IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA CIVIL DIVISION

MICHAEL GONZALEZ, esquire
CAROLYN STEWART **CASE #**
WILLIAM H. BRABAZON
KENNETH BERRY,
GEORGE RODRIQUEZ,
et al
Plaintiffs/Petitioners,
v.

HILLSBOROUGH COUNTY, FLORIDA,

Defendant/Respondent.
_____/

CONSOLIDATED PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND ALTERNATIVE MOTION FOR A TEMPORARY INJUNCTION WITH INCORPORATED MEMORANDUM OF LAW

Plaintiffs, in the cases captioned above, by and through their undersigned attorney, and pursuant to Section 26.012 (3), F.S., 2019 and to Rule 1.610, Fla.R.Civ.P., respectfully move this Court for the entry of a Temporary Restraining Order or, in the alternative, move for a Temporary Injunction enjoining Defendants, HILLSBOROUGH COUNTY, FLORIDA, and the Hillsborough County Sheriff's Office, and all those acting in concert with or at the behest of Defendants, from enforcing, or attempting to enforce EXECUTIVE ORDER of the COUNTY EMERGENCY POLICY GROUP establishing a CURFEW in response to County Wide Threat from the COVID 19 Virus, (the "EPG Curfew order") against Plaintiffs. Attached hereto are Affidavits of Verification supporting the request for extraordinary relief articulated herein, which also incorporate the Complaint in this action as a verified basis for the relief requested. In support of the relief requested herein, would show the following:

I. INTRODUCTION TO THE MOTION: A SUMMARY OF THE REASONS FOR EMERGENCY AND EXTRAORDINARY RELIEF

1. As explained in the operative Complaint below, these actions challenge Municipal Code Chapter 22, Sections 22-24 and the BOCC's legislative powers that are unlawfully delegated to EPG therein; and Hillsborough County EXECUTIVE ORDER of the COUNTY EMERGENCY POLICY GROUP establishing a CURFEW in response to County Wide Threat from the COVID 19 Virus, on a number of bases, as specified below.

2. The Plaintiff's in this action are a number of individuals who reside in Hillsborough County who are impacted by the Curfew, and the potential criminal penalties attached thereto and whose civil liberties and constitutional rights are being violated.

3. The constitutional flaws in the challenged "Executive Order" are that it is a criminal law enacted outside legal legislative authority by an entity that cannot issue laws, is unconstitutionally vague and overbroad, and violates both the United States and Florida constitutions require criminal laws to state explicitly and definitely what conduct is punishable, and when reviewed must at a minimum pass ration basis review. Laws and the underlying authorities that violate these standards should rightfully be declared void, where the offensive portions of code or ordinances may be severed to leave any legitimate parts. Vagueness, overbreadth and underinclusive doctrines rests on the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, and Article I, Section 9 of the Florida Constitution. By requiring fair notice of what is punishable and what is not, the law should apply equally without being open to arbitrary application upon the whim of those enforcing it, should not encompass more activity than required by irrationally precluding the exercise of the rights

guaranteed by the U.S. and Florida Constitutions, and should not omit persons and groups such that there can be no rational basis for the "law." An order of the curfew's nature should be void for vagueness if the order's delegation of authority to police and/or administrators is so extensive that it would lead to arbitrary arrests, fines, and prosecutions.

4. Additionally, the process by which the adoption of the Curfew by the Hillsborough County Emergency Policy Group took place, violated multiple Florida Statutes. Article I, Section 24(b) of the Florida Constitution requires all meetings of public entities to be in public and noticed. The curfew was placed into effect with no notice, hearing or publication of the law as of April 13, 2020. The County may suggest that that the requirement of Florida Statute 286.0115(3) provides an exemption from public notice and participation in the case of emergency. However, the nature of how this Curfew Order was adopted, to include creation and enactment by a body unlawfully delegated legislative authority, clearly shows that the need for such actions that avoid Florida Constitutional requirements did not constitute an emergency in any sense of the word.

5. Most significantly, the power to enact laws unlawfully delegated to the EPG violates the Non-Delegation and Separation of Powers Doctrines. In its present form and under authorities given in the County Code Chapter 22, the EPG has displaced the BOCC's legislating authority, and all Executive Orders and legislative type issuances by the EPG should be declared constitutionally void. Non-delegation and Separation of Powers are doctrines of constitutional law under which State government under the Florida Constitution and related statutes, and at County level is reinforced further by the County Charter, the three branches of government (executive, legislative, and judicial) are kept separate. The legislating body may not delegate law-making to other branches. In this particular case, the Sheriff of Hillsborough County, a Constitutional Officer of the State of Florida, and a member of Judicial branch of government, is

a voting member of a legislative body. The Sheriff has a duty to enforce state laws and statutes, and County ordinances; within Constitutional bounds, and to ensure the security and safety of Hillsborough's citizens. This is accomplished through the delivery of law enforcement services, the operation of the County Jail, and the provision of court security. The Office of the Sheriff functions as an Executive Officer of the court. Under Florida law, the Sheriff derives his legal authority from the Constitution of the State of Florida and is not part of the County legislative branch. The Sheriff is vested with the ability to appoint and direct deputies who will act in his name and office to enforce the appropriate and applicable laws of the State of Florida.

