FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-1661

JUSTIN GREEN,

Appellant,

v.

ALACHUA COUNTY,

Appellee.

On appeal from the Circuit Court for Alachua County.
Donna M. Keim, Judge.

June 11, 2021

TANENBAUM, J.[1]

From May 2020 until around mid-May 2021, anyone residing in or visiting Alachua County has found himself under the yoke of a mask mandate, accomplished through a series of emergency orders from the chair of the board of county commissioners. Under these fiats, any person in the county had to wear a government-approved face-covering to patronize a restaurant, grocery store, or retail establishment; visit or work on a construction site; or use

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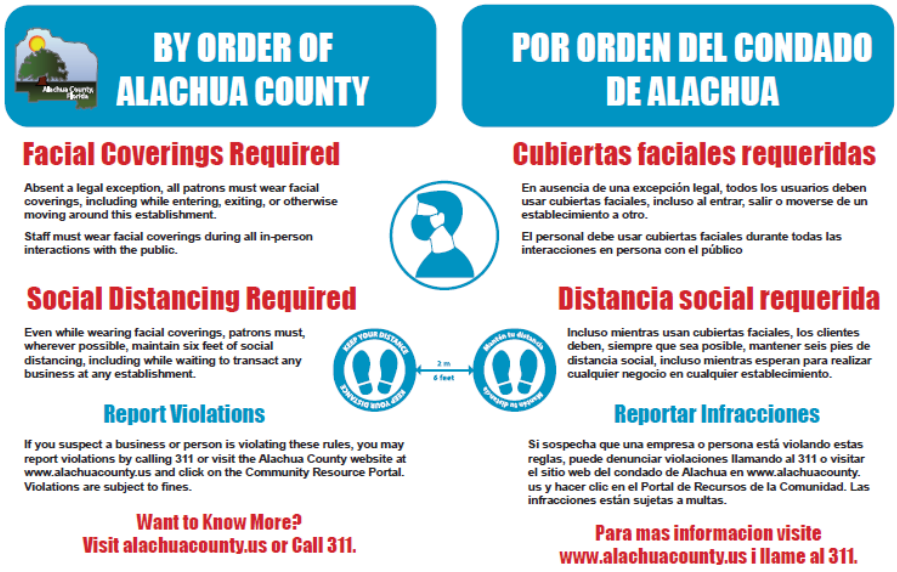
[1] Judge Tanenbaum substituted in for Judge Makar after oral argument had taken place in this case, but he has viewed the recording of that argument—and of course has considered the briefs—in full.

public transit. The diktats also required that a person cover his face in any location "where social distancing measures are not possible." One consequence for being caught without a mask was a fine. Another consequence was being subjected to whispering informants, impelled by county-designed publicity like the following proposed signage encouraging citizens to inform on their disobedient neighbors:



The threat of government-sponsored shaming was not an idle one. The chairman who issued the original mask mandate stated publicly that "masks are the only outwardly visible signal that you are contributing to the solution," and that "masks are also a sign of respect that you recognize [essential workers'] risk and are doing something to lower it."

Justin Green sued the county to challenge the mask mandate, which until recently seemed like it might never end.[2] Green

[2] Green recently suggested this matter is now moot, but we disagree. At the beginning of May, the Governor issued another COVID-19-emergency executive order, this one Executive Order 21-102. That order purports to "eliminate[] and supersede[] all local COVID-19 restrictions and mandates on individuals and businesses." Fla. Exec. Order 21-102 § 1 (May 3, 2021); *see also id.* § 2 (purporting to eliminate and supersede any local emergency

argues, among other points, that the county's command that he wear something on his face violated his fundamental right to

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order or ordinance that imposes "restrictions or mandates upon businesses or individuals due to the COVID-19 emergency"); § 3 (prohibiting local governments from renewing or enacting any such "restrictions or mandates"). While the State seemingly continues to be governed more by a flurry of state and local orders, and less by statutes and ordinances, this opinion offers no comment on the effect the Governor's order may have on local mandates like the one at issue here.

Still, Green advises that the county recently failed to renew (one more time, at least, after many previous renewals) its continuing local state of emergency. Even though the latest mask mandate was to stay in effect "until Alachua County no longer has a local state of emergency," Alachua Cnty. Emergency Order 2021-13, § 5 (March 22, 2021), the latest gubernatorial executive order expressly does *not* preclude the county from enacting an actual ordinance, "pursuant to regular enactment procedures," containing the same mask mandate, provided the enacted mandate is not "based on a local state of emergency or on emergency enactment procedures due to the COVID-19 emergency." Fla. Exec. Order 21-102, § 4.

Because of the nature of the various emergency orders that we have seen and the county's continued commitment to public mask-wearing, we are not convinced that this is the last that we will see of this issue. We conclude, then, that this case fits within the exception to the mootness doctrine, which is "for controversies that are capable of repetition, yet evading review." *Morris Publ'g Grp., LLC v. State*, 136 So. 3d 770, 776 (Fla. 1st DCA 2014) (internal quotation omitted); *cf. Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (noting that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case," so long as a petitioner remains "'under a constant threat' that government officials will use their power to reinstate the challenged restrictions" (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 75 (2020))).

privacy. He moved for an emergency temporary injunction, and after a hearing, the trial court denied the request. Green appeals that order denying the injunction. We reverse because the trial court did not apply the strict scrutiny that the supreme court specifically requires for this type of constitutional challenge. We remand so the trial court can apply the correct analysis, if there is any extant mask mandate for Green to challenge.

I.

In the typical case, to obtain a temporary injunction, a plaintiff would have to establish the following: (1) that irreparable harm is likely; (2) that an adequate remedy at law is unavailable; (3) that success on the merits is substantially likely; and (4) that the injunction would serve the public interest. *Naegele Outdoor Advert. Co. v. City of Jacksonville*, 659 So. 2d 1046, 1047 (Fla. 1995). The only matter for our review regarding an order on a temporary injunction would be whether the trial court abused its discretion when it considered these four elements and ruled on the request. *See Alachua County v. Lewis Oil Co.*, 516 So. 2d 1033, 1035 (Fla. 1st DCA 1987) ("Wide judicial discretion rests in the circuit court in granting or dissolving temporary injunctions, and an appellate court will not interfere where no abuse of discretion appears."). Also, we ordinarily would not consider *de novo* the required elements of a temporary injunction. Generally, we would neither consider anew the merits of a constitutional claim nor offer preliminary commentary on the possible legal viability of those claims. *See Smith v. Hous. Auth. of City of Daytona Beach*, 3 So. 2d 880, 881 (Fla. 1941) ("The obvious purpose of a temporary injunction is the maintenance of the subject matter in status quo pending the determination of the cause and, as the name implies, such an order is not conclusive and the provisions of it may be merged in, or dissolved by, the final decree.").

