NO.: SC21-254
L.T. CASE NOS.: 4D20-1765; 502020CA006920XXXXMB

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOSIE MACHOVEC, ET AL.,
***Petitioners*,**

v.

PALM BEACH COUNTY,
***Respondent*.**

From the District Court of Appeal of the State of Florida,
Fourth District

RESPONDENT, PALM BEACH COUNTY'S, BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The trial court denied Petitioners' claim for injunctive relief on two independent bases: 1) Petitioners failed to establish a likelihood of success on the merits; and 2) Petitioners failed to establish the public interest would be served by enjoining the enforcement of Respondent's (the County's) Executive Order 12 (EO-12). [1]

[1] Respondent respectfully requests this Court take judicial notice of the pleadings filed in lower tribunal case numbers 4D20-1765 and 502020CA006920XXXXMB, pursuant to section 90.202(6), Florida Statutes.

Machovec v. Palm Beach County, 310 So. 3d 941, 943 (Fla. 4th DCA 2021) (finding "support for the trial court's determination that Appellants failed to establish a substantial likelihood of success on the merits or that an injunction will serve the public interest . . . .").

Before the Fourth District Court of Appeal, Petitioners abandoned all of their arguments concerning the "substantial likelihood of success" prong of the test for injunctive relief, except one: whether a face covering constitutes medical treatment such that EO-12 was subject to strict scrutiny review. *Id.* (summarizing Appellants' sole argument).

Significantly, Petitioners failed to present any argument on appeal regarding the second, independent basis for the trial court's denial of injunctive relief: Petitioners' failure to establish that the public interest would be served by enjoining enforcement of EO-12. The County argued that Petitioners' failure to present any argument as to this issue constituted a waiver of the issue on appeal, and mandated affirmance. Respondent's Answer Brief in Case No. 4D20-1765 at 8.

The Fourth District expressly recognized that this second independent basis for the trial court's order was not challenged by Petitioners when, in concluding, the Court noted: "Appellants' *sole argument on appeal* fails because they did not establish that the County's emergency order mandating the wearing of face coverings intrudes on their constitutional right to refuse medical treatment." *Machovec*, 310 So. 3d at 948 (emphasis supplied).

ARGUMENT

I. THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE FOURTH DISTRICT'S OPINION BECAUSE: 1) THE FOURTH DISTRICT'S AFFIRMANCE OF THE TRIAL COURT'S DENIAL OF INJUNCTIVE RELIEF RESTS ON AN ISSUE PETITIONERS WAIVED BELOW; AND 2) THE OPINION BELOW DID NOT EXPRESSLY CONSTRUE A PROVISION OF THE FLORIDA OR FEDERAL CONSTITUTION (RESTATED).

PETITIONERS WAIVED THE "PUBLIC INTEREST" ISSUE

Petitioners seek to invoke this Honorable Court's discretionary jurisdiction to review an opinion of the Fourth District Court of Appeal, where no basis for discretionary review exists.

The trial court denied injunctive relief on two grounds: 1) Petitioners failed to establish a substantial likelihood of success on the merits; and 2) Petitioners failed to establish that the public interest would be served by enjoining enforcement of EO-12.

The sole argument advanced by Petitioners before the Fourth District Court of Appeal concerned the first prong of the injunctive relief test, as they argued a substantial likelihood of success on the merits of their claim that a face covering constituted "medical treatment". The County argued below that Petitioners abandoned all other arguments on appeal, and presented no argument whatsoever regarding the trial court's second, independent basis for denying injunctive relief, thus waiving review of this second issue. The Fourth District noted as much when, in concluding, it referred to petitioners' medical treatment argument as petitioners' "sole argument on appeal." *Machovec*, 310 So. 3d at 948. The Court also concluded the "Background" portion of its opinion by noting: "In Appellants' appeal, their focus *is solely on the contention* that '[t]he

trial court applied the wrong level of scrutiny . . . .'" *Id.* at 944 (emphasis supplied).

Thus, the Fourth District's opinion affirming the trial court's order rests soundly on the basis that petitioners failed to demonstrate that injunctive relief was in the public interest, and because Petitioners waived this issue on appeal, the opinion is unassailable as to this issue. If an "'issue [i]s waived, it cannot be grounds for reversal on appeal.'" *Florida Holding 4800 LLC v. Lauderhill Lending LLC*, 275 So. 3d 183, 187 (Fla. 4th DCA 2019) (quoting *Vidal v. Liquidation Props., Inc.*, 104 So. 3d 1274, 1276 (Fla. 4th DCA 2013)); *Anheuser-Busch Companies, Inc. v. Staples*, 125 So. 3d 309, 312 (Fla. 1st DCA 2013) (noting an appellate court "[is] not at liberty to address issues that were not raised by the parties." (citing Philip J. Padovano, *Florida Appellate Practice* § 18.5, at 340-41 (2011 ed.))); *Lightsee v. First National Bank of Melbourne*, 132 So. 2d 776, 776 (Fla. 2d DCA 1961) ("We are not authorized to pass upon issues other than those properly presented on appeal . . .").

Because the Fourth District's affirmance of the trial court's order denying injunctive relief rests on a basis Petitioners waived below, that opinion cannot be overturned, and Petitioners' Notice to Invoke Discretionary Jurisdiction is, in essence, a request for an advisory opinion. Such requests made of this Court are valid only when made by Florida's Governor or Florida's Attorney General. *See* Art. IV, § 1(c), Fla. Const.; Art. V, § 3(b)(10), Fla. Const.; *Casiano v. State*, 310 So. 3d 910, 913 (Fla. 2021) (noting appellate courts reserve the exercise of judicial power for cases involving actual controversies, with the sole exception being when the Florida Constitution authorizes advisory opinions).

On this basis, the County respectfully requests this Court decline to exercise discretionary jurisdiction to review the Fourth District's opinion.

NO EXPRESS CONSTRUCTION OF FLORIDA'S CONSTITUTION

To the extent this Court is inclined to examine the Fourth District's discussion of what constitutes "medical treatment", to

determine whether it may form an allowable basis for this Court's exercise of discretionary jurisdiction, the Fourth District did not "expressly construe[ ] a provision of the state or federal constitution" as is required to form the basis for this Court's review. Art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(ii).

To the contrary, the opinion below begins from the premise that Article I, Section 23 of the Florida Constitution encompasses a right to choose or refuse medical treatment. *Machovec*, 310 So. 3d at 947. That interpretation was not in dispute. The opinion proceeds to examine the case law on which Petitioners relied, to analyze Petitioners' sole argument that wearing a face covering constitutes "medical treatment". *Id.* at 945-47.

Thus, the Fourth District's opinion does not expressly construe a state or federal constitutional provision, rather, it merely involves "an application of state or federal constitutional principles to the facts of the case" which "does not amount to a construction of the provision involved." Philip J. Padovano, 2 Fla. Prac., Appellate Practice § 3:8 (2021 ed.) As Judge Padovano noted, Article V, section 3(b)(3) of the

Florida Constitution "plainly requires a written statement explaining or defining the disputed constitutional language." *Id.* The Fourth District's opinion contains no such statement, as there is no dispute concerning the language of Article I, section 23 of the Florida Constitution.

CONCLUSION

Petitioners have failed to establish any basis for this Honorable Court to exercise its very limited discretionary jurisdiction to consider this case; therefore, Respondent respectfully requests this Court deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Respondent, Palm Beach County's, Brief on Jurisdiction has been furnished via the E-Filing Portal this 7th day of April, 2021, to: Jared H. Beck, Esq., Elizabeth Lee Beck, Esq., and Victor Arca, Esq., Beck & Lee Trial Lawyers, Co-Counsel for Petitioners, 12485 SW 137th Ave., Ste. 205, Miami, FL 33186, jared@beckandlee.com, elizabeth@beckandlee.com, victor@beckandlee.com; Louis Leo IV, Esq., and Joel Medgebow, Esq., Florida Civil Rights Coalition, P.L.L.C., Co-Counsel for Petitioners, 1279 W. Palmetto Park Rd., #273731, Boca Raton, FL 33486, info@floridacivilrights.org, louis@floridacivilrights.org, joel@medgebowlaw.com; Melissa Martz, Esq., Co-Counsel for Petitioners, 1128 Royal Palm Blvd., 125,Royal Palm Beach, FL 33411, melissamartzesq@gmail.com; and Cory C. Strolla, Esq., Co-Counsel for Petitioners, 777 S. Flagler Dr., West Tower, Ste. 800, West Palm Beach,FL 33401, strollalaw@yahoo.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font and word count limit requirements of Florida Rules of Appellate Procedure 9.045 and 9.210, and is being filed in Bookman Old Style 14-point font with a word count that does not exceed 2,500 words.

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