

**IN THE CIRCUIT COURT OF THE 17<sup>TH</sup> JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY, FLORIDA**

CHRISTOPHER P. NELSON

CASE NO:

Petitioner,

v.

BROWARD COUNTY, a political  
Subdivision of the State of Florida

Respondent.

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**RULE 9.100 PETITION FOR WRIT OF CERTIORARI FROM A QUASI-  
JUDICIAL DECISION OF CODE ENFORCEMENT OFFICER**

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Petitioner, CHRISTOPHER P. NELSON (“Mr. Nelson” or “Petitioner”), by and through undersigned counsel, hereby files this Petition for Writ of Certiorari against Respondent, Broward County (“County” or “Respondent”), and alleges as follows:

### **Nature of Proceedings**

1. As a matter of right and pursuant to Fla. R. Civ. P. Rule 1.630(b) and (c), Fl. Stat. 26.012(1), and Fla. R. Civ. P. Rule 9.100(c)(2), Petitioner seeks through the Court’s appellate review jurisdiction, a Writ of Certiorari challenging the decision of the hearing officer finding valid a citation issued to Petitioner from Broward County Code Enforcement on the grounds that the decision (1) was entered in violation of Petitioner’s due process rights, (2) is not supported by competent substantial evidence, and (3) is a departure from the essential requirements of the law. *City of Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982) (setting forth the standard of review application to petitions for writ of certiorari).

2. Petitioner, Christopher P. Nelson, is a resident of Broward County, Florida. The facts that gave rise to issuance of the citation occurred in Broward County.

3. Respondent, Broward County, is a Florida municipality and is responsible for implementing Broward County Emergency Orders 20-21, 20-22, 20-23, 20-24, 20-25, 20-26, 20-27 (“Local Orders”), dated July 8, 2020, July 17, 2020,

July 29, 2020, August 21, 2020, September 25, 2020, September 25, 2020, and September 30, 2020, respectively, which are the basis for issuance of the citation to Petitioner.

### **STANDARD OF REVIEW**

4. In reviewing a quasi-judicial order of a local agency, the Circuit Court's standard of review is to determine (1) whether the agency complied with procedural due process; (2) whether the findings and ruling were based on competent, substantial evidence; and (3) whether the agency observed "the essential requirements of law". *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

### **FACTS**

5. Since March 2020, many state executive orders have been issued with regard to COVID-19.

6. On April 29, 2020, Florida Governor Ron DeSantis ("Gov. DeSantis") signed Executive Order 20-112 which included a "phased approach" to "reopening" the state. Gov. DeSantis has since signed many executive orders relating to COVID-19, however, none of the executive orders included a mandate or a requirement to wear a face covering in any setting.

7. On July 8, 2020, Broward County issued Order 20-21, requiring Broward County residents to wear face masks in virtually all aspects of daily life in the community.

8. On July 17, 2020, Broward County issued Order 20-22, which provided that no establishment shall serve or transact business with any person or patron who is not complying with the facial covering requirements of the Broward County Emergency Order 20-21.

9. From mid-July through August 21, 2020, local orders 20-22, 20-23, and 20-24 were issued and all contained provisions requiring county residents, including Mr. Nelson to wear facial coverings in virtually all aspects of daily life.

10. On September 15, 2020, Mr. Nelson participated in a demonstration in a Target store located in the city of Fort Lauderdale, Florida.

11. The demonstration was in opposition to local government overreach due to the local orders requiring facial coverings in certain situations. Mr. Nelson and a group of others marched through Target shouting “breathe freely”, “take off your masks”, and “it’s all about choice!”

12. During the demonstration, no store employee asked Mr. Nelson or any of the other individuals opposing the government’s illegal mandate to leave the store.

13. The opposition to government overreach lasted approximately four (4) minutes after which Mr. Nelson and the other group members left the store. Mr.

Nelson did not ask anyone at Target to serve him or to transact any business with him.

14. Upon information and belief, police were subsequently notified of the demonstration by a customer at the store.

15. The police did arrive and, upon information and belief, one of the members of the group Mr. Nelson was a part of did speak with the police that evening however, the police did not ask for identification nor did they detain, question, or cite the group member during this encounter.

16. The sign in front of Target stated: "Face coverings are required by order of Broward County; all guests must be wearing a face covering to enter this building Emergency Order 20-07".