The EPG was delegated legislative powers under County code Chapter 22, Section 22 by the County BOCC where such powers are lawfully vested in the County BOCC by the Florida Constitution, associated Statutes, and the County Charter. Local governments are considered arms of the Florida state legislature. Authority for County governments is granted by Article VIII, § 1 of the Florida Constitution, Florida Statute §125.01;125.011 and 125.66. Chapter 252, Florida Statutes authorizes emergency operations by local governments without rescission or change to legislative authority. Hillsborough County enacted Hillsborough County Code of Ordinances and Laws Chapter 22, Article II, Sections 22-23 in order to protect the health, safety, and welfare of the County's residents during declared emergencies. In this, without any authority, it created a legislative body that replaces the County's BOCC.

The EPG, with members unelected as a body of any type, where no citizen in the County may vote to remove every single EPG member from their elective offices which are not associated with the EPG, is acting in the stead of the County's elected government, and within the legislative branch of the State government. In addition to the Sheriff, the EPG includes mayors, the County Administrator who is Chief of the County's Executive branch, and the School Board Director: none

of whom can under the most expansive imagination be viewed as being rightfully vested with legislative authority as has happened within our County.

Only three County Commissioners, the Hillsborough County Sheriff, select mayors, the County Administrator and the School Board Director are voting members of this EPG that is empowered to enact executive orders enforceable as criminal laws subject to prosecution in a County Criminal Court, jail and/or fines. This is all counterintuitive to the Non-Delegation and Separation of Powers Doctrines inherent to the Florida and United States Constitutions, and the Hillsborough County Charter. In near irony, under the County Code that created it, the EPG without any oversight declares emergencies that empower it to enact Executive Orders that serve as laws that are subject to no review outside the Courts in an action such as this.

Accordingly, the fact that the Hillsborough County Sheriff is voting member of this board empowered to enact orders subject to prosecution in a County Criminal Court violates the Florida and Untied States Constitution separation of powers doctrine.

6. All of the "governmental interests" purportedly "served" by the challenged curfew order have pre-existing remedies found by the Safer at Home orders issued by this same group (on 26 March 2020 and 1 April 2020) and by the Governor of the State of Florida on 1 April 2020. The flaws identified in the challenged legislative body and its unconstitutional legislation allow unbridled discretion by law enforcement which aside from now making and enforcing the law, is is also judge and jury as the curfew is impossibly tangled by exceptions that make it impossible for anyone to know what is allowed and what is not allowed, and decisions as to such may arbitrarily be made by law enforcement, even including with encouragement by EPG members' encouragement of who to target and when under such law.

II. JURISDICTION AND VENUE

7. This is an action for declaratory and injunctive relief, and this action is related to the three separate actions specified above.

8. This in an action challenging the constitutionality of the Hillsborough County Code, Chapter 22 Sections 22-24 and the EPG as a legislative body. This action subsequently challenges Hillsborough County EXECUTIVE ORDER of the COUNTY EMERGENCY POLICY GROUP establishing a CURFEW in response to County Wide Threat from the COVID 19 Virus and the procedures by which it was enacted which adversely affect each individual Plaintiff's civil liberties and constitutional rights

9. This is an action for temporary and permanent injunctive relief and for a declaratory judgment and related relief. The jurisdiction of this Court is invoked pursuant to Chapter 86 et.seq. Florida Statutes, which authorizes circuit courts to enter declaratory judgments related to controversies within the jurisdiction of the circuit court. The jurisdiction of this Court is also invoked pursuant to Rule 1.610, Fla.R.Civ.Pro., Chapter 26.012(3), Florida Statutes, which authorizes the circuit courts to enter injunctions, and the inherent power of Florida courts to grant injunctive and declaratory relief.

10. The jurisdiction of this Court is also invoked pursuant to Article I, Sections 2, 6, 9, 10, 12, 21, and 23, and Article X, Section 6 of the Constitution of the State of Florida.