However, the supreme court has said that the analysis is entirely different when a temporary injunction motion is based on a privacy challenge. *See Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1256 (Fla. 2017). In *Gainesville Woman Care*, the court took us to task for not strictly adhering to its prior directives for handling such appeals. The supreme court in that case expressed again and again the sentiment that this court

"misapplied and misconstrued [supreme court] precedent by placing the initial evidentiary burden on [the plaintiffs] to prove a 'significant restriction' on Florida's constitutional right of privacy before subjecting [the challenged law] to strict scrutiny." *Id.* at 1245 (quoting in part *State v. Gainesville Woman Care, LLC*, 187 So. 3d 279, 282 (Fla. 1st DCA 2016)); *id.* at 1258 (concluding that this court "erred in admonishing the trial court for its failure to" make fact findings as to the "existence of a significant restriction on a woman's right to seek an abortion"); *see also id.* at 1246, 1255, 1259, 1260, 1261, 1262, 1263, 1264. We will not make that mistake again.

Rather, as we are told we must do, we will follow (and expect trial courts to do the same) what the supreme court made quite clear, repeatedly, in that case: The right of privacy is a "fundamental" one, expressly protected by the Florida Constitution, and *any* law that implicates it "is *presumptively* unconstitutional," such that it must be subject to strict scrutiny and justified as the least restrictive means to serve a compelling governmental interest. *Id.* at 1246 (emphasis supplied); *see also id.* at 1253, 1254, 1256, 1260, 1265; *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985) (identifying the "compelling state interest standard" as the "explicit standard to be applied" to a privacy claim, "in order to give proper force and effect to the amendment"). The supreme court in *Gainesville Woman Care* told us *multiple* times what this special approach means for the evidentiary burden at a temporary injunction hearing: A plaintiff does not bear a threshold evidentiary burden to establish that a law intrudes on his privacy right, and have it subjected to strict scrutiny, "*if it is evident on the face of the law* that it implicates this right." 210 So. 3d at 1255 (emphasis supplied); *see also id.* at 1245–46, 1256, 1258–59.

We read the supreme court's jurisprudence on the right to privacy to require that we make a single, threshold, *de novo* inquiry when considering a temporary injunction appeal—Does the challenged law implicate an individual's right of privacy? *Cf. Winfield*, 477 So. 2d at 547 (explaining that before strict scrutiny applies, there must be a "threshold" determination of whether "a reasonable expectation of privacy" exists). This question appears to be a legal one. *Cf. Gainesville Woman Care*, 210 So. 3d at 1256;

In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (determining as a legal matter that "Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy"); *Winfield*, 477 So. 2d at 548 (explaining that "it is within the discretion of [the supreme court] to decide the limitations and latitude afforded article I, section 23," and declaring, as a matter of state law, that an individual has a "legitimate expectation of privacy in financial institution records"). And that conclusion determines what type of proceeding the trial court must conduct when it considers a temporary-injunction motion.

If a challenged law implicates a privacy right, the burden shifts to the government "to prove that the law further[s] a compelling state interest in the least restrictive way." *Gainesville Woman Care*, 210 So. 3d at 1260. When the government fails to offer evidence to demonstrate a compelling state interest, the trial court then is absolved of having to make any finding to that effect. *See id.* at 1260–61. In this context, the supreme court also tells us that the remaining prongs of the inquiry collapse into the first prong. *See id.* at 1263–64 (holding that given the likelihood of the law's unconstitutional impingement on privacy, there could be no adequate remedy at law for its enforcement; the law's mere "enactment would lead to irreparable harm"; and enjoining the enforcement of a law encroaching a fundamental constitutional right would serve the public interest).

II.

A.

When we look at the proceeding before the trial court through the lens of *Gainesville Woman Care*, then, we must initially consider whether the trial court reached the right conclusion about whether the mask mandate implicated a privacy right. The trial court did not subject the mask mandate to strict-scrutiny analysis, because the court concluded at the threshold that there was no cognizable constitutional right in play. As the trial court put it in its order, "[t]here is no recognized constitutional right *not* to wear a facial covering in *public* locations or to expose other citizens of

the county to a contagious and potentially lethal virus during a declared pandemic emergency."

The trial court, though, did not assess Florida law to consider Green's asserted right of privacy. Indeed, it never discussed or even referenced the Florida Constitution's express guarantee of privacy. It instead relied heavily on a case from a federal appellate court that considered a challenge to Florida's motorcycle helmet law under the United States Constitution. *Cf. Picou v. Gillum*, 874 F.2d 1519, 1521–22 (11th Cir. 1989). In *Picou* the Eleventh Circuit stated that "there is no broad legal or constitutional 'right to be let alone' by government," which the trial court quoted in its order. *Id.* at 1521. The trial court later backtracked by seemingly acknowledging there is a right to be let alone, but it still concluded that the right "is no more precious than the corresponding right of his fellow citizens not to become infected by that person and potentially hospitalized."

We cannot reconcile this analysis of the trial court with the express privacy guarantee found in the Florida Constitution, as it has been characterized and interpreted by our supreme court. The trial court simply looked at the right asserted by Green too narrowly, relying on the wrong privacy jurisprudence. The right to be let alone by government does exist in Florida, as part of a right of privacy that our supreme court has declared to be fundamental. *See, e.g.*, *Winfield*, 477 So. 2d at 547. As we are about to explain, the supreme court has construed this fundamental right to be so broad as to include the complete freedom of a person to control his own body. Under this construction, a person reasonably can expect not to be forced by the government to put something on his own face against his will. Florida's constitutional right to privacy, then, necessarily is implicated by the nature of the county's mask mandate. This means the trial court had to apply the single-prong, strict-scrutiny mode of analysis set out in *Gainesville Woman Care*. Because of its erroneous treatment of Green's asserted right, the trial court did not do so. That is the error we correct by reversing the order currently on review.

B.

A person's "right to be let alone by other people" is "left largely to the law of the individual States" and is not contained in the Fourth Amendment of the U.S. Constitution. *Katz v. United States*, 389 U.S. 347, 350 (1967); *see also State v. Sarmiento*, 397 So. 2d 643, 645 (Fla. 1981) ("[T]he citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution."). Florida's citizens later secured for themselves a broader state right of privacy, including an explicit right to be let alone, by adding section 23 to the Florida Constitution's Declaration of Rights, which states in pertinent part as follows: "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." Art. I, § 23, Fla. Const. (emphasis supplied); *see Winfield*, 477 So. 2d at 548 (characterizing amendment as "an independent, freestanding constitutional provision which declares the fundamental right to privacy," and as one "intentionally phrased in strong terms"); *cf. id.* ("The drafters of the amendment rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion' in order to make the privacy right as strong as possible.").