17. It is clear from the video of this demonstration that Mr. Nelson did enter the building wearing a facial covering and this was later confirmed by local police in a statement to the media.

18. Following this incident and inquiries from the media, Assistant Police Chief Frank Sousa commented and said that officers did respond to the Target and that "the protestors entered the store with their masks."

19. On September 25, 2020, two additional local orders were issued, local order 20-25 and local order 20-26.



20. On September 30, 2020, Governor Ron DeSantis issued Executive Order 20-244 (“E.O. 20-244”), which moved the State of Florida into Phase 3 of the plan to re-open the state. This executive order superseded and eliminated any and all restrictions of certain past executive orders and suspended individual fines and penalties related to violations of COVID-19 restrictions and orders. **See Appendix, Tab A1 – 014-016; Tab A2 -001-003.**

21. Specifically, Section 4 of Executive Order 20-244 states:

Section 4. Suspension of COVID-19-related Individual Fines and Penalties

This order, consistent with Executive Order 20-92 suspends the collection of fines and penalties associated with COVID-19 enforced upon individuals.

The executive order was noted to be “effective immediately.” **See Appendix, Tab A1 – 014-016; Tab A2 -029-057.**

22. On September 30, 2020, five days after E.O. 20-244 went into effect and 15 days after Mr. Nelson visited Target, Broward County issued an order, Emergency Order 20-27 (“Order 20-27”), which required that facial coverings be worn by all persons in Broward County when in an establishment, unless a specific exemption applied as outlined in section 3.C of Order 20-27.<sup>1</sup> **See Appendix, Tab A1 – 014-016; Tab A2 -029-057.**

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<sup>1</sup> Local order 20-27 was not the local order in effect on September 15, 2020 when the demonstration took place, however, this is the local order that the County relied

23. For purposes of this action, the relevant portion of the facial covering requirement states:

3. While at an Establishment Other Than an Amenity: All people must wear facial coverings at all times when visiting or using establishments other than amenities. This includes while entering, exiting, and otherwise moving around within the establishment. This rule applies even when social distancing of at least 6 feet is also maintained; therefore, you must wear a facial covering when entering, inside, moving within, or leaving a store, even if no one is within 6 feet of you. The term "establishment" includes any retail, commercial governmental, charitable, nonprofit, and other business, or organization.

**See Appendix, Tab A1 – 014-016; Tab A2 -029-057.**

24. As for enforcement of this provision, Order 20-27 states:

E. Enforcement. Failure to comply with any of the requirements set forth in this section by any person or any establishment is subject to enforcement by law enforcement, code enforcement officers, and any other personnel as provided under Florida law or the Broward County Code of Ordinances. Enforcement may be criminal and/or civil and may include misdemeanor charges with fines not to exceed \$500 per violation, imprisonment not to exceed 60 days, or both, or civil fines of up to \$1,000 per day per violation or fines of up to \$15,000 per violation for a knowing violation that is irreparable or irreversible in nature. While the collection of fines and penalties against individuals is currently suspended per Governor Ron Desantis' Executive Order 20-244, individuals may still be cited. Citations will

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upon during their argument. The facial covering requirements as they relate to the establishments and enforcement of these requirements are essentially the same in local orders 20-21-20-27 and they all reference local order 20-21 which was the initial order implementing the facial covering requirement.

continue to be issued against individuals and businesses, and citations, fines, and penalties, will continue to be imposed against establishments violating this or any other provision of any County Emergency Order. Fines and penalties assessed against individuals will be collected upon expiration of the Governor's suspension of the collection of fines and penalties against individuals."<sup>2</sup>

**See Appendix, Tab A1 – 014-016; Tab A2 -029-057.**

25. About this same time, Mr. Nelson received a citation in the mail from Broward County Code Enforcement citing him with a violation of Sec. 8-56(b)2 of the Broward Municipal Code. The citation noted that it was for “failure to use facial covering.” While Mr. Nelson received this citation on or about September 26, 2020, the date of the citation was September 16, 2020, the day after the demonstration.

**See Appendix Tab A1-002; Tab A2-058.**

26. The citation provided notice of the right to a hearing in front of a hearing officer, however, the instructions state that a person wishing to contest the citation:

...must appear for an administrative hearing at Broward County Government Center...[and] IF YOU FAIL TO PAY WITHIN 10 DAYS AND DO NOT APPEAR AT A HEARING AS INDICATED: You waive your right to contest the citation and a judgment may be entered against you.

