks, phones, keyboards, toilets, faucets and sinks.
E. Clean the area or item with soap and water or another detergent if it is dirty. Then, use a household disinfectant specifically an EPA-registered household disinfectant. Follow the instructions on the label to ensure safe and effective use of the product. Many products recommend: Keeping surface wet for a period of time and taking precautions such as wearing gloves and making sure you have good ventilation during use of the product;
F. Diluted household bleach solutions may also be used if appropriate for the surface. Check to ensure the product is not past its expiration date. Unexpired household bleach will be effective against COVID-19 when properly diluted;
G. For soft surfaces such as carpeted floor, rugs, and drapes, clean the surface using soap and water or with cleaners appropriate for use on these surfaces;
H. For electronics, such as tablets, touch screens, keyboards, remote controls, and ATM machines, consider putting a wipeable cover on electronics. Follow manufacturer instructions for cleaning and disinfecting. If no guidance exists, use alcohol-based wipes or sprays containing at least 70% alcohol and then dry the surface thoroughly after disinfecting.

F. CURFEW

In order to protect the public health, safety and welfare, and mitigate the spread of the COVID-19 virus, a curfew is hereby established in all of Gadsden County, Florida, from the hours of 9:00 PM and 5:00 AM, continuing to remain in effect beginning Friday, August 21st, 2020 at 9:00 PM. Law Enforcement shall have the authority to exercise reasonable discretion in the enforcement of the of this Section.
The curfew applies to all pedestrian and vehicular movement, standing and parking, except for: individuals participating in, going to, or returning from employment, including, but not limited to, federal, state, and local government employees, judicial personnel, those providing hospital and other health care services, first responder and correctional personnel, child protection and child welfare personnel, housing and shelter personnel, postal and shipping services personnel, and those performing utility and telecommunications repairs. Medical patients in need of transport, and others seeking medical care, are also excluded from the curfew. The curfew shall not prohibit a person from walking a pet/animal in the vicinity of their residence or in such place where the animal(s) is/are maintained. Violations of this section shall be punished in accordance with State law and Section 1-8 of the Gadsden County Code of Ordinances.
Businesses that sell or offer gasoline, diesel or other fuels and restaurants offering delivery, takeout, drive-thru and in-restaurant dining shall be exempted from the curfew requirements as provided herein. Except, such businesses shall not allow more than ten (10) individuals to congregate on their premises.

G. INTERNET CAFES

Pursuant to Florida Statutes Chapter 849, Internet Cafés have been deemed to be ILLEGAL. Moreover, in order to protect public health, promote adequate social distancing and ensure compliance with the gathering size restrictions set forth herein, Internet Cafés within the County shall remain CLOSED. Pursuant to Florida Statutes, all sums of money and every other valuable thing drawn and won as a prize, or as a share of a prize, or as a share, percentage or profit of the principal promoter or operator, in any lottery, and all money, currency or property of any kind to

be disposed of, or offered to be disposed of, by chance or device in any scheme or under any pretext by any person, and all sums of money or other thing of value received by any person by reason of her or his being the owner or holder of any ticket or share of a ticket in a lottery, or pretended lottery, or of a share or right in any such schemes of chance or device and all sums of money and other thing of value used in the setting up, conducting or operation of a lottery, and all money or other thing of value at stake, or used or displayed in or in connection with any illegal gambling or any illegal gambling device contrary to the laws of this state, shall be forfeited, and may be recovered by civil proceedings, filed, or by action for money had and received, to be brought by the Department of Legal Affairs or any state attorney, or other prosecuting officer, in the circuit courts in the name and on behalf of the state; the same to be applied when collected as all other penal forfeitures.

H. OTHER PROVISIONS

The provisions and language of Resolution 20-24, specifically Sections R & T, styled "RE-OPENING OF VACATION RENTALS" and "RE-OPENING OF ORGANIZED YOUTH ACTIVITIES", respectively, and any accompanying Exhibits referenced therein and attached thereto, are hereby incorporated as though fully set forth in this section.

I. EXPIRATION

This Resolution shall expire upon the expiration of the existing Gadsden County State of Emergency, except that if such State of Emergency is extended, this order shall also be deemed to extend for the duration of such extension. This order may be cancelled earlier by action of the Gadsden County Board of County Commissioners.

J. SCRIVENERS' ERRORS

Scriveners' errors may be corrected as needed.

By Special Order of the Gadsden County Board of County Commissioners on this 21st day of August 2020.

BOARD OF COUNTY COMMISSIONERS GADSDEN COUNTY, FLORIDA:

By: _____
Nicholas Thomas
Clerk of the Circuit Court

By: _____
Anthony O. Viegbesie, Ph.D.
Chairman