UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN T. AND ESTHER N. DODERO, LIONEL AND TAMMY ALFORD, AS CO-TRUSTEES OF THE LIONEL D. ALFORD, JR. AND TAMMY NIX ALFORD REVOCABLE TRUST, DOUGLAS B. AND SHELLY L. BUSH, ST. JOHNS FLORIDA PROPERTIES, L.L.C., KI FLORIDA PROPERTIES, L.L.C., MICHAEL D. HUCKABEE AND JANET M. HUCKABEE AS CO-TRUSTEES OF THE ANGUS B. WILES TRUST, CAMPING ON THE GULF LAND, L.L.C., SANDY SHORES PROPERTY OWNERS ASSOCIATION, INC., TODD HARLICKA, CHRISTOPHER F. CORRADO EDWARD J. AND JOY L. MCMILLIAN, JE COASTAL PROPERTIES, L.L.C., ERIC AND DEBORAH WILHELM AS CO-TRUSTEES OF THE ERIC AND DEBORAH WILHELM REVOCABLE TRUST, DAVID A. BRADFORD AS TRUSTEE OF THE ELIZABETH M. BRADFORD REVOCABLE TRUST DATED JULY 12, 2012, AND PARKER H. PETIT,

Plaintiffs

v.

WALTON COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA; MICHAEL A. ADKINSON, JR., IN HIS OFFICIAL CAPACITY AS WALTON COUNTY SHERIFF,

Defendants
_____/

Case No.:

MEMORANDUM IN SUPPORT OF THE PRESENT PLAINTIFFS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION[1]

INTRODUCTION

On April 2, 2020, the Walton County Board of County Commissioners ordered *every* beachfront-owning Walton County landowner, on pain of criminal sanction, to stay off their own *private* property. Categorical in its approach, unbridled in its reach, and untethered to any facts suggesting that the current COVID-19 public-health crisis warrants a blanket deprivation of constitutionally guaranteed private property rights, the Ordinance issued by Walton County has empowered Walton County Officials, including the Sheriff (a defendant in this action), to enter, seize, occupy, and take private property without any justification, reasonable or otherwise. And since the Ordinance's enactment four days ago, numerous Walton County residents (including many of the Plaintiffs in this action) have felt the affliction of local governmental intrusion into their daily lives via law-enforcement patrols, orders to vacate, and threats of criminal prosecution for doing no more than setting foot in their own backyards that they own.

Recognizing that the COVID-19 health crisis demands measured balancing of government action and personal liberty, the Governor has explicitly allowed Florida

[1] To ensure expeditious consideration of this emergency motion, the undersigned has provided counsel for the Defendants (both Walton County and the Walton County Sheriff) with copies of this motion while counsel perfects formal service of process.

residents to take part in certain "essential" activities, including recreation, so long as they comply with the Federal Center for Disease Control's social-distancing guidance. And perhaps foreseeing that local entities might not take the same care with their residents' fundamental property rights, the Governor has superseded any local restrictions that conflict with his COVID-19 Executive Orders.

For that reason, the Walton County private-beach closure Ordinance (which also constitutes a taking under the Fifth Amendment, an unreasonable seizure under the Fourth Amendment, an intrusion into the right to privacy guaranteed by the Florida Constitution), must be permanently enjoined. And because several of the Plaintiffs in this action are currently experience ongoing, irreparable injury by virtue of their expulsion from their real property,[2] preliminary injunctive relief, entered on an emergency basis, is necessary to end the infringements perpetrated by the Defendants and the Ordinance. For these reasons and those that follow, the Present Plaintiffs respectfully request entry of a preliminary injunction.

[2] These include John T. and Esther N. Dodero, David A. Bradford as Trustee of the Elizabeth M. Bradford Revocable Trust dated July 12, 2012; Michael D. and Janet M. Huckabee as co-trustees of the Angus B. Wiles Trust; Camping on the Gulf Land, L.L.C.; Sandy Shores Property Owners Association, Inc.; Todd Harlicka, Christopher F. Corrado, and Eric and Deborah Wilhelm, as co-trustees of the Eric and Deborah Wilhelm Revocable Trust (collectively, the "Present Plaintiffs"). Each of these Plaintiffs are currently present in Walton County and are suffering from ongoing deprivation of their fundamental right to be present on their private land.

RELEVANT FACTS

Since January 2020, the Nation has been paying attention to the spread of COVID-19. Among the public officials at the forefront of the response is Florida Governor Ron DeSantis. In an effort to balance virus containment with the personal liberties guaranteed to all Americans by the United States Constitution, the Governor has taken a decidedly incremental approach, which has culminated in a series of executive orders.

Specifically, after issuing Executive Orders that, first, ordered the Department of Health to declare a public health emergency, *see* Ex. A. and, second, declared a Florida-wide state of emergency, *see* Ex. B, the Governor took measures specifically targeting the areas and activities most likely to contribute to the spread of the virus while leaving unmolested other areas and activities enjoyed by Floridians. For instance, on March 17, 2020, the Governor limited the sale of alcohol in bars, pubs, and nightclubs while allowing restaurants to continue operating (so long as they limited their occupancy to 50 percent capacity and abided by the Federal Center for Disease Control's social-distancing guidance). Ex. C. On March 20, 2020, the Governor tightened these restrictions, but again did so incrementally, focusing on restaurants and bars, public meetings, gyms and fitness centers (*i.e.*, "potential gathering places for the spread of COVID-19," Ex. D), and several counties in which the spread of COVID-19 appeared particularly rapid. *Id.* Throughout the remainder

of March, the Governor continued issuing Executive Orders in response to the rapidly evolving situation, but only after weighing the costs of increasing restrictions with the public health benefits they were designed to accomplish.

On April 1, 2020, the Governor issued two Executive Orders; both have critical importance for this case. The first, Executive Order 20-91, provides that "all persons in Florida shall limit their movements and personal interactions outside of their home to only those necessary to obtain or provide essential services or conduct essential activities." Ex. E. The Executive Order, in turn, defines "'essential activities'" to include "and encompasses . . . [p]articipating in recreational activities (consistent with social distancing guidelines) such as walking, biking, hiking, fishing, hunting, running, or swimming . . . ." *Id.*

Later that day, the Governor issued Executive Order 20-92 to "to provide clarity as to the effect of" Executive Order 20-91. Ex. F. The "clarity" provided by Governor DeSantis reads: "This Order shall supersede any conflicting official action or order issued by local officials in response to COVID-19." *Id.*

Although the Governor expressly preempted *all* local COVID-19 responses that conflict with his Executive Order, the Walton County Board of County Commissioners promulgated an ordinance that conflicts with his Executive Order *one day* after the Governor forbade it from doing so. Specifically, Walton County, unsatisfied with its March 19, 2020, decision to "close[] the beaches in Walton

County to the *public*," Ex. G (emphasis added), took issue with purported "widespread use of the beach on *privately* owned beachfront property." Ex. H (as reflected in Exhibit H, the "Ordinance") (emphasis added). Without providing a shred of substantiating evidence, Walton County offered *ipsi dixit* that "a trend" exists "whereby owner occupancy of rental units has substantially increased in the last two weeks, thereby contributing to a growing number of non-residents entering Walton County despite a decline in tourism and a state-wide ban on short term rentals." *Id*. For that reason, it:

> [D]eclare[d] that an emergency continues to exist due to crowds on the beaches of Walton County, that such crowding is likely to lead to the spread of COVID-19, and that immediate enactment of an Emergency Ordinance temporarily closing all beaches in Walton County, *whether public or private*, is necessary to prevent the spread of COVID-19.

Id. (emphasis added).

ANALYSIS

In deciding whether to grant preliminary injunctive relief, the Court must considered whether the Present Plaintiffs have established: "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225-26 (11th

Cir. 2005). "Ordinarily the first factor," likelihood of success on the merits, "is the most important." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

I. THE PRESENT PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS.

Walton County has told hundreds of Walton County residents that they may not set foot on their own private property. Under the best of circumstances, an invasion of this sort onto the homesteads of United States citizens would shock the conscience, and rightly so. Aggravating this intrusion, however, is that the Walton County Ordinance is utterly pointless. It blinks reality to suggest that a family enjoying their private beach (indeed, their own backyard) risks spreading COVID-19 any more than, *e.g.*, their trip to the supermarket, house of worship, or sitting on their front porch. Not only has the Governor recognized this by expressly defining as "essential" the sort of activities a family would enjoy on their waterfront property, he has taken steps to ensure that localities respect the liberty and property interests of *all* Floridians by "supersed[ing] any conflicting official action or order issued by local officials in response to COVID-19," such as the Walton County Ordinance. Ex. F.

Walton County should not be permitted to flout either the rights enjoyed by private-property owners or the measured decisions of Florida's Chief Executive. For these reasons and those that follow, the Present Plaintiffs are substantially likely to succeed on the merits of their claims.

A. The Walton County Ordinance is expressly preempted.

Even if Walton County had any power to commandeer private property (and it does not), the taking effected by the Ordinance has been preempted by Gubernatorial Executive Order. Because Executive Orders issued via the State Emergency Management Act "have the force and effect of law," *id*., they can preempt local ordinances and regulations. Indeed, the Florida Supreme Court has long recognized that as a matter of black-letter State-law supremacy, a political subdivision like Walton County may not act in contravention of a general law or special law. *See City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066 (Fla. 1981), *petition for review denied*, 408 So. 2d 1092 (Fla. 1981) (ordinances of political subdivisions are inferior to state law and must fail where a conflict exists); *see also Campbell v. Monroe Cty.*, 426 So. 2d 1158, 1161 (Fla. 3d DCA 1983) (a county ordinance may not conflict with any controlling provisions of a state statute and if any doubt exists, such doubt is to be resolved against the ordinance).

As discussed above, Executive Orders No. 20-91 and 20-92 have taken "a topic or a field in which local government might otherwise establish appropriate local laws and reserve[d] that topic for regulation exclusively by the" State. *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006). Because the Executive Orders provide "a specific statement" evidencing a clear intent that local regulations

conflicting with the Governor's COVID-19 guidance is off limits, Walton County's Ordinance is expressly preempted. *Id*.

Specifically, the Governor's Executive Orders, both of which he issued as an exercise of his authority under the State Emergency Management Act, (1) expressly allow participation "in recreational activities (consistent with social distancing guidelines) such as walking, biking, hiking, fishing, hunting, running, or swimming," Ex. E, all of which occur on private beaches,[3] and (2) expressly "supersede any conflicting official action or order issued by local officials in response to COVID-19," Ex. F. The Walton County Ordinance, which bars private citizens from engaging in these "essential activities" on their own private property, constitutes "conflicting official action" insofar as it cannot be reconciled with the

[3] In addition to use of the beach, ownership of property that extends to the mean high-water line of the Gulf of Mexico (or the Erosion Control Line where one exists) includes littoral rights to use of the Gulf's waters. *See Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008) ("[U]pland owners hold several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) . . . ."); *Thiesen v. Gulf, Florida and Alabama Railway*, 75 Fla. 28, 78 So. 491, 507 (Fla. 1917) ("[Littoral] rights we think are property, and being so the right to take it for public use without compensation does not exist. The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability whether for residence or business purpose. The right of access to the property over the water, the unobstructed view of the bay and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not in many cases be exchanged for the price of an inland lot in the same vicinity. In many cases doubtless the riparian rights incident to the ownership of the land were the principal if not sole inducement leading to its purchase by one and the reason for the price charged by the seller.").

Governor's Executive Orders. For that reason, Walton County's Ordinance is "supersede[d]" —*i.e.*, expressly preempted—and it must be enjoined.

B. The Walton County Ordinance has resulted in a physical taking and occupation of the Present Plaintiffs' property, in violation of the Fifth Amendment.

The Walton County Ordinance must also be enjoined because it perpetuates a taking without just compensation in contravention of the Fifth Amendment to the United States Constitution. The U.S. Supreme Court has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Loretto v. Teleprompter Manhattan Catv Corp*., 458 U.S. 419, 426 (1982). For that reason, "[a] physical invasion constitutes a per se taking, in part because the 'power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.'" *Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 949 (11th Cir. 2018) (quoting *Loretto*, 458 U.S. at 435.

To carry their burden of proving that a taking occurred, the Present Plaintiffs "need not demonstrate direct government appropriation of private property." *Id.* (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987). Indeed, "[a] taking also occurs when the government gives third parties 'a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed,'" as occurs each time Walton County Officials (including the Defendant

Sheriff and his staff) enter private property to enforce the Walton County Ordinance. "[E]ven a temporary or intermittent invasion of private property," moreover, "can trigger physical takings liability." *Id.* at 950; *see also First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (regarding "temporary" takings).

Here, the Present Plaintiffs own portions of the beach in Walton County. *See* Ex. I; Ex. J ¶¶ 1-2; Ex. K ¶ 1; Ex. L ¶ 1; Ex. O ¶ 1; Ex. P ¶ 1. The Ordinance in this case closes *all* beaches in the County, both public and private, and prohibits any person from entering or remaining on any beach in the County under threat of criminal punishment. Ex. H. The Present Plaintiffs need show no more to demonstrate that a taking occurred.

Walton County has not just sought to regulate how the Present Plaintiffs may use their property. Instead Walton County has commandeered and outright taken the property and is invading, occupying, and patrolling that property for the purposes of excluding the Plaintiffs, under the threat of criminal punishment, from land that belongs to them. *See* Ex. J ¶¶ 6-9; Ex. K ¶¶ 5-6; Ex. L ¶¶ 5-6; Ex. M; Ex. N; Ex. O ¶¶ 5-7; Ex. P ¶¶ 5-6. By its conduct, Walton County has physically taken the Present Plaintiffs property to the same degree as if it placed it behind fences or physically occupied it with structures. *Rubano v. Dept. of Transp.*, 656 So. 2d 1264, 1267 (Fla.

1995) (recognizing a taking if the government "by its conduct . . . has effectively taken" private property).

For the duration of the Ordinance, Walton County has taken every strand from the bundle of rights constituting the Plaintiffs' property interest in their beaches. Indeed, "occupation of another's property . . . is perhaps the most serious form of invasion of an owner's property interests," because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, at 435. Thus, the Ordinance and Walton County's actions to evict the Plaintiffs' from their property under threat of prosecution constitutes a *per se* physical taking without any compensation, just or otherwise. For that reason, it must be enjoined.

C. The Walton County Ordinance intrudes on the Plaintiffs' right to be free from unreasonable seizures under the United States Constitution and the right to privacy under the Florida Constitution.

Finally, the Ordinance is flatly violative of the right to be free from unreasonable seizures under the Fourth Amendment to the United States Constitution and the right to privacy memorialized in the Florida Constitution.

1. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures, shall not be violated." The Supreme Court has recognized that the Fourth Amendment protects real property from unreasonable

seizure, *see, e.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 52 (1993), including those seizures that are temporary or partial, *see United States v. Place*, 462 U.S. 696, 705 (1983). A seizure of the type perpetuated by the Walton County Ordinance "must be evaluated under the traditional standards of reasonableness by assessing on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests." *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999).

Under any conceivable test of reasonableness, the Walton County Ordinance constitutes an unreasonable seizure. The Present Plaintiffs are all "private property owner[s]" possessing the "fundamental right . . . to exercise exclusive dominion and control over [their] land." *GeorgiaCarry.Org, Inc v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012). The degree to which the Walton County Ordinance treads on these fundamental rights is profound and comprehensive; not only are Present Plaintiffs blocked from excluding Walton County Officials from interloping on their land, the interlopers themselves are expelling these private landowners from their private land. And finally, because the county-wide flat ban on private beach-presence is entirely untethered, factually or logically, to slowing the spread of COVID-19, it is plainly not needed to effectuate any legitimate governmental interest.

For these reasons, the Walton County Ordinance violates the Fourth Amendment's prohibition on unreasonable seizures. It must therefore be enjoined.

2. Article I, section 23 of the Florida Constitution provides that "[e]very 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." The right to privacy in the Florida constitution "'embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.'" *State v. J.P.*, 907 So. 2d 1101, 1112 (Fla. 2004) (quoting *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989)). For that reason, it has been applied in a wide variety of contexts.[4]

[4] *See, e.g*, *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998) (addressing the visitation rights of grandparents when a child's parent is deceased); *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998) (addressing a statutory rape law as applied to particular defendants); *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997) (addressing assisted suicide); *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996) (addressing the visitation rights of grandparents when a child's parents are living together); *In re Dubreuil*, 629 So. 2d 819 (Fla. 1994) (addressing a patient's right to refuse a blood transfusion for religious reasons, where the patient is the parent of four minor children); *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (addressing whether a surrogate may exercise an incompetent patient's right to decline medical treatment); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (addressing parental consent for a minor to obtain an abortion); *Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989) (addressing a patient's right to refuse a life-sustaining blood transfusion); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988) (addressing the closure of court proceedings and records); *Rasmussen v. S. Fla. Blood Serv.*, 500 So. 2d 533 (Fla. 1987) (addressing the confidentiality of donor information concerning an AIDS-tainted blood supply); *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985) (addressing the confidentiality of bank records); *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. 2d DCA), *review denied*, 492 So. 2d 1331 (Fla. 1986) (addressing the removal of a nasogastic feeding tube from an adult in a permanent vegetative state). *Cf. Renee B. v. Fla. Agency for Health Care Admin.*,

In *J.P.*, for instance, the Florida Supreme Court held that a juvenile curfew ordinance implicated the privacy rights of minors protected by Article I, Section 23. In other words, the Court held that "a minor has a right of privacy" explicitly protected by the Florida Constitution "to remain on public streets . . . in the middle of the night" without interference from government authorities. *See J.P.*, at 1120 (Cantero, J., dissenting) (emphasis omitted). If Florida's constitutional right "to be let alone and free from governmental intrusion into the person's private life" reaches the rights of minors to be on *public* streets at night, it necessarily protects the right of property owners to be present on their own *private* property.

Under Florida law, "the fundamental and highly guarded nature of" the right to privacy means that "any law that implicates" it, "regardless of the activity, is subject to strict scrutiny and, therefore, presumptively unconstitutional." *Weaver v. Myers*, 229 So. 3d 1118, 1133 (Fla. 2017) (internal quotes omitted). To justify its Ordinance, Walton County must demonstrate "that the challenged regulation serves a compelling [governmental] interest and accomplishes its goal through the use of the least intrusive means." *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990). As laudable and compelling as the interest in stemming the spread of COVID-19 is, preventing

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790 So. 2d 1036 (Fla. 2001) (holding that the right of privacy was not implicated by agency rules that barred public funding for abortions); *City of N. Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995) (holding that the right of privacy was not implicated by an administrative regulation that required all job applicants to sign an affidavit stating they have not used tobacco products during the preceding year).

literally every person that owns property along the Gulf of Mexico in Walton County from accessing his or her private property without any exception cannot conceivably be considered a narrowly tailored approach. When an ordinance like the one imposed by Walton County "sweeps to broadly and includes within its ambit a number of innocent activities which are constitutionally protected," it fails to satisfy the narrowly tailored prong of strict scrutiny and it cannot stand. *See J.P.*, at 1117.

Every private property owner along the beaches of Walton County is subject to the Ordinance, irrespective of whether *any* specific property has ever been the source of the crowds allegedly driving the County's concern.[5] *See* Ex. H at 2 (stating "an emergency continues to exist due to *crowds* on the beaches" (emphasis added)). It applies as equally to a nuclear family enjoying time in their backyard as it would to a crowd of college spring-breakers. *Id.* And to no effect. It is impossible to discern how forcing nuclear families or small groups complying with social distancing guidelines off of their privately-owned backyards provides any possible benefit to management of COVID-19. Ex. J ¶¶ 5, 10-11; Ex. K ¶¶ 4, 7-8; Ex. L ¶¶ 7-8; Ex. O ¶¶ 8-9; Ex. P ¶¶ 7-8. Nor does the Ordinance include any findings that the presence of families or small groups adhering to the federal government's social distancing

[5] In fact, the County's "crowd" concern can easily be achieved if the Sheriff were to simply enforce trespass laws on private property when private property owners request the Sheriff to remove unruly trespassers. This, however, is something the Sheriff has heretofore refused to do.

guidelines while on privately-owned beach presents any special risk to the spread of COVID-19. *See generally* Ex. H.

Further, just like the curfew in *J.P.* that the Florida Supreme Court struck, the Walton County Ordinance is insufficiently tailored because it imposes criminal sanctions, *J.P.*, at 1118-19 (finding ordinance's imposition of criminal penalties to be "the most troubling aspect" of the court's strict scrutiny review). It is inconceivable how Walton County could believe its Ordinance is narrowly tailored when it threatens private property owners with criminal penalties for simply stepping on their own private property.

* * *

The Walton County Ordinance has allowed Walton County Officials to trample the Plaintiffs' constitutionally guaranteed right "to be let alone and free from governmental intrusion." Fla. Const. Art. I, § 23. For that reason, and because it constitutes an unreasonable seizure in contravention of the Fourth Amendment to the United States Constitution, it must be enjoined.

II. THE CONSTITUTIONAL INJURIES SUFFERED BY THE PRESENT PLAINTIFFS ARE IRREPARABLE.

As noted above, the Walton County Ordinance infringes the Present Plaintiffs' rights under both the Fourth Amendment to the United States Constitution and Article I, section 23 of the Florida Constitution. The right to be free from unwarranted governmental seizure of private real property, and the right to privacy

explicitly memorialized in the Florida Constitution, "must be carefully guarded," because "once an infringement has occurred it cannot be undone by monetary relief." *Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (cited in *Siegel v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000)). In other words, each day that the private landowners in Walton County are illegally kept off of their own private property is a day that they can never have back. For that reason, the Court should conclude that Walton County's ongoing seizure of and invasion into the Present Plaintiffs' private property, and the constitutional violations that flow from those actions, are irreparable and must be preliminarily enjoined.

The Present Plaintiffs, moreover, have, and will continue to, suffer emotional distress from the Ordinance and those who are enforcing it. *See United Steelworkers v. Textron, Inc*., 836 F.2d 6, 8 (1st Cir. 1987) (emotional distress from loss of insurance acknowledged in irreparable injury analysis). This risk is neither hypothetical nor hyperbole; since the Walton County adopted the Ordinance late on April 2, 2020, the Present Plaintiffs have been approached and forced off their private property by multiple county officials acting under the color of governmental law. *See* Ex. J ¶¶ 6-9; Ex. K ¶¶ 5-6; Ex. L ¶¶ 5-6; Ex. M; Ex. N; Ex. O ¶¶ 5-7; Ex. P ¶¶ 5-6 Ex. H ("violation of this Ordinance shall constitute a criminal offense"). This includes county health and safety personnel, lifeguards, and Sheriff's deputies, *see* Ex. J, ¶¶ 6-9; Ex. K ¶¶ 5-6; Ex. L ¶¶ 5-6; Ex. M; Ex. N; Ex. O ¶¶ 5-7; Ex. P ¶¶ 5-6,

some of whom have threatened arrest and incarceration for noncompliance, *see* Ex. J ¶¶ 6-7, 9; Ex. K ¶ 5; Ex. L ¶ 5; Ex. O ¶ 6-7; Ex. P ¶ 5.

Finally, the Ordinance does more damage than preventing the Present Plaintiffs from engaging on their *private* property in the sort of outdoor recreational activities the Governor has identified as "essential." It also might result in *greater* COVID-19 exposure by causing more *public* engagement. *See* Ex. J ¶¶ 10-11; Ex. K ¶¶ 7-8; Ex. L ¶¶ 7-8; Ex. O ¶¶ 8-9; Ex. P ¶¶ 7-8. In other words, the Walton County Ordinance forces the Present Plaintiffs' to engage in essential recreational activities in *public* spaces rather than the safety of their own private property and backyards. *See, e.g., Id*.

The Present Plaintiffs, like the rest of the world, are living through uncertain, dynamic times. Family engagement and finding the peace that comes with the solitude of time on one's own property is critically important for navigating the stress and tension caused by a world that looks nothing like it used to several weeks ago. The unreasonable restriction of private use of private property caused by Walton County has already, and will continue to, deprive the Present Plaintiffs of much-needed respite. *See* Ex. J ¶¶ 3-5, 10-11; Ex. K ¶¶ 2-4, 7-8; Ex. L ¶¶ 2-4, 7-8; Ex. O ¶¶ 3-4, 8-9; Ex. P ¶¶ 3-4, 7-8. The time lost is time that cannot ever be regained.

Taken together, the Walton County Ordinance is inflicting irreparable injuries that necessitate entry of a preliminary injunction.

III. THE CONSTITUTIONAL INJURIES SUFFERED BY THE PRESENT PLAINTIFFS FAR EXCEED THE NEGLIGIBLE BENEFIT GAINED BY THE WALTON COUNTY ORDINANCE.

As discussed above, the Walton County Ordinance invades the Present Plaintiffs' constitutional rights on multiple fronts. Walton County, through threats of prosecution (including fines of up to $500 and incarceration of up to 60 days), has physically prevented the Present Plaintiffs from being able to use or even set foot in their private backyards. Ex. J ¶¶ 6-9, 12; Ex. K ¶¶ 5-6, 9; Ex. L ¶¶ 5-6, 9; Ex. M; Ex. N; Ex. O ¶¶ 5-6, 10; Ex. P ¶¶ 5-6, 9. On a daily basis, Walton County Officials enter and occupy the Present Plaintiffs' private properties and prevent them, their family members, or invitees from being able to possess or physically occupy their own private properties. Ex. J ¶ 12; Ex. K ¶ 9; Ex. L ¶ 9; Ex. O ¶ 10; Ex. P ¶ 9.