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<sup>2</sup> During the hearing, the County relied upon Order 20-27, however, the controlling order at that time was



No instructions for obtaining accommodations (i.e., remote appearance via Zoom or other service) are noted on the citation. At the hearing, however, housekeeping rules were read and stated that masks were required at all times in the building, even for those who had a medical condition. **See Appendix Tab A1-002; Tab A2-058; Tab A3 -008.**

27. On or about October 5, 2020, Mr. Nelson received a letter in the mail from the Clerk of the Circuit and County Court advising, among other things, of the hearing date and time, that counsel may be retained, to bring all original documents, and that a record of the proceedings will be required for any appeal.

28. Prior to the hearing date, Mr. Nelson received a Notice of Court Date from the Broward County Clerk of the Circuit/County Court that the hearing had been rescheduled for February 19, 2021 at 1:30pm.

29. On February 19, 2021, a code enforcement hearing was held in this matter before Hearing Officer, Christopher Narducci.

30. During the introduction, Hearing Officer Narducci explained to Mr. Nelson that “if fines are set and not paid as required, you will be assessed with a fine that may be recorded in the public record with Broward County; in which case it becomes a lien until such fine is paid.” **See Appendix Tab A3-007.**

31. The Clerk then went over some “housekeeping rules.” One of the stated rules was “[m]asks must be worn at all times while in the building. Failure of any



party or witness to wear facial coverings or masks, even for a medical reason, may result in your case being rescheduled, continued, or may be heard in your absence.”

**See Appendix Tab A3-008.**

32. When asked by the hearing officer how he was doing, Mr. Nelson responded, “[w]ell, I’m having a little trouble breathing but other than that, I’m doing alright.” **See Appendix Tab A3-009**

33. Gerald Henry, Code Enforcement Supervisor, testified for the County and stated that Mr. Nelson was cited for failure to wear a facial covering. **See Appendix Tab A3-023.**

34. On cross-examination, Mr. Henry admitted that he was not present at the Target on the night the demonstration occurred, and that Mr. Nelson’s violation was related to COVID-19. **See Appendix Tab A3-024.**

35. The County argued that at the time of the violation, local order, 20-27 required facial coverings to be worn in public establishments. **See Appendix Tab A3-033.**

36. The County further argued that Mr. Nelson was not wearing a facial covering but then stated Mr. Nelson removed the facial covering in order to make a point that “it shouldn’t be required.” **See Appendix Tab A3-033.**

37. The County's argument was that the facial covering was required by the local order and that Mr. Nelson was not wearing the facial covering. **See Appendix Tab A3-034.**

38. The County recognized that E.O. 20-244, signed by Gov. DeSantis on September 25, 2020, included a provision that suspends individual fines and penalties and cited to section 4 of Executive Order 20-244, stating "[s]ection 4 says, 'Suspension of COVID-19-related individual fines and penalties'". **See Appendix Tab A3-034.**

39. The County argued that they have interpreted this section to mean that the County cannot collect fines, but they also argued:

there's nothing in that order limiting our authority to continue to hold hearings on citations that are related to the emergency orders for COVID-19, including the requirements for facial covering in establishments such as Target.

**See Appendix Tab A3-035.**

40. However, if a citation is issued, a hearing is held, the citation is found to be valid, and a fine is imposed, imposition of the fine will result in a record of the fine in the county's public record and a lien. The hearing officer clearly stated, "if fines are set and not paid as required, you will be assessed with a fine that may be recorded in the public record with Broward County; in which case it becomes a lien until such fine is paid. **See Appendix Tab A3-007.**

41. Therefore, even if the County says that the fine cannot be collected, the record of the fine alone results in an individual being penalized because it will likely result in a lien on record with the County. This is in direct conflict with E.O. 20-244.