The framers of this text included the phrase "the right to be let alone" for its historical and legal significance. *See id.* at 546 ("The concept of privacy or right to be let alone is deeply rooted in our heritage and is founded upon historical notions and federal constitutional expressions of ordered liberty."); *see also* Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 671, 732–733 & n. 343 (1978) (providing history of the text's development). The phrase dates back to the nineteenth century and Thomas Cooley's discussion of the logic behind a cause of action for assault. THOMAS COOLEY, A TREATISE ON THE LAW OF TORTS 29 (Callaghan & Co. 1879) ("The right to one's person may be said to be a right of complete immunity: to be let alone."). Justice Brandeis used the term in a dissent that addressed how he believed the Fourth Amendment protects against government intrusion upon an individual's right to privacy. *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (explaining how the Framers "sought to protect Americans in their

beliefs, their thoughts, their emotions and their sensations" by conferring "as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men"), *quoted in Winfield*, 477 So. 2d at 546.

The phrase referred originally to a right to privacy that had been developing in the common law. Around the time of Cooley's treatise, the U.S. Supreme Court observed the following:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by *clear and unquestionable authority of law*.

Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (emphasis supplied). The Supreme Court later construed the U.S. Constitution to include a right to "bodily integrity." *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990); *cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926 (1992) (Blackmun, J., concurring) ("The Court today reaffirms the long recognized rights of privacy and bodily integrity.").

That is the Supreme Court's gloss on the non-textual right that it has deemed to flow *implicitly* out of the U.S. Constitution. *See Gainesville Woman Care*, 210 So. 3d at 1253. Our supreme court reads Florida's *explicit* right to privacy even *more* broadly. *Winfield*, 477 So. 2d at 548. It has said, "[T]he amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *In re T.W.*, 551 So. 2d at 1192.

Although the constitutional text is silent on the point, the supreme court has explained repeatedly that within the right to be let alone is "a fundamental right to the *sole control* of his or her person." *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990) (emphasis supplied) (quoting *Schloendorff v. Soc'y of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .")); *Burton v. State*, 49 So. 3d 263, 265 (Fla. 1st DCA 2010). This right ostensibly covers "an individual's

control over or the autonomy of the intimacies of personal identity" and a "physical and psychological zone within which an individual has the right to be free from intrusion or coercion, whether by government or by society at large." *Browning*, 568 So. 2d at 10 (quotations and citations omitted). The supreme court has applied the principle to state that a person cannot be forced to receive unwanted medical treatment, *Id.* 568 at 11–12; or be forced to devote her body to the carrying of a child to term, *see In re T.W.*, 551 So. 2d at 1196; *cf. Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 636 (Fla. 1980) (characterizing the right of privacy as also protecting one's right to "decisional autonomy" in "various types of important personal" matters).

As defined by the supreme court, article I, section 23's guarantee of bodily and personal inviolability—which we are asked to follow—must include the inviolability of something so intimate as one's own face. A person then reasonably can expect to be free from governmental coercion regarding what he puts on it. *Cf. State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116 (Fla. 2006) ("Under a free government, at least, the free citizen's first and greatest right, which underlies all others [is] the right to the inviolability of his person; in other words, the right to himself . . . ." (quoting *Chambers v. Nottebaum*, 96 So. 2d 716, 719 (Fla. 3d DCA 1957))); *id.* at 117; *Gainesville Woman Care*, 210 So. 3d at 1262 (reiterating well-understood "concepts of bodily autonomy and integrity" (quotation and citation omitted)).

III.

We return to the government order that is at issue in this appeal. Alachua County's commission chairman had been issuing and reissuing emergency mask mandates for a year—since May 2020, in fact. The edicts commanded every person within the county's jurisdiction to wear a face-covering that met governmental specifications. They ordered the following, under penalty of fine (and enforced by county-induced informants):

> Persons working in or visiting grocery stores, restaurants, bars, dance halls, nightclubs, in-store retail establishments, pharmacies, public transit vehicles, vehicles for hire, along with locations inside or outside,

> where social distancing measures are not possible shall appropriately wear facial coverings as defined by the CDC, in a manner which covers the mouth and orifices of the nose.

Alachua Cnty. Emergency Order 2020-50, ¶ 3 (Oct. 9, 2020).[3] This mask must have "snugly" covered a person's nose and mouth, and it must have been "secured with ties or ear loops." *Id.*; *see also* Alachua Cnty. Emergency Order 2020-21, ¶ 8 (May 2, 2020).

We note that the county chairman's dictate did not just force a person to wear a mask in public. The mask mandate potentially reached into the privacy of one's home.[4] Moreover, the signage proposed by the county to help with enforcement, wherein residents were encouraged to report anyone they saw violating the mask mandate to the government, added to the sense of invasiveness flowing from this effort by the county.

Based on what the supreme court has told us about the scope of article I, section 23, Green (and anyone else in Alachua County) reasonably could expect autonomy over his body, including his face, which means that he was correct to claim an entitlement to be let alone and free from intrusion by Alachua County's commission chairman. The mask mandate, then, implicated the right of privacy. According to *Gainesville Woman Care*, the mask mandate was *presumptively* unconstitutional as a result.[5] Because the trial court reached the opposite legal conclusion, it did not subject the mask mandate to the strict scrutiny analysis that

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[3] Alachua County's commission chairman later superseded this directive with another one, Emergency Order 2021-13, but that order contained the same mandate.

[4] Despite this extraordinarily broad language, the trial court characterized the mandate as one applicable "in limited circumstances."

[5] *But see Machovec v. Palm Beach County*, 310 So. 3d 941 (Fla. 4th DCA 2021) (reaching a different legal conclusion). We certify conflict with the Fourth District on this issue.

Gainesville Woman Care requires for consideration of a temporary injunction motion when privacy is implicated. It also reached the other prongs that would apply to a typical temporary-injunction motion but not to one based on a privacy claim—consideration of an adequate legal remedy, irreparable harm, and the public and private interests at stake. The trial court's incorrect legal conclusion about the right implicated by the mask mandate in turn spoiled the remainder of the temporary injunction proceeding. For this reason, we reverse the trial court's denial of the temporary injunction. We remand for a new proceeding that presumes the unconstitutionality of the mask mandate, in the event there still is some mask mandate that remains to be litigated.[6]

In any additional injunction hearing regarding a mask mandate in this case, the single question that the trial court must answer is the likelihood that the mask mandate would survive strict scrutiny. If the trial court were to conclude from the county's evidence that there is a substantial likelihood the mask mandate would *not* survive that scrutiny, then it would have to enjoin the mask mandate. *See Gainesville Woman Care*, 210 So. 3d at 1263–64 (holding that given the likelihood of the law's unconstitutional impingement on privacy, there could be no adequate remedy at law for its enforcement, and the law's mere "enactment would lead to irreparable harm," and enjoining the enforcement of a law that encroaches on a fundamental constitutional right presumptively "would serve the public interest").