In contrast to the profound deprivation of rights inflicted by the Walton County Ordinance, the Ordinance adds little, if anything, beneficial to the health-crisis response. In fact, it likely makes the situation much worse. The Walton County Ordinance prevents the Present Plaintiffs, many of whom own residences along the beach, from using their own backyards to quarantine or stay safe at home. Common sense tells us that the chances of a family or landowner catching or spreading COVID-19 is far less in his or her own private backyard (where no one else should

be, lest they be trespassing) than traveling to the grocery store or hardware store or other essential businesses. Likewise, recreating in one's own private backyard (to fish, swim, etc.), as specifically authorized by the Governor's Executive Orders, is far safer than traveling somewhere public to recreate.

Moreover, the Present Plaintiffs have followed the CDC guidelines and never have a group of more than ten people together. *See, e.g.*, Ex. J ¶¶ 7, 10; Ex. K ¶¶ 4, 7; Ex. L ¶¶ 4, 7; Ex. O ¶¶ 4, 8; Ex. P ¶¶ 4, 7. Indeed, there is plenty of room for compliance with social distancing. In fact, one of the Present Plaintiff's use of his privately-owned beach (i.e., backyard) on April 3, 2020, shows he is much further away from anyone than he even would be within his own house:

See Ex. L ¶ 7.

The County's Ordinance forces family members into a confined space within their house rather than allow them to social distance and recreate in their sandy backyard. Or it forces them to public locations to recreate potentially closer to many other persons increasing the risk of spreading COVID-19. Either way, it is counterproductive. And it is beyond reasonable dispute that any hypothetical, negligible benefit conjured by those who passed the Walton County Ordinance cannot possibly outweigh the profound trammeling of the Present Plaintiffs'

constitutional rights.

In reality, the purpose of the County's Ordinance has nothing to do with controlling the spread of COVID-19. Instead, it is merely a decision by Walton County that it is more convenient for the Sheriff to enforce closure of the County's public beaches and the Governor's Executive Orders if they invade the Present Plaintiffs' constitutional rights and close *all* beaches, public and private. *See* https://walton.civicweb.net/document/66799?splitscreen=true&media=true (April 2, 2020, Walton County Board of County Commissioners Emergency Meeting). It is inconceivable that the Constitution could countenance the invasion of multiple constitutional rights in the name of mere administrative convenience. The negligible benefits of the County's Ordinance simply cannot outweigh the burden imposed on Plaintiffs' constitutional rights.

IV. ENJOINING THE WALTON COUNTY ORDINANCE WOULD SERVE THE PUBLIC INTEREST.

Enjoining the Walton County Ordinance would not harm the public interest; if anything, it would serve the public interest. As noted above, the only real effect of the County's Ordinance is to make it more difficult for private property owners along the Gulf of Mexico to shelter at home. Commonsense tells us that the chances of a family or landowner catching or spreading COVID-19 is far less in his or her own private backyard (where no one else should be, lest they be trespassing) than traveling into public spaces to engage in the very sort of essential recreational

activities authorized by the Governor and that a property owner might otherwise be able to engage in on their own property.

Simply put, recreating in one's own private backyard to fish, swim, or otherwise, is far safer than traveling to a public location to do so. Being forced to go out in public to conduct these type of essential recreational activities increases the exposure risk both to the property owners along the Gulf of Mexico affected by the County's Ordinance and to the public in general.

The County's Ordinance forces family members into a confined space within a house rather than allow them to social distance and recreate in their sandy backyard. Or it forces them to public locations to recreate potentially closer to many other persons increasing the risk of spread of COVID-19 among the Present Plaintiffs and the public. Enjoining the County's Ordinance could only serve the public interest by avoiding this perverse outcome.

CONCLUSION

For the foregoing reasons, the Court should preliminarily enjoin the Walton County Ordinance.

Respectfully submitted by:

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Dated: April 6, 2020

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that the foregoing complies with the size, font, and formatting requirements of Local Rule 5.1(C), and that the foregoing complies with the word limit specified in Local Rule 7.1(F). Specifically, this motion contains 5,555 words, excluding the case style, signature block, and certificates.

/s/ D. Kent Safriet
D. Kent Safriet

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record via email on this 6th day of April, 2020.

/s/ D. Kent Safriet
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