42. The County argued that they are following the Governor's Executive Order but stated "the County would not move to collect the fines again from Mr. Nelson *during the pendency of the governor's order* that makes that effective state-wide." **See Appendix Tab A3-035.**

43. Mr. Nelson argued that his citation should be dismissed for several reasons.

44. Mr. Nelson argued that contrary to the County's position that individual fines related to COVID-19 were only "suspended *during the pendency of the governor's order*", Executive Order 20-244 prohibits the County from issuing and/or collecting any individual fines or penalties related to COVID-19 after September 30, 2020. **See Appendix Tab A3-037.**

45. In support of this position, Mr. Nelson offered statements made by Governor DeSantis and quoted in the media, including that Governor DeSantis wanted "[local] government to work collaboratively with individuals in their

counties” and that he issued the relevant section of E.O. 20-244 as “an [act of executive grace]”. **See Appendix Tab A3-037.**<sup>3</sup>

46. The Hearing Officer inquired as to how the Executive Order signed on September 25, 2020 applied to this citation that was issued on September 16, 2020. Mr. Nelson offered statements that Gov. DeSantis made and where he explained that the order could not “[claw back] fines that were already paid but it prevents local government from collecting outstanding fines.” **See Appendix Tab A3-039.**

47. Mr. Nelson further argued that, pursuant to 21 U.S.C. 360bbb-3, on April 18, 2020 and in a revised letter on April 24, 2020, the U.S. Food and Drug Administration issued an Emergency Use Authorization (“EUA”) for the general public to use facial coverings. **See Appendix Tab A3-036.**

48. Mr. Nelson argued that a product that has only been granted EUA, such as facial coverings, cannot be mandated or required pursuant to 21 U.S.C. 360bbb-3(e)(1)(A). **See Appendix Tab A3-038.**

49. Mr. Nelson noted several constitutional claims and requested that these arguments be preserved for any appeal. Mr. Nelson argued that facial covering requirements in Order 20-21, Order 20-22, and Order 20-27 violate the state and

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<sup>3</sup> <https://fb.watch/3-JZIZNbO-/> (see 27:30-28:15); [https://www.dropbox.com/sh/iwp87ztp2r4321f/AAASSPU9r0dlKu45g\\_j0lexIa?dl=0](https://www.dropbox.com/sh/iwp87ztp2r4321f/AAASSPU9r0dlKu45g_j0lexIa?dl=0) (see 27:30-28:15)



federal constitution's "right to inform[ed] [consent], and due process substantively and procedurally." **See Appendix Tab A3-038.**

50. Mr. Nelson explained that when a product has only been granted emergency use authorization under the federal law, it is considered experimental and has risks that are unknown. **See Appendix Tab A3-040.**

51. Facial coverings, for the purported purpose of reducing viral transmission, are authorized pursuant to an emergency use authorization and are experimental. The risks of using these products for this purpose are unknown. A product issued pursuant to an emergency use authorization cannot be required or mandated. The Broward County facial covering requirements conflict with federal law and violate Mr. Nelson's constitutional rights. The mandates are void *ab initio* and cannot be enforced.

52. Mr. Nelson requested that the Hearing Officer dismiss the citation.

53. The County's rebuttal was based on separation of powers between the federal government and local government and argued that the federal government does not have a basis to limit the state's police powers. The County further argued that the emergency use authorization is not in contravention with the County's order, including the facial covering requirement, and it would not prevent this case or require that it be dismissed. **See Appendix A3-041.**

54. The County acknowledged that there may be unknown risks [in requiring facial coverings] and stated that “the reasons of unknown risk is something that the states can take into account in setting executive and emergency orders under their own state powers and weigh the risks to the requirements that may need to be ordered...” See **Appendix Tab A3-041-042**.

55. In rebuttal, Mr. Nelson reiterated that Governor DeSantis placed a suspension on these types of measures and collection of fines for these matters. Mr. Nelson also noted that Governor DeSantis has not put into effect a state-wide mask mandate. See **Appendix Tab A3-042**.

56. Mr. Nelson again stated that when it comes to the emergency use authorization, the bottom line is that an individual or recipient has an option to accept or refuse the product. See **Appendix Tab A3-042**.

57. The Hearing Officer found that the citation was valid and imposed a fine of \$125 (\$100 fine plus \$25 administrative fee). See **Appendix Tab A3-043; Tab A4-001**.

58. Following this hearing, on March 10, 2021, Governor DeSantis issued Executive Order 21-65. Section 1 of the order states:

Section 1. I hereby remit any fines imposed between March 1, 2020 and March 10, 2021 by any political division of Florida related to local government COVID-19 restrictions.

See **Appendix Tab A5-001-002**.

59. Mr. Nelson submits this Writ for Certiorari and, for the reasons set forth below, requests that this Court overturn the decision of the Hearing Officer and find that Mr. Nelson's citation was invalid or in the alternative, if this Court finds that the citation was initially valid, an order affirmatively stating that the requirement to pay the fine imposed by the Hearing Officer is null and void.