If the trial court does engage in this strict scrutiny inquiry, when the trial court analyzes whether the mask mandate is the least restrictive means to achieve a compelling governmental interest, a relevant consideration should be the statutory scheme established by the Legislature for the management of a public health emergency involving an infectious disease. *See* § 381.00315, Fla. Stat. The Legislature gave the state surgeon general, as the

[6] To be clear, we are not saying that the mask mandate in fact was unconstitutional. If, however, Green persists in his challenge to some new mask mandate that the county adopts, the trial court would have to start its analysis with this presumption of unconstitutionality.

State's health officer, the authority to "protect the public health" by, among other steps, ordering "an individual to be examined, tested, vaccinated, treated, isolated, or quarantined for communicable diseases that have significant morbidity or mortality and present a severe danger to public health"; isolating or quarantining someone who refuses; and forcing an individual to be vaccinated or treated if "there is no practical method to isolate or quarantine the individual." *Id. at* (1)(c)4.; *see also id.* at (4) (giving the Department of Health "the authority to declare, enforce, modify, and abolish the isolation and quarantine of persons, animals, and premises as the circumstances indicate for controlling communicable diseases"); *id.* at (5) (giving the Department of Health rulemaking authority "to specify the conditions and procedures for imposing and releasing an isolation or quarantine"). The trial court's analysis should address how, if at all, the mandate fits within this state scheme for managing a declared public health emergency. *Cf.* § 252.46, Fla. Stat. (authorizing counties to make orders and rules "as are necessary for emergency management purposes," but that "are not inconsistent with any order or rules adopted . . . by any state agency exercising a power delegated to it by the Governor or the division [of emergency management]").

It would behoove the trial court also to consider that while article I, section 23 "was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual," *Fla. Bd. of Bar Exam'rs re Applicant*, 443 So. 2d 71, 74 (Fla. 1983), "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). And there is this warning from William Pitt the Younger, roughly paraphrasing a similar sentiment in John Milton's *Paradise Lost*: "Necessity is the plea for every infringement of human freedom."

REVERSED and REMANDED for further proceedings. CONFLICT CERTIFIED.

LONG, J., concurs with opinion, in which TANENBAUM, J., joins.

LEWIS, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

LONG, J., concurring.

I concur in Judge Tanenbaum's opinion because I see no other way to faithfully apply *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017).

I write separately to address an important and difficult question implicated by this case: Whether the constitutional right to be let alone is justiciable and, if so, to what extent. This inquiry is, at its core, a function of the separation of powers. And I question whether our current article I, section 23 jurisprudence can sufficiently protect against the grave risk of judicial intrusion into the powers of other constitutional offices.

Our constitution establishes and builds out the branches and functions of government. The separation of powers is found in this basic structural make-up. But it is further emphasized in its own article II provision: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. Constitutional officers are bound to fill out completely, and to confine themselves within, their respective constitutionally limited roles.

The constitution also contains a declaration of rights. They are the people's rights. They are not protections from a particular branch. Instead, they apply to the whole of government. And every constitutional officer is bound to their terms. Every judge, legislator, and governor; as well as every local officer—county commissioner, sheriff, and clerk alike.

In this way, our political system depends on our elected representatives to evaluate and restrain their own behavior to the terms of the constitution. And the people hold them accountable. If you do not like what your county commissioners are doing, then you can elect new ones. This is the primary mechanism for the vindication of the people's rights—the ballot box.

But here, Green takes a different approach. He has asked the judiciary to intervene and affirmatively prevent the county's action. This extraordinary remedy pressures the constitutional structure and must be handled with great care. To prevent violating the separation of powers, courts strive to act only when they possess objective criteria to avoid judicial intrusion into the powers of other constitutional offices. *See Coleman v. Miller*, 307 U.S. 433, 454–55 (1939) (when addressing justiciability in the context of the separation of powers, courts should consider whether they possess "satisfactory criteria for a judicial determination").

Green asks the courts to enjoin the action of Alachua County, arguing the county's mask mandate violates article I, section 23. That provision reads simply: "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." Art. I, § 23, Fla. Const. No doubt this language reflects a core principle of the republic. It is the free citizen's explicit constitutional *protection from government*, and his first and greatest right: "the right to the inviolability of his person; in other words, the right to himself." *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116 (Fla. 2006) (quoting *Chambers v. Nottebaum*, 96 So. 2d 716, 719 (Fla. 3d DCA 1957)).

But the face of article I, section 23 contains *no* limiting principles. This may emphasize the importance of the provision, but it also affects its justiciability. The breadth of the language does not lend itself to objective judicial application because "[p]ractically any law interferes in some manner with someone's right of privacy." *Stall v. State*, 570 So. 2d 257, 261 (Fla. 1990) (quoting *In re T.W.,* 551 So. 2d 1186, 1204 (Fla. 1989) (Grimes, J., concurring in part, dissenting in part)). And the great "difficulty

lies in deciding the proper balance between this right and the legitimate interest of the state." *Id.*

Acknowledging the importance and difficulty of this balance leads ultimately to the question of responsibility—Who does the balancing? But in answering this foundational question, the supreme court has pointed in two different directions. On the one hand the court has said, "it is within the discretion of this Court to decide the limitations and latitude afforded article I, section 23." *Winfield v. Div. of Pari–Mutuel Wagering, Dep't of Bus. Regul.*, 477 So. 2d 544, 548 (Fla. 1985). On the other hand, it has recognized that "[a]s the representative of the people, the legislature is charged with the responsibility of deciding where to draw the line." *Stall*, 570 So. 2d at 261. Apparently, the legislature draws the line, but the courts decide if it was drawn in the right place.

How then are we to determine when the representatives of the people have crossed the line? As Judge Tanenbaum points out in his opinion, we can find some guardrails in the historical understanding of the right to be let alone. That is an important inquiry, but, because the history suggests sweeping generalized principles, the results are of limited utility. Armed with our historical knowledge, we are then told to ask if it is *reasonable* for the plaintiff to assert that the government should stay out of this aspect of his life. *Winfield*, 477 So 2d at 547 (holding that the evaluation of claims under article I, section 23 first requires the courts to determine whether the challenged government action implicates "a *reasonable* expectation of privacy") (emphasis added). Ironically, this, our only analytical tool, employs language that was rejected by the drafters of the provision. *Id.* at 548 ("The drafters of the amendment rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion'").

Presumably, courts inserted the term *reasonable* because the provision lacks meaningful parameters. But even the courts' unilateral addition of this governing principle struggles to right the ship.

The corollary of whether the plaintiff has a reasonable expectation of privacy is whether the government's intrusion is reasonable. This kind of judicial review begins to resemble

untethered oversight of otherwise lawful government actions. Extraordinary power, of questionable constitutional footing, is exercised in deciding when a county commission, governor, or legislature is acting reasonably.