11. The jurisdiction of this Court is also invoked pursuant to 42 U.S.C. Secs. 1983, 1985, and 1988. This is a cause of action also arising under Article I, Section 10 of the Constitution of the United States, and under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

12. The jurisdiction of this Court is also invoked pursuant to *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996), abrogated on other grounds *Steel Co. v. Citizens for Better Env*., 523 U.S. 82 (1998) (noting that government may impose a curfew during times of emergency but they must be imposed in good faith, have a factual basis, and be necessary to maintain order) and *SW v. State*, 431 So. 2d 339 (2DCA 1983), "Government has a legitimate right to enact laws for the protection of minors, but such laws must reasonably relate to their purpose without unduly limiting individual freedoms."

13. An actual and existing controversy exists between Plaintiffs and Defendant Hillsborough County relative to their respective rights and duties as set forth herein.

14. Venue is proper in Hillsborough County, because Hillsborough County is the County where the Plaintiffs and Defendants are located, and where relief is sought from the enforcement of the unconstitutional threat to personal and property rights brought about through enforcement of the challenged order.

III. PARTIES

15. Plaintiff **MICHEAL CELSO GONZALEZ, esquire,** resides in North Tampa, and does business in South Tampa as an attorney. Plaintiff **CAROLYN STEWART** resides in the Plant City area, and is a retired United States Army Colonel currently completing her 3d year of Law School.

16. Plaintiff, **WILLIAM H. BRABAZON,** is a Department of Defense civilian assigned to Mac Dill AFB, and resides in the South Tampa area. Plaintiff **KENNETH BERRY** resides in Riverview. Mr. Berry was a Chef at a local golf course who was furloughed due to the COVID 19 outbreak, and was working to make ends meet as an Uber Eats delivery. The Curfew

has impacted his ability to earn a living based on all the restaurants closing to comply with the EPG Curfew order. Plaintiff **GEORGE RODRIQUEZ** resides in New Tampa. Mr. Rodriquez is the Vice President for Sales of pharmaceutical company that does business throughout Tampa

17. At all times material hereto, Defendant HILLSBOROUGH COUNTY, FLORIDA, was and is a political subdivision of the State of Florida. Naming HILLSBOROUGH COUNTY, FLORIDA, as a Defendant in this action is intended to include all HILLSBOROUGH COUNTY, FLORIDA representatives, employees, and agents, including but not limited to, the County Board of Commissioners, the COUNTY EMERGENCY POLICY GROUP, the County Attorney's Office, and all employees and agents under whose authority to enact and enforce licensing laws, regulations and ordinances is duly governed and limited by, *inter alia*, Sec.286, et.seq., Florida Statutes (Florida "Sunshine" law) and Article I, Section 24, Florida Constitution, as well as the defined authorization to carry out county government responsibilities under Chapter 125, Florida Statutes, duly governed, limited and enumerated by, *inter alia* Sec.125.01, Sec. 125.011, Sec. 125.66 and Sec. 286, et.seq. of the Florida Statutes (Florida Constitution, effective July 1, 1993), and the Hillsborough County Charter.

IV. PLAINTIFFS' STATEMENT OF JURISDICTIONAL ALLEGATIONS ESTABLISHING STANDING, RIPENESS AND A RIGHT TO RELIEF

18. Plaintiffs assert that their position, as set forth in this Complaint, is legally sound and supported by fact and law. The Defendants' threatened actions in the form of a curfew whose violation can result in arrest and prosecution in County Criminal Court have created a bona fide controversy between the parties, and Plaintiffs are in doubt as to their rights, privileges and immunities with respect to the Curfew Order, the unconstitutional delegation of legislative

authority exercised by the EPG under County Code Sections 22-22 through 22-24; and the flawed procedures that resulted in the passage of the curfew order. Plaintiffs require, therefore, a declaratory judgment determining their rights, privileges and immunities, and relief from repeated and continuing legislative actions by the EPG.

19. There is a clear, present, actual, substantial and bona fide justifiable controversy between the parties.

20. Plaintiffs are and will be threatened with adverse treatment and a denial of due process and their civil rights, on the basis of a Curfew Order that is hopelessly vague and fails to alert Plaintiff's as to what specific conduct could result in their arrest.

21. Plaintiffs have no adequate remedy at law. No amount of money damages could adequately compensate the Plaintiffs for the irreparable harm described herein, specifically the deprivation of constitutionally protected fundamental rights.

22. Plaintiffs and the public at large will suffer irreparable injury if injunctive relief is not granted, and Defendants are permitted to enforce the provisions of the Curfew Order while also retaining continued law-making authority delegated to the EPG as challenged herein.