### **Summary of Argument**

60. Mr. Nelson was cited and fined for a violation of a Broward County local order that requires individuals to wear a facial covering in any establishment in Broward County.

61. The County's local orders related to the requirements to wear a facial covering and enforcement of violations of the facial covering requirement were void *ab initio* because they conflict with federal law. The Hearing Officer's decision finding the citation valid and imposing the fine constituted a departure from the essential requirements of the law.

62. The County's local orders violate Mr. Nelson's constitutional rights to informed consent, privacy, and substantive due process. The Hearing Officer's decision finding the citation valid and imposing the fine constituted a departure from the essential requirements of the law.

63. Imposition of the fine against Mr. Nelson is in direct conflict with E.O. 20-244 and E.O. 21-65, issued by Gov. DeSantis on September 25, 2020 and March



10, 2021, respectively. The Hearing Officer's decision finding the citation valid and imposing the fine constituted a departure from the essential requirements of the law.

64. Since masks were required to be worn at all times in the government building where the hearing was held, even for those with medical conditions, the Citation issued to Mr. Nelson deprived Mr. Nelson of due process in that the citation did not provide information as to how to schedule a virtual appearance at the hearing.

65. Mr. Nelson is requesting that this Court exercise jurisdiction over the parties and the subject matter and that this Court grant the relief requested herein.

### **ARGUMENT**

#### **I. Provisions of Broward County Local Orders 20-21, 20-22, and 20-27 Related to Facial Covering Mandates and Enforcement of these Mandates Were Void *Ab Initio* As They Are In Direct Conflict With Federal Law**

66. On April 18, 2020 and April 24, 2020, pursuant to Section 564 of the Federal Food, Drug, and Cosmetic Act (the “Act”), codified at 21 U.S.C. 360bbb-3, the U.S. Food and Drug Administration (“FDA”) issued an Emergency Use Authorization (“EUA”) authorizing the use of face masks for use by members of the general public to cover their noses and mouths. **See Appendix Tab A2-059-065.**

67. The same section that authorizes the FDA to grant an EUA, 21 U.S.C. 360bbb-3, requires that the public have “the option to accept or refuse administration of the product.” 21 U.S.C. 360bbb-3(e). It even provides that the Secretary of HHS



is to “ensure that individuals to whom the product is administered are informed” of “the option to accept or refuse administration of the product.” **See Appendix Tab A2-059-065.**

68. The FDA and CDC’s guidance and regulations reflect the statutory prohibition from mandating that an individual receive a product that has only been granted EUA. For example, the FDA guidance entitled *Emergency Use Authorization of Medical Products and Related Authorities* provides that:

...section 564 does provide EUA conditions to ensure that recipients are informed about the MCM [medical countermeasure] they receive under an EUA. For an unapproved product [such as the COVID-19 vaccines], the statute requires that **FDA ensure that recipients are informed** to the extent practicable given the applicable circumstances ... **That they have the option to accept or refuse the EUA product...**

**See Appendix Tab A2-066-114.**

69. The FDA defines a face mask as “a device, with or without a face shield, that covers the user’s nose and mouth and may or may not meet fluid barrier or filtration efficacy levels. It includes cloth face coverings as a subset.” **See Appendix Tab A2-059-065.**

70. Facial coverings, when used to reduce viral transmission, must be approved by the FDA since it is being used as a medical device.

71. The guidance specifically addresses an individual recipient's rights and discusses information that a recipient must be given. The guidance states:

b. Information for Recipients

Although informed consent as generally required under FDA regulations is not required for administration or use of an EUA product, section 564 does provide EUA conditions to ensure that recipients are informed about the MCM they receive under an EUA. For an unapproved product (section 564(e)(1)(A)(ii)) and for an unapproved use of an approved product (section 564(e)(2)(A)), the statute requires that FDA ensure that recipients are informed to the extent practicable given the applicable circumstances:

- That FDA has authorized emergency use of the product;
- **Of the significant known and potential benefits and risks associates with the emergency use of the product, and of the extent to which such benefits and risks are unknown;**
- **That they have the option to accept or refuse the EUA product and of any consequences of refusing administration of the product; and**
- Of any available alternatives to the product and of the risks and benefits of available alternatives.

See Appendix Tab A2-066-114 (emphasis added).

72. Since facial coverings to reduce viral transmission of COVID-19 have only be granted EUA approval, and have not been licensed by the FDA, there must be the “option to accept or refuse the EUA product.” Requiring an individual to wear a face covering is in direct violation of federal law as it relates to a product that has been authorized under an EUA.

73. The facial covering requirements in local orders 20-21, 20-22, and 20-27 violate 21 U.S.C. (b)(b)(b)-3(e) because they mandate a product that has only been approved for emergency use. The provisions of the Broward County local orders that require a face covering are in conflict with the federal law. The decision of the hearing officer must be quashed and Mr. Nelson's citation should be dismissed.

## **II. The County Had No Authority To Move Forward With the February 19, 2021 Hearing**

74. Mr. Nelson's citation was issued on September 16, 2020.

75. E.O. 20-244, suspending the collection of fines and penalties against individuals related to COVID-19 was issued on September 25, 2020.

76. Holding the hearing against Mr. Nelson was in violation of E.O. 20-244 because any finding that the citation was valid carried with it the penalty of imposition of a fine against Mr. Nelson.

77. Even if, as the County argues, the fine is uncollectable, the imposition of the fine goes onto the County's public record and causes a lien against the individual. This is a penalty against an individual and at the time of the hearing, this was prohibited by E.O. 20-244.

78. This Court should quash the decision of the Hearing Officer and find the citation invalid.



### **III. Provisions of Broward County Local Orders 20-21, 20-22, and 20-27 Related to Facial Covering Mandates and Enforcement of These Mandates Are Invalid Because They Are In Direct Conflict with E.O. 20-244 and E.O. 21-65**

79. The Broward County local orders, 20-21, 20-22, and 20-27 are in direct conflict with Section 4 of E.O. 20-244 which suspends the collection of fines and penalties associated with COVID-19 enforced upon individuals.

80. On September 25, 2020, Gov. DeSantis held a press conference in St. Petersburg. During the press conference he announced, among many other things, that the state was moving into phase 3.

81. When asked to address the mask mandates, Gov. DeSantis stated:

“I don’t address it directly, actually, that is a good point, so what I did do in there is, just as an act of executive grace, all outstanding fines and penalties that have been applied against individuals are suspended. I think we need to get away from trying to penalize people for social distancing and just work with people constructively, put out what you want, but to impose some type of penalty...but all these fines, we are going to hold in abeyance and hope that we can move forward in a way that is more collaborative.”

<https://fb.watch/3-JZIZNbO-/> (See 27:30-28:15).

82. If there were any question as to the meaning of Section 4 of E.O. 20-244, after the hearing, on March 10, 2021, Gov. DeSantis issued E.O. 21-65 which states “I hereby remit any fines imposed between March 1, 2020 and March 10, 2021



by any political division of Florida related to local government COVID-19 restrictions. **See Appendix Tab A5-001-002.**

83. The provisions of the Broward County local orders which mandate facial coverings, and which provide for enforcement of violation of the facial covering requirement, are in direct conflict with E.O. 20-244 and E.O. 21-65. Imposition of any fine or penalty on an individual, related to COVID-19, like the fine and penalty imposed on Mr. Nelson in this case, is invalid. The decision of the hearing officer should be quashed and the citation dismissed.

#### **IV. Mask Mandates Violate Federal and State Constitutional Rights**

##### ***A. Informed Consent/Privacy***

84. Florida's constitutional right of privacy contained in Article I, Section 23, establishes the right of every person to "be let alone and free from governmental intrusion into [one's] private life."

85. In Florida, any law that implicates the fundamental right of privacy, regardless of the activity, is subject to strict scrutiny and, therefore, presumptively unconstitutional. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1245 (Fla. 2017).

86. The Florida Supreme Court has decided various matters relating to medical self-determination and privacy. "Privacy" has been used interchangeably with the common understanding of the notion of "liberty," and both imply a

fundamental right of self-determination subject only to the state's compelling and overriding interest. *Krishner v. McIver*, 697 So. 2d 97 (Fla. 1997).

87. Privacy has been defined as an individual's "control over or the autonomy of the intimacies of personal identity," *Gerety, Redefining Privacy*, 12 Harv. C.R.C.L.L.Rev. 233, 281 (1977); or as 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." Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 Fla. St. U.L.Rev. 671, 677 (1978); *Krishner v. McIver*, 697 So. 2d 97 (Fla. 1997).

88. The Court in *Krischer* states explicitly that:

"[b]ecause privacy exists precisely to protect individuals from overuse of state powers, the general interest in regulating society does not in itself prevail against a valid privacy claim, without more. Rather, the state must establish a special or *compelling* interest justifying the intrusion into privacy. Otherwise privacy prevails.

*Krishner* at 114.

89. While Broward County's mask mandate is not a law, the mandate is enacted pursuant to local emergency orders pursuant to Section 252.46 of the Florida Statutes and violations of this provision are being enforced through hefty fines and, in some cases, jail time.

90. With virtually all medical products, there are benefits but there are also risks. Facial coverings being used in this manner are no exception. This is why the

cornerstone of medical ethics is informed consent, a principle which is also a long-recognized fundamental, civil, and human right. Informed consent requires conveying the risks and benefits of a medical product to a patient and obtaining uncoerced consent. *See, e.g., Rivers v. Katz*, 67 N.Y.2d 485, 494 (1986) (“fundamental right to make decisions concerning one’s own body”); *The Nuremberg Code* (1947) (“The voluntary consent of the human subject is absolutely essential. This means that the person...[is] able to exercise free power of choice, without the intervention of any element of...coercion.”). Nonetheless, Broward County has removed the concept of informed consent and continues to require individuals to wear a face covering in virtually all aspects of their daily life with the threat of prosecution and fines for any violation of these mandates.

91. While Mr. Nelson’s informed decision to not wear a face covering may seem like the unpopular view in today’s society, this is often the case when people are fighting for constitutional rights to remain in place.

92. During the press conference on September 25, 2020, Gov. DeSantis, speaking about a new antigen test that was available, digressed and began to talk about the elderly in nursing homes and his experience while visiting these nursing homes.

93. Governor DeSantis discussed his experience in the nursing homes and stated that when he would visit with nursing homes residents, “everyone was so



happy.” Governor DeSantis said that some of the residents were saying, “I want to live to see my family.” He said when family came in with all the PPE and the masks, some of the residents said, “take off your masks I want to see you smile.” Gov. DeSantis continued and said, “sometimes we think we know what folks want and that they are all so fearful of this, I think people have taken proper precautions but I think a lot of people want to be able to live.”

94. It is respectfully submitted that when the majority takes away rights from a minority that has been demonized and marginalized for their views, it is in those moments that the courts give life and meaning to these constitutional rights and safeguards – not only to protect the minority, but to protect the principles that protect all Americans.

95. There is an ongoing public pressure campaign to denounce anyone who questions any aspect of the mainstream COVID-19 narrative however, constitutional and individual rights must remain protected.

96. Respondent respectfully requests that this Court carry out justice and cautiously examine the evidence demonstrating that an individual must have a choice and cannot be required or mandated to wear a facial covering. Mandating this product in this experimental way is contrary to Mr. Nelson’s constitutional rights provided by the federal and state constitutions.



97. For the reasons stated above, Mr. Nelson requests that this Court quash the decision of the hearing officer and dismiss the citation.

***B. Due Process***

98. Section 9 of the Florida Constitution states, “No person shall be deprived of life, liberty or property without due process of law...”.

99. The basic test of substantive due process is whether the state can justify the infringement of its legislative activity upon personal rights and liberties. *See State v. Robinson*, 873 So. 2d 1205, 1214 (Fla. 2004). An individual’s right to decline an experimental product is a fundamental right and liberty that is undoubtedly protected under this test. Requiring an individual to wear or use a product that has only been approved under an EUA is beyond all question an invasion of rights secured by the federal and state constitution.

100. The Federal Constitution likewise states that no state shall “deprive any person of life, liberty, or property, without due process of law...”

101. The federal and state constitutions guarantee Mr. Nelson the fundamental substantive due process right to life and liberty which cannot be infringed upon without a compelling state interest that is implemented in the least restrictive means.

102. It is a deprivation of Mr. Nelson’s substantive due process right to life and liberty to mandate him, under the threat of fines or of not being able to conduct

daily life activities, to wear a product, such as a face covering, that is being used for an unapproved use under an EUA.

103. Mr. Nelson respectfully requests that the decision of the hearing officer be quashed and that the citation be dismissed.

**Count I: Petition for Writ of Certiorari Jurisdiction and Request For Relief**

104. Paragraphs 1-89 are hereby realleged and incorporated herein by reference.

105. Broward County's local emergency orders, Order 20-21, Order 20-22, and Order 20-27, require individuals to wear a facial covering in virtually every aspect of daily life including grocery shopping, working, walking in common areas of one's apartment complex, obtaining services, and in all other circumstances where one cannot comply with social distance requirements.

106. On September 15, 2020, Mr. Nelson was cited for failure to wear a facial covering in violation of Broward County's municipal code, Sec. 8-56(b)2 - Failure to adhere to requirements of emergency orders during local state of emergency. **See Appendix Tab A1-002; Tab A2-058.**

107. A fine of \$125 for this citation was imposed on Mr. Nelson. **See Appendix Tab A4-001.**

108. On September 30, Gov. DeSantis issued E.O. 20-244 suspending the collection of individual fines and penalties related to COVID-19, including fines and

penalties for violation of mask mandates. **See Appendix Tab A1-014-016; Tab A2-001-003.**

109. On March 10, 2021, Gov. DeSantis issued E.O. 21-65 which specifically stated that any fines imposed between March 1, 2020 and March 10, 2021 by any political division of Florida related to local government COVID-19 restrictions were cancelled. **See Appendix Tab A5-001-002.**

110. Facial coverings are only authorized by the FDA under an Emergency Use Authorization (EUA).

111. Under federal law, an individual must have the right to accept or refuse a product that is only authorized under an EUA.

112. Broward County's local orders requiring facial coverings under which Mr. Nelson was cited, was and still are void *ab initio* and they are in conflict with federal law and Gov. DeSantis' executive orders.

113. Requiring an individual to wear a facial covering in this manner is a violation of the federal and state constitutions' right to informed consent.

114. Requiring an individual to wear a facial covering in this manner is a violation of the federal and state constitutions' right to due process.

115. The standard of review for the Circuit Court's analysis of certiorari claims is three-fold: (1) Was procedural due process afforded; (2) was there competent substantial evidence to support the decision; and (3) did the action meet



the essential requirements of law. *See Deerfield Beach v. Valliant*, 419 So. 2d 624 (Fla. 1982).

116. Mr. Nelson's argument focuses on prongs two and three. Regarding prong two, the record does not constitute competent substantial evidence to support the issuance of the decision finding the citation valid and imposing the fine. The hearing officer erroneously disregarded the evidence presented by Mr. Nelson, including E.O. 20-244, the letter from the FDA dated April 24, 2020, and the FDA's guidance on products authorized under an EUA.

117. Considering this evidence, the only logical conclusion is that Broward County's ordinance is invalid because it contravenes federal law and the imposition of the fine is in conflict with the executive orders issued by Gov. DeSantis.

118. Regarding prong three, the hearing officer did not consider E.O. 20-244 or the requirement of the federal law that an individual must be able to choose whether or not to accept a product that is authorized only for emergency use, even if the product is approved for some other use. This is a departure from the essential requirements of the law and therefore, Mr. Nelson respectfully requests that this Court exercise its power to quash the decision of the hearing officer and dismiss the citation against Mr. Nelson or in the alternative to affirmatively recognize that the fine imposed by the hearing officer is void.



WHEREFORE, Petitioner respectfully requests this Court: (1) exercise jurisdiction over the parties and the subject matter of this proceedings; (2) determine that this Petition for Writ of Certiorari demonstrates a preliminary basis for relief; (3) issue a Writ of Certiorari quashing the Order issued by the Hearing Officer; (4) declare that the County's facial covering mandate is invalid and void *ab initio*; (5) declare that the imposition of the fines and penalties against Mr. Nelson are invalid; (6) declare that the County's issuance of the citation and imposition of the fines and penalties against Mr. Nelson violated his right to informed consent; (7) declare that the County's issuance of the citation and imposition of the fines and penalties against Mr. Nelson violated his right to substantive due process; (8) award Mr. Nelson reasonable attorneys' fees and costs incurred in connection herewith; and (9) enter an order for such other and further relief as this Court deems just and proper.

## **CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS**

The undersigned hereby certifies that this brief was prepared using a 14-point Times New Roman font in compliance with the requirements of Fla. R. App. P. 9.210(a)(2).

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 19<sup>th</sup> day of March, 2021, I caused a true and correct copy of the foregoing to be served on Counsel for Respondent via USPS at **Michael Owens, County Attorney, Broward Office of the County Attorney, Governmental Center, Suite 423, 115 S. Andrews Avenue, Fort Lauderdale, FL 33301-1818**, and via ECF at [mowens@broward.org](mailto:mowens@broward.org).

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