This kind of reasonableness inquiry differs in important ways from other areas of the law. For example, our search and seizure jurisprudence uses similar language, but it relies on a constitutional provision that expressly defines itself in terms of reasonableness. Art. I, § 12, Fla. Const. (protecting the people "against *unreasonable* searches and seizures") (emphasis added). And our search and seizure reasonableness inquiry is used *within* the branch, to review past conduct, and determine whether a particular piece of evidence will be permitted in a judicial proceeding. This markedly differs from the article I, section 23 inquiry that has been used to reach out of the courthouse, into another branch of government, and affirmatively proscribe another's future behavior. All of this without a clear directive or objective constitutional provision. It is difficult to square this approach with article II, section 3's fundamental and explicit commitment to the separation of powers.

Proponents respond that even if it is untethered oversight, it is what article I, section 23 requires. For decades courts have busied themselves by mining state and federal constitutions for hidden rights that their insufficiently industrious predecessors were unable to find. And then, after making their discoveries, have acted against the other branches demanding compliance. And this approach to article I, section 23 treats its language as an explicit adoption of what had been an extra-constitutional judicial practice—the constitutionalization of judicial oversight of government. But I question whether the language the people adopted in section 23 casts aside such fundamental tenets of our form of government.

Instead, a plaintiff pursuing a constitutional challenge to a government action under article I, section 23 should bear a burden to present a manageable standard. *See, e.g.*, *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 135 (Fla. 2019) (requiring petitioners' to "present the courts with [a] roadmap by which to avoid intruding into the powers of the other branches of

government"); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019) (holding that plaintiffs in constitutional challenge failed to provide a judicially discernable standard that is limited and precise enough to avoid political questions). Anything less "'would necessarily' require the courts 'to subjectively evaluate the Legislature's value judgements.'" *Citizens for Strong Schs.*, 262 So. 3d at 137 (quoting *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 406–07 (Fla. 1996)).

Not only would this approach lead to a different result in this case, it would also recognize and respect the courts' limited role in our constitutional republic. Ours is a system that puts the power to make the law in the hands of the people's elected representatives. *See, e.g.*, *Stall*, 570 So. 2d at 261 (Fla. 1990) (recognizing that it is the legislature's responsibility, as the representatives of the people, to decide the scope of article I, section 23). And rather than handing over their political disputes to judges, it would require litigants to develop strategies that honor our constitutional structure.

Our constitution, quite intentionally, channels political disputes to the elected branches. The power to make policy is vested in the legislative branch, which is directly accountable to the people. The judicial branch is charged with applying the law for the purpose of deciding disputes. These distinct constitutional tasks require different things. The judiciary demands legal competence and impartiality. Those traits do not require the same level of direct accountability necessary for a policymaking branch. This constitutional structure works only if the courts do not stray beyond those judicial acts that require only legal competence and impartiality. Our current article I, section 23 jurisprudence rests uncomfortably on the personal dispositions of judges. Rather than looking to legal competence and impartiality, the analysis inevitably veers into judges' notions of appropriate government intrusion. This case is a reflection of that problem. Both the majority and dissenting opinions spend much of their time struggling with whether this particular government intrusion is reasonable. That struggle speaks to the failings of our current jurisprudence and what it requires of judges.

The late Justice Scalia once noted that "[w]e have become addicted to abstract moralizing." Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* 262–63 (Christopher J. Scalia & Edward Whelan eds., 2017). It can be relatively harmless in the political spheres, but "abstract moralizing is a dangerous practice when it is . . . *judicially enforced*." *Id*. It presents great dangers because an "inspiring sentiment" in a governing document like "[e]veryone has a right to respect for his private . . . life" provides nothing from which judges can objectively determine what "respect for private life consists of." *Id.* It is this very danger that the constitutional structure protects against through the separation of powers.

Our system of government demands that decisions on disputed policy questions face the rigors of the political process. A courthouse, in a quiet conference room closed to the public, should not be the place we define the parameters of the people's freedoms.

LEWIS, J., dissenting.

I disagree with the majority's finding that this case is not moot, as well as with its reversal of the trial court's denial of Appellant's emergency motion for temporary injunction. Therefore, I respectfully dissent.

FACTS AND PROCEDURAL BACKGROUND

On May 4, 2020, the Board of County Commissioners of Alachua County published an emergency order in response to the COVID-19 pandemic. Therein, the Board cited in part to Governor DeSantis's declaration of a public health emergency in Executive Order 20-52, to the national emergency declaration made by former President Trump, and to the recommendations made by the Center for Disease Control and the Florida Department of Health regarding community mitigation strategies, including the use of face coverings. The emergency order set forth in part that "[p]ersons working in or visiting grocery stores, restaurants, retail facilities, pharmacies, construction sites, public transit vehicles, vehicles for hire, along with locations where social distancing measures are not possible shall wear facial coverings as defined by the CDC." The order added that "[a] face covering shall not be

required for children under six, persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medical problem" and that "[f]ace masks do not have to be worn while eating or drinking."

Appellant filed a complaint, seeking declaratory and temporary injunctive relief against Alachua County, arguing in part that the mask mandate violated his right to privacy under the Florida Constitution. Appellant also filed an emergency motion for temporary injunction, arguing that he would suffer irreparable harm because the mask mandate endangered his fundamental constitutional rights, that no remedy at law existed to adequately address his injuries, that he had a substantial likelihood of success on the merits, and that granting a temporary injunction would serve the public interest.

Following a hearing on Appellant's emergency motion and a review of the parties' legal arguments, the evidence presented at the hearing, and the record, the trial court entered an order finding that Appellant had failed to establish a prima facie basis for a temporary injunction. The trial court determined that Appellant had not shown (1) a likelihood of success on the merits, (2) a lack of adequate remedy at law, (3) a likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest. With regard to the four elements, the trial court stated in pertinent part as follows:

> *1. Substantial Likelihood of Success on the Merits*
>
> . . . .
>
> Here, the Plaintiff fails to show a prima facie, clear legal right to the relief requested. There is no recognized constitutional right *not* to wear a facial covering in *public* locations or to expose other citizens of the county to a contagious and potentially lethal virus during a declared pandemic emergency. Article I, § 23, Florida Constitution, "was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual." *Stall v. State*, 570 So. 2d 257, 262 (Fla. 1990) . . . .

. . . .

This Court additionally finds that the facial covering requirement contained in the County's emergency order is neither a medical treatment, compelled or otherwise, nor compelled speech. The plaintiff cites to no precedent which directly supports these arguments and this Court declines to adopt the interpretation put forth by the Plaintiff.

Because the facial covering requirement does not violate any of the constitutional rights asserted by the Plaintiff, strict scrutiny does not apply in this case. There is no recognized right to a reasonable expectation to privacy in a public location, particularly as that right pertains to facial coverings. In addition, the emergency rule only requires the use of a facial covering under limited circumstances where a person is coming into contact with the public in a closed setting, such as public transit and a business where social distancing measures are not possible or are difficult to implement. The requirement to wear a facial covering during the limited circumstances set forth in the ordinance is a minimal inconvenience; and, its benefits to the public in potentially reducing the spread of COVID-19 outweigh any inconvenience. Furthermore, pursuant to section 252.38(3)(a)5, Florida Statutes, the County's emergency order is subject to review every 7 days. Thus, the facial covering requirement is not permanent and is subject to removal by the BOCC at each weekly review of the emergency order.[1]

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[1] By virtue of Alachua County's Emergency Order 2021-13, the mask mandate was set to expire on May 12, 2021. We are authorized to take judicial notice of the order pursuant to section 90.202(10), Florida Statutes.

2. Lack of an Adequate Remedy at Law

. . . Here, the Plaintiff has failed to assert any actual damage which could not be remedied by law were the facial covering requirement found to be unconstitutional. Although the Plaintiff asserts that his rights are being violated, as previously noted, there is no recognized constitutional right to privacy, under either the U.S. Constitution or the Florida Constitution, implicated here; nor is there forced medical treatment or compelled speech. Even if the mask requirement were to ultimately be found unconstitutional, it is a *de minimis* infringement on the plaintiff's public interactions. Although the county's emergency order does not mandate that an individual purchase masks for themselves or for their employees, if they are a business, any such cost paid by an individual or business is capable of being remedied by monetary compensation. Furthermore, as noted in the County's response, the Plaintiff could file a federal § 1983 claim seeking damages.

3. Likelihood of Irreparable Harm Absent the Entry of an Injunction

. . . .

Here, the Plaintiff fails to allege a reasonable probability that a *real injury* will occur unless the temporary injunction is issued. The wearing of a face covering in public under the limited circumstances contained in the emergency order will not, in any way, alter the Plaintiff's physical person or result in permanent disfigurement. Thus, a temporary injunction is not appropriate.

4. Injunctive Relief Will Serve the Public Interest

. . . Here, there is a global pandemic involving COVID-19, a virus which the CDC and others advise is spread through airborne transmission and is spread by asymptomatic individuals. Multiple sources relied upon

> by the County reflect that mitigation is dependent upon the use of social distancing and personal protection equipment, such as face masks/coverings. The County's need to take measures to control the spread of COVID-19 clearly outweighs the Plaintiff's private interest in not wearing a mask in the limited circumstances required by the county's emergency order; and, an injunction in this situation would disserve the public interest.

This appeal followed.

ANALYSIS

Appellant argues on appeal that the trial court misapplied Florida's constitutional right to privacy in denying his emergency motion for a temporary injunction. The majority finds that this case is not moot, and it reverses on the merits and remands for further proceedings. For the reasons that follow, I disagree.

This Case is Moot

"An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist. A moot case generally will be dismissed." *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992) (internal citations omitted). As we have explained, it is not this Court's function to give opinions on moot questions or to declare principles or rules of law that cannot affect the matter at issue. *Roe v. Dep't of Health*, 312 So. 3d 175, 177 (Fla. 1st DCA 2021); *see also Lund v. Dep't of Health*, 708 So. 2d 645, 646 (Fla. 1st DCA 1998) ("The general rule in Florida is that a case on appeal becomes moot when a change in circumstances occurs before an appellate court's decision, thereby making it impossible for the court to provide effectual relief.").

In *Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 465 (Fla. 1st DCA 2017), this Court found that the issue of whether the ordinances at issue were lawful when enacted was moot because the legislature rendered the ordinances null and void. In *Carchio v. City of Fort Lauderdale*, 755 So. 2d 668, 669

(Fla. 4th DCA 1999), the Fourth District declined to reverse and direct the entry of an injunction against the enforcement of a 1996 ordinance as an invalid total ban on female nudity because the ordinance had since been amended by a 1998 ordinance that changed the definition of prohibited nudity. The Fourth District explained that "[b]ecause the 1998 amendment redefines the prohibited act to something less than a total ban of nudity it renders moot plaintiffs' claim on the theory of a total ban to an injunction against its enforcement as well as the question raised as to its constitutionality." *Id.* at 670; *see also 421 Northlake Blvd. Corp. v. Vill. of N. Palm Beach*, 753 So. 2d 754, 756 (Fla. 4th DCA 2000) ("Initially, we hold that the Village's 1998 amendment of the ordinance renders appellant's challenge to the 1996 version of section 45–20 moot."); *Freni v. Collier Cnty.*, 573 So. 2d 1054, 1055 (Fla. 2d DCA 1991) (concluding that the issue of whether the trial court erred in denying the motion for temporary injunction was moot where the appellants sought to enjoin a referendum that subsequently resulted in a favorable vote, and affirming the trial court's order denying the temporary injunction as being moot).

As in the foregoing cases where the challenges to the ordinances at issue were rendered moot by a subsequent action, Appellant's challenge to Alachua County's mask mandate was rendered moot on May 3, 2021, by virtue of Executive Order 21-102,[2] which provides in part:

> Section 1. In order to mitigate the adverse and unintended consequences of the COVID-19 emergency and to accelerate the State's recovery, **all local COVID-19 restrictions and mandates on individuals and businesses are hereby suspended**.
>
> Section 2. This order eliminates and supersedes **any existing emergency order or ordinance** issued by a county or municipality that imposes restrictions or mandates upon businesses or individuals due to the COVID-19 emergency.

[2] We are authorized to take judicial notice of executive orders pursuant to section 90.202(5), Florida Statutes.

> Section 3. For the remaining duration of the state of emergency initiated by Executive Order 20-52, **no county or municipality may renew or enact an emergency order or ordinance, using a local state of emergency or using emergency enactment procedures** under Chapters 125, 252, or 166, Florida Statutes, **that imposes restrictions or mandates upon businesses or individuals due to the COVID-19 emergency**.
>
> Section 4. Nothing herein prohibits a political subdivision of the State from enacting ordinances pursuant to regular enactment procedures to protect the health, safety, and welfare of its population. Only orders and ordinances within the scope of Section 1 based on a local state of emergency or on emergency enactment procedures due to the COVID-19 emergency are hereby eliminated and preempted.

(Emphasis added).

Executive Order 21-102 eliminated all existing Florida emergency orders or ordinances dealing with COVID-19, including of course the one at issue on appeal. As the majority acknowledges, Appellant has filed a suggestion of mootness in this appeal. The effect of the majority's disposition could lead to the trial court's constitutional analysis of a non-existent order. The trial court could not grant Appellant's requested relief of an injunction enjoining the County from enforcing the mask mandate contained in its emergency order because that order is no longer in effect, and so there is no enforcement to be enjoined.

I recognize that an otherwise moot case will not be dismissed where (1) the questions raised are of great public importance, (2) the questions raised are likely to recur, or (3) collateral legal consequences that affect the rights of a party flow from the issue. *Godwin*, 593 So. 2d at 212; *see also Casiano v. State*, 310 So. 3d 910, 913 (Fla. 2021). The majority finds that this case falls under the second exception; specifically, that this case presents a question that is capable of repetition, yet evading review. In

addressing this issue, we must consider whether local governments are "likely" to enact mask mandates through regular ordinance-enacting procedures or, in other words, whether there is a reasonable expectation that Appellant will be subjected to the same action again. *See Waters v. Dep't of Corrs.*, 306 So. 3d 1264, 1266 (Fla. 1st DCA 2020) (noting that the exception to the mootness doctrine applies when the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration and where there is a reasonable expectation that the same complaining party would be subjected to the same action again). While it is not unimaginable that Alachua County may attempt to enact a mask mandate through regular enactment procedures, such an action is unlikely. Indeed, the mask mandate was set to expire on May 12, 2021, by virtue of the County's Emergency Order 2021-13. Because it is unlikely that Appellant will be under "constant threat" that the county will enact the mask mandate through a regularly enacted ordinance, the exception to the mootness doctrine is not applicable in this case. Accordingly, I would dismiss the case as moot. Even if the case were not moot, Appellant would not be entitled to relief for the reasons that follow.

The Right to Privacy is not Implicated

"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." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258 (Fla. 2017) (internal citation omitted). The majority correctly states that the right to be let alone by the government exists in Florida. *See* Art. I, § 23, Fla. Const. However, the Florida Supreme Court has made clear that the right "was not intended to be a guarantee against all intrusion into the life of an individual." *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995). In order for the right of privacy to be implicated, and for the attendant strict scrutiny standard to apply, "a reasonable expectation of privacy must exist." *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985). Florida's privacy right "is circumscribed and limited by the circumstances in which it is asserted." *Kurtz*, 653 So. 2d at 1028. In determining whether an individual has a

legitimate expectation of privacy, "all the circumstances" must be considered, "especially objective manifestations of that expectation." *Id.*; *see also Fla. Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71, 74 (Fla. 1983) ("The extent of his privacy right, however, must be considered in the context in which it is asserted and may not be considered wholly independent of those circumstances.").

The majority's conclusion that "a person reasonably can expect not to be forced by the government to put something on his own face against his will" completely fails to consider the circumstances in which the right is asserted, *i.e.*, that the mask mandate was Alachua County's response to "a clear and present threat to the lives, health, welfare, and safety" of its people posed by a contagious, airborne virus during a global pandemic. The majority's decision to ignore the circumstances in which Appellant asserts the right of privacy renders its analysis fatally flawed. The conclusion that the right of privacy is not implicated in this case does not authorize the government to force a person to wear a facial covering for no reason at all or for any reason other than to curtail the spread of a potentially deadly virus during a global pandemic.

Of further significance is that the Florida Constitution provides for "the right to be let alone and free from government intrusion into **the person's private life**." Art. I, § 23, Fla. Const. (emphasis added). The County's mask mandate does not require a person to wear a mask in his or her own home; rather, it requires the use of a facial covering only when a person might come into contact with members of the public in order to reduce the spread of COVID-19. The fact that the mask mandate does not infringe on a person's private or home life further indicates that it does not implicate Florida's right of privacy. Although the majority makes the conclusory statement that the mask mandate "potentially reached into the privacy of one's home," that supposition is not supported by the language of the mandate. Additionally, Appellant is not raising an as-applied constitutional challenge, nor is he arguing that the mask mandate reaches into his home.

Moreover, the majority's conclusion that the mask mandate implicates the right to privacy is based on its conclusory and faulty

reasoning that because Florida's right of privacy guarantees the freedom of a person to control his own body, a person can reasonably expect not to be forced to put something on his face. But the majority does not explain how requiring a person to wear a mask when interacting with the public during a pandemic is the equivalent of controlling the person's body. In fact, the case law the majority relies upon is distinguishable and its application to this case would be far-fetched.

The majority primarily relies on *Gainesville Woman Care, LLC*, where the supreme court held that the Mandatory Delay Law—which "impedes a woman's ability to terminate her pregnancy for at least an additional twenty-four hours and requires the woman to make a second, medically unnecessary trip, which adds additional costs and delay"—infringed on the right to privacy and "turn[ed] informed consent on its head, placing the State squarely between a woman who has already made her decision to terminate her pregnancy and her doctor who has decided that the procedure is appropriate for his or her patient." 210 So. 3d at 1246, 1258 (explaining the potential consequences of such an unnecessary delay, including the possibility that it might push women past the gestational limit for medication abortion and, thus, force them to undergo a riskier surgical abortion). Because the challenged law implicated Florida's right of privacy, strict scrutiny applied. *Id.* at 1254. The court explained that its precedent establishes that "Florida's constitutional right of privacy encompasses a woman's right to choose to end her pregnancy," and "[t]his right would have little substance if it did not also include the woman's right to effectuate her decision to end her pregnancy." *Id.* at 1253–54. It would be irrational, and downright repugnant, to liken a woman's fundamental right to choose to end her pregnancy or an unnecessary interference with that right, which is indisputably a deeply personal decision and involves bodily integrity and personal autonomy, to a requirement that a person wear a facial covering when interacting with members of the public during a pandemic so as to curtail the spread of a contagious virus.

In *In re Guardianship of Browning*, the supreme court concluded that the constitutional right of privacy includes the right to choose or refuse medical treatment and extends to all relevant decisions concerning one's health for competent and

incompetent persons alike and that the right may be exercised by proxies or surrogates. 568 So. 2d 4, 11, 13 (Fla. 1990). Accordingly, the court answered in the affirmative the certified question of "[w]hether the guardian of a patient who is incompetent but not in a permanent vegetative state and who suffers from an incurable, but not terminal condition, may exercise the patient's right of self-determination to forego sustenance provided artificially by a nasogastric tube," and explained that "[t]he right of privacy requires that we must safeguard an individual's right to chart his or her own medical course in the event of later incapacity." *Id.* at 7–8, 13. Curiously, the majority relies on *Browning* in support of its conclusion, yet it does not find that the mask mandate is the equivalent of compelled medical treatment—a conclusion that would, indeed, be both bizarre and unsupported by case law.

As the Fourth District recently explained,

> requiring facial coverings to be worn in public is not primarily directed at treating a medical condition of the person wearing the mask/shield. Instead, requiring individuals to cover their nose and mouth while out in public is intended to prevent the transmission from the wearer of the facial covering to others (with a secondary benefit being protection of the mask wearer). Requiring facial coverings in public settings is akin to the State's prohibiting individuals from smoking in enclosed indoor workplaces.

Machovec v. Palm Beach Cnty., 310 So. 3d 941, 946 (Fla. 4th DCA 2021). Accordingly, the Fourth District concluded that the mask mandate did not implicate the constitutional right to choose or refuse medical treatment, and it held that the county's mask mandate did not implicate the right of privacy and, thus, the trial court correctly applied the rational basis standard of review to the ordinance in denying the emergency motion for temporary

injunction. *Id.* at 944, 947.[3] Unlike the majority, I agree with the Fourth District.