23. The public interest would best be served by the granting of injunctive relief, and, indeed, the public interest is disserved by permitting the enforcement of invalid Curfew Order as manifest in the EXECUTIVE ORDER of the COUNTY EMERGENCY POLICY GROUP establishing a CURFEW in response to County Wide Threat from the COVID 19 Virus, and the flawed procedures in violation of Florida Statute's that resulted in this flawed and vague order that violates numerous constitutional rights, as set forth herein.

24. All conditions precedent to the institution and maintenance of this cause of action have occurred or have been performed.

25. The acts, practices and jurisdiction of Defendant, HILLSBOROUGH COUNTY. as set forth herein, were and are being performed under color of state law and therefore constitute state action within the meaning of that concept.

V. GENERAL ALLEGATIONS

A. DESCRIPTION OF THE HISTORY LEADING TO THE EXECUTIVE ORDER of the COUNTY EMERGENCY POLICY GROUP establishing a CURFEW in response to County Wide Threat from the COVID 19 VIRUS

26. In December 2019, a cluster of pneumonia cases, caused by a newly identified β-coronavirus, occurred in Wuhan, China. This coronavirus, was initially named as the 2019-novel coronavirus (2019-nCoV) on 12 January 2020 by World Health Organization (WHO). WHO officially named the disease as coronavirus disease 2019 (COVID-19) and Coronavirus Study Group (CSG) of the International Committee proposed to name the new coronavirus as SARS-CoV-2, both issued on 11 February 2020.

27. First coronavirus case outside of China is reported in Thailand on January 13, 2020. On January 20, 2020, the first US case is reported: a 35-year-old man in Snohomish County, Washington. On January 23, 2020, Wuhan is placed under quarantine, Hubei province follows within days. WHO declares a global public-health emergency on January 30, 2020 and the next day, January 31, 2020, President Trump bans foreign nationals from entering the US if they were in China within the prior two weeks.

28. On February 2, 2020, the first death outside China is recorded in the Philippines. On February 8, 2020, a. US citizen dies in Wuhan – first death of an American citizen. On February 9, 2020, the reported death toll in China surpasses that of the 2002-2003 SARS epidemic, with 811 deaths recorded (based on present news reports, it would appear that number was underreported

by a factor as high as times 50). On February 11, 2020, WHO announces that the new coronavirus disease will be called "COVID-19." Coronavirus cases start to spike in South Korea. On February 19, 2020, the Iran outbreak begins. On February 21, 2020, the Italy outbreak begins.

29. On February 29, 2020, the United States reports the first death on American soil. On March 3, 2020, Coronavirus cases begin to sharply increase in Spain, marking the start of its outbreak. Days later, Italy places all 60 million residents on lockdown. WHO declared the outbreak a pandemic on March 11, 2020 and President Trump bans all travel from 26 European countries the same day. Two days later, on March 13, 2020, a US national emergency is declared over the novel coronavirus outbreak. On March 17, 2020, a leaked federal plan warns the new coronavirus pandemic "will last 18 months or longer" and may come in "multiple waves" of infections.

30. By March 23, 2020, New York City confirms 21,000 cases, making it the biggest epicenter of the outbreak in the United States. Total confirmed cases in the US reach 82,404 — the highest in the world — surpassing China's 81,782 (as alleged and reported) and Italy's 80,589 on March 26, 2020.

B. A DESCRIPTION OF EXECUTIVE ORDER of the COUNTY EMERGENCY POLICY GROUP establishing a CURFEW in response to County Wide Threat from the COVID 19 VIRUS

31. The Executive Order of the County Emergency Policy Group establishing a curfew lists 26 separate “WHEREAS” findings. The gist’s of these findings is to provide a summary and historical basis for the Curfew Order, and to support that such order is necessary and proper, and would meet the definition of a necessary emergency to place restrictions on 1.4 million residents in Hillsborough County.

32. The first "WHEREAS" points to action taken by the Governor to declare a public health emergency. The second "WHEREAS" shows that days later, the Governor expanded the order to state a general state of emergency:

WHEREAS, on March 1, 2020 the Governor of the State of Florida issued Executive Order Number 20-51, declaring that a public health emergency exists throughout the State of Florida as a result of the spread of the COVID-19 virus; and

WHEREAS, on March 9, 2020 the Governor of the State of Florida issued Executive Order Number 20-52, declaring that a state of emergency exists throughout the State of Florida as a result of the spread of the COVID-19 virus and its imminent threat to health and welfare of the citizens of Florida;

33. The third "WHEREAS" shows that the Hillsborough County Emergency Policy Group (EPG was convened and issued an order declaring a local state of emergency. The EPG exists for only seven days at a time, and is required to declare an emergency on a weekly basis:

WHEREAS, on March 12, 2020, the Hillsborough County Emergency Policy Group did convene and issