

IN THE SUPREME COURT OF FLORIDA

Case No. SC 21-254

L.T. Case Nos. 4D20-1765; 502020CA006920XXXXMB

JOSIE MACHOVEC, CARL HOLME, KAREN HOLME, RACHEL EADE
and ROBERT SPREITZER,

Petitioners,

v.

PALM BEACH COUNTY

Respondent.

**PETITIONERS' BRIEF ON JURISDICTION FOR
DISCRETIONARY REVIEW OF A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL**

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JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction under Art. V, § 3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(ii), which provide that this Court may review decisions that expressly construe a provision of the Florida Constitution.

STATEMENT OF CASE AND FACTS

Petitioners, all residents of Palm Beach County, seek an order preliminarily enjoining Palm Beach County's face-mask mandate as an infringement on their right to privacy guaranteed under Article I, Section 23 of the Florida Constitution. The record below contains numerous scientific studies from both before and after the ongoing emergency mandate was enacted June 24, 2020, casting serious doubt on the effectiveness of face masks in combatting airborne respiratory illnesses, including COVID-19, as well as demonstrating significant health risks posed by face masks to the wearer. The mandate was passed expressly in accordance with the federal Centers for Disease Control and Prevention ("CDC") guidelines to help slow the spread of coronavirus, and the face masks required by Palm Beach County are defined by the federal Food and Drug Administration to be a type of "medical device."

The trial court denied Petitioners' motion for injunction. It concluded that the mask mandate does not infringe any privacy right under Article I, Section 23, including the right to refuse medical treatment or the right to autonomy over one's own medical health. The trial court further concluded that the mandate passed rational-basis review.

The Fourth District Court of Appeal in *Machovec v. Palm Beach County*, Case No. 4D20-176 (Fla. 4th DCA 2021) (App. A) affirmed and held, on the basis of the CDC's updated guidelines, that while masks may affect the health of the mask wearer, because the mask requirement is primarily intended to help prevent the respiratory droplets coming from the wearer's mouth or nose from traveling in the air and onto other people, the Petitioners have no viable constitutional claim.

SUMMARY OF ARGUMENT

This Court has discretionary jurisdiction under Art. V, § 3(b)(3), Fla. Const. and Fla. R. App. 9.030(a)(2)(A)(ii), which provide that this Court may review decisions that expressly construe a provision of the Florida Constitution. The Fourth DCA expressly construed Art. I, § 23, Fla. Const.

This Court should accept discretionary jurisdiction to establish that the mask mandate is subject to strict scrutiny because it infringes on the right to privacy under Article I, Section 23 of the Florida Constitution, and to ensure

that determining where the right to privacy ends and the government's police power begins remains the province of Florida's judicial branch rather than the CDC or any other constitutionally unauthorized body.

ARGUMENT

I. This Court Has Discretionary Jurisdiction Based On The Fourth DCA's Decision That Expressly Construed Article I, Section 23 Of The Florida Constitution.

The jurisdiction of the Florida Supreme Court is set forth in the Florida Constitution. Art. V, § 3(b), Fla. Const. The Florida Constitution grants the Florida Supreme Court discretion to "review any decision of district court of appeal that . . . expressly construes a provision of the state . . . constitution." Art. V, § 3(b)(3), Fla. Const.; see *also* Fla. R. App. P. 9.030(a)(2)(A)(ii) (same). There must be an actual construction of a constitutional provision, meaning that a "judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958).

The Fourth DCA expressly construed Article I, section 23 of the Florida Constitution, which provides:

Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right

of access to public records and meetings as provided by law.

The Fourth DCA construed the phrase “right to be let alone and free from governmental intrusion into the person’s private life” to “guarantee[] . . . an important right, but it is not absolute.” (App. at 12). The appellate court further explained that the right constituted by this phrase is limited by “circumstances in which a public emergency, for instance ... the spread of infectious or contagious diseases or other potential public calamity, presents an exigent circumstance before which all private rights must immediately give way under the government’s police power.” (App. at 12 (quoting *Davis v. City of S. Bay*, 433 So. 2d 1364, 1366 (Fla. 4th DCA 1983) (internal quotation marks omitted))).

The court also interpreted the same phrase to encompass a “right to refuse medical treatment”; at the same time, the court explained this right does not include a right to refuse to wear a mask because “[t]he mask mandate is directed to protecting the health, vis-à-vis the coronavirus, of people in the proximity of the mask wearer, with facial coverings providing a ‘mitigating measure’ to help prevent the respiratory droplets coming from the mask wearer’s mouth or nose from traveling in the air and ‘onto other people.’” (App. at 12).

II. This Court Should Accept Discretionary Jurisdiction To Establish That The Mask Mandate Is Subject To Strict Scrutiny Such That The Role Of Drawing Boundaries Between The Right To Privacy And The Police Power Remains In The Judicial Branch Rather Than The Province Of Any Constitutionally Unauthorized Body.

Because the Fourth DCA construed the scope of Article I, Section 23 as not being infringed by the mask mandate, it applied the lowest level of constitutional scrutiny, rational-basis review, and found that the ordinance passes constitutional muster. (App. at 12). The decision is at odds with this Court's holding in *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990), where the Court wrote that "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," and applied strict scrutiny to the district court's order on a guardian's petition to effectuate a living will. *Id.* at 11, 13-14. Here, the Fourth DCA's opinion acknowledges that face masks may affect the health of the wearer, but nonetheless reads into the right to autonomy over one's health an exception for "infectious or contagious diseases . . . before which all private rights must immediately give way under the government's police power." (App. at 12 (quoting *Davis v. City of S. Bay*, 433 So. 2d 1364, 1366 (Fla. 4th DCA 1983)); see also (App. at 10-11 (quoting *State Dep't of Agric. & Consumer Servs. of Animal Indus. v. Denmark*, 366 So. 2d 489, 491 (Fla. 4th DCA 1979))). In *Denmark*, the

Fourth DCA reversed an injunction against state regulations concerning the detection, identification, and quarantine of horses with Equine Infectious Anemia, otherwise known as “Swamp Fever,” finding that these regulations satisfied rational-basis review. 366 So. 2d at 469, 471. This Court should accept jurisdiction to rule that the Fourth DCA’s constitutional analysis regarding diseased livestock cannot be readily transferred to human beings while maintaining fidelity with Article I, Section 23 of the Florida Constitution.

The net effect of the Fourth DCA’s equivalence of people with livestock is to elevate the CDC as the arbiter of what measures are constitutionally permissible to address “infectious or contagious diseases.” In this vein, it should be no surprise that the Fourth DCA’s opinion takes judicial notice of CDC findings on no less than four separate occasions – even though there is abundant evidence in the record casting doubt on the effectiveness and safety of masks, not to mention the CDC’s own shifting position on the issue.¹ It should be concerning to all Floridians that the power to weigh and decide between competing individual and societal interests – the very *raison d’être* for strict scrutiny analysis – has apparently passed from the state’s judicial

¹ See, e.g. Cody Crawford & Joshua Robinson, *A closer look at shifting CDC recommendations on face masks*, FOX43 (Apr. 8, 2020), available at <https://www.fox43.com/article/news/health/coronavirus/cdc-shifting-face-mask-recommendations/293-46accf60-44df-46e9-9188-f50af185cdb4>

branch to an unelected and politically unaccountable agency in D.C. But that is precisely what the Fourth DCA's opinion accomplishes, among other things.

As the present worldwide pandemic continues into its second year of existence with no end in sight,² courts across the country have taken the opportunity to reflect and adjudicate upon the tension between blind deference to unelected technocratic "experts" and life in a constitutional republic upheld by an independent judicial branch. Three months ago, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020), the United States Supreme Court granted the application of a church and synagogue for temporary injunctive relief against the New York governor's emergency executive order imposing occupancy restrictions on houses of worship. In doing so, the U.S. Supreme Court held:

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to

² Gabby Hart, *Health officials say no end in sight for COVID-19 virus, mask mandates*, KSNV NBC Las Vegas (Feb. 3, 2021), available at <https://news3lv.com/news/local/health-officials-say-no-end-in-sight-for-covid-19-virus-mask-mandates>

conduct a serious examination of the need for such a drastic measure.

Id. at 68. In his concurring opinion, Justice Gorsuch wrote:

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.

...

What could justify so radical a departure from the First Amendment's terms and long-settled rules about its application? Our colleagues offer two possible answers. Initially, some point to a solo concurrence in *South Bay Pentecostal Church v. Newsom*, 590 U. S. —, 140 S.Ct. 1613, 207 L.Ed.2d 154 (2020), in which THE CHIEF JUSTICE expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency and how little was then known about the disease. *Post*, at 78 (opinion of BREYER, J.). At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.

Id. at 69-70; *see also Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2603, 2605 (2020) (“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.” (Alito, J. joined by Thomas & Kavanaugh, JJ., dissenting)).

Citing the foregoing precedent and principles contained therein, other courts have since entered orders (1) enjoining the closure of schools in Lucas County, Ohio, *Monclova Christian Academy v. Toledo-Lucas Cty. Health Dep’t*, 984 F.3d 477 (6th Cir. 2020); (2) enjoining statewide restrictions on religious worship services in Nevada, *Calvary Chapel Lone Mountain v. Sisolak*, 831 Fed. Appx. 317 (9th Cir. Dec. 15, 2020); (3) finding that the indefinite suspension of jury trials violates the right to speedy trial, *U.S. v. Henning*, ___ F. Supp. 3d ___, 2021 WL 222355 (C.D. Cal. Jan. 19, 2021); and (4) enjoining the Erie County, New York health department’s order shutting down a laser-tag facility, *Lasertron, Inc. v. Empire State Dev. Corp.*, ___N.Y.S. 3d, 2021 WL 28456 (N.Y. Sup. Ct. Jan. 4, 2021)

("Notwithstanding issues of public health, a higher standard must be expected of government officials who take these drastic steps. . . . The Court must not shy away from performing their independent and constitutionally required role in reviewing the decisions of the State so as to ensure that government does not take its broad authority to a point of abuse.").

This is not a case about whether the coronavirus pandemic is "overdone" or a "hoax." (App. at 11). Rather, as the foregoing authorities demonstrate, the pandemic has enabled governmental officials to enact an extraordinary array of capricious and abusive measures trampling on the constitutional rights of citizens spread far and wide across the nation. But "we may not shelter in place when the Constitution is under attack. Things never go well when we do." *Roman Catholic Diocese*, 141 S.Ct. at 71 (Gorsuch, J., concurring). This Court should join those which have already taken up the mantle of defending our sacrosanct constitutional republican tradition by accepting jurisdiction in this case.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant jurisdiction in this appeal.

[signatures follow]

Dated: March 1, 2021

Respectfully submitted,

/s/ Jared H. Beck

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CERTIFICATE OF SERVICE

I certify that on March 1, 2021, the foregoing document has been filed and furnished to all counsel of record below by electronic service, by e-mail and through the portal system with the Florida Courts e-Filing Portal which sent e-mail notification of such filing in accordance with Rule 2.516 Fla. R. Jud. Admin.

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