Nor is the majority's conclusion supported by *Winfield*, where the supreme court found that "the law in the state of Florida recognizes an individual's legitimate expectation of privacy in financial institution records"; accordingly, the right of privacy was implicated and the strict scrutiny standard applied to the question of whether the Division could subpoena a citizen's bank records without notice. 477 So. 2d at 547–48. The court noted that the United States Supreme Court has held that the right of privacy "protects the decision-making or autonomy zone of privacy interests of the individual" in "matters concerning marriage, procreation, contraception, family relationships and child rearing, and education," as well as "one's interest in avoiding the public disclosure of personal matters." *Id.* at 546. None of those privacy interests are at issue here, and the mask mandate does not bear even a remote resemblance to those important and limited privacy rights. The majority does not draw any parallels, and there are none, between a person's legitimate expectation of privacy in his or her own financial records and a person's interest in not wearing a mask during a pandemic for the protection of others (and him/herself).

While *Machovec* is the only Florida appellate court opinion on point, there are cases more instructive than the ones the majority relies upon. For instance, in *Kurtz*, the Florida Supreme Court answered in the negative the certified question of whether article I, section 23 prohibits a municipality from requiring job applicants to refrain from using tobacco for one year before applying for, and as a condition for being considered for, employment, even where the use of tobacco is not related to the job function. 653 So. 2d at 1026. The regulation was based on the City's policy decision to reduce costs and increase productivity by eliminating a substantial

[3] The appellants have filed a notice to invoke the discretionary jurisdiction of the Florida Supreme Court. *See Machovec v. Palm Beach Cnty.*, SC21–254 (Fla. 2021).

number of smokers from its workforce and it required job applicants to sign an affidavit stating that they had not used tobacco or tobacco products for at least one year immediately before their application. *Id.* at 1026–27 (noting that when the appellee stated during the job interview that she was a smoker and could not truthfully sign the affidavit, she was informed that she would not be considered for employment until she was smoke-free for a year). The court concluded that Florida's right of privacy was not implicated because individuals do not have a reasonable expectation of privacy in the disclosure of their smoking habits given that they have to reveal whether they smoke in many aspects of life. *Id.* at 1026, 1028. Nor did the regulation violate the federal constitution's privacy provision, which "extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children"; "[c]learly, the 'right to smoke' is not included within the penumbra of fundamental rights protected under that provision." *Id.* at 1028–29.

The regulation in *Kurtz* arguably involved a greater government intrusion, yet a lesser government interest than the mask mandate challenged here. The City's regulation required an applicant to completely refrain from smoking for one year before applying for employment. The targeted conduct involved an addiction that is difficult to stop and applied to the applicant's public and private life alike. The County's mask mandate simply requires a person to wear a facial covering when in public. The City's regulation was intended to benefit the City for its purpose was to reduce the additional costs the City incurred for smoking employees and to increase productivity in the workplace. The purpose of the County's mask mandate, by contrast, was to protect people from COVID-19, a rapidly spreading virus that may result in serious illness or death and had caused the declaration of a state of emergency.

In *State v. Eitel*, 227 So. 2d 489, 490 (Fla. 1969), the Florida Supreme Court set out to answer the question of whether a motorcyclist has "a constitutional right to ride the highways without the protective helmet and goggles or face mask the legislature says he must wear," and it upheld the law. The court "approve[d] without hesitation the requirement of protection for

the eyes" because it served to protect others to whom a collision between a motorcyclist's naked eye and dirt may pose a menace, and the court ultimately approved the helmet requirement that was intended to protect the cyclist because "society has an interest in the preservation of the life of the individual for his own sake." *Id.* at 490–91. The court held that "the legislature may impose a minimal inconvenience which affords effective protection against a significant possibility of grave or fatal injury," noting that "[t]he inconvenience to the person will vary, but the danger is real and the protection reasonably adapted to its avoidance." *Id.* at 491. In response to the cyclists' claim that the law infringed on their right of privacy, the court stated:

> But Mill said there that 'no person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them.' If he falls we cannot leave him lying in the road. The legislature may constitutionally conclude that the cyclist's right to be let alone is no more precious than the corresponding right of ambulance drivers, nurses and neurosurgeons.

Id.; *see also Hamm v. State*, 387 So. 2d 946, 947 (Fla. 1980) ("We expressly upheld the constitutionality of section 316.211 in *State v. Eitel*, 227 So.2d 489 (Fla.1969), finding that the statute had a rational, valid purpose, and could withstand attacks of both vagueness and unconstitutional delegation."); *see also Picou v. Gillum*, 874 F.2d 1519, 1520–22 (11th Cir. 1989) (holding that Florida's mandatory motorcycle helmet law does not violate the federal constitutional right to privacy and is a rational exercise of the state's police powers, and reasoning in part that the right claimed did not resemble the right to reproductive decisions, decisions about the structure of the family unit, and parental freedom to control children's education and "[t]here is little that could be termed private in the decision whether to wear safety equipment on the open road," that the helmet requirement did not implicate the appellant alone as "[t]he required helmet and faceshield may prevent a rider from becoming disabled by flying objects on the road, which might cause him to lose control and involve other vehicles in a serious accident," and that the costs of

a cyclist's injury may be borne by the public); *Stall v. State*, 570 So. 2d 257, 259–61 (Fla. 1990) (holding that although persons have a right to privately possess obscene materials, the right of privacy does not apply to vendors of obscene material because "there is no legitimate reasonable expectation of privacy in being able to patronize retail establishments for the purpose of purchasing such material," and noting that "[w]e are a society of individuals who make a whole community").

As these cases demonstrate, a person's privacy right is not absolute and is not to be considered in isolation, without regard for the circumstances under which the right is asserted. When a person chooses to be around fellow citizens, his or her decisions and actions affect others. Persons who are unwilling to be subject to any inconvenience, however minimal, for the protection of others around them may choose to remain in the privacy of their own home, free from any government intrusion. As the trial court aptly stated, a person's right to be let alone is no more precious than his fellow citizen's right not to become infected by him with a contagious, airborne, and potentially fatal virus. The mask mandate is in no way an attempt by the government to control a person's body, as found by the majority. The mask mandate is not compelled medical treatment, and the wearing of facial covering does not alter one's physical person. Rather, the mask mandate is a temporary and *de minimus* interference with a person's public interactions in response to a global pandemic. I agree with the trial court that the "[t]he County's need to take measures to control the spread of COVID-19 clearly outweighs [Appellant's] private interest in not wearing a mask in the limited circumstances required by the county's emergency order; and, an injunction in this situation would disserve the public interest."

CONCLUSION

In conclusion, this case should be dismissed as moot because the issue raised has ceased to exist and is unlikely to recur. Alternatively, if it were proper to reach the merits, the denial of Appellant's emergency motion for temporary injunction should be affirmed because the trial court properly concluded that strict scrutiny does not apply to the mask mandate because it does not implicate the right of privacy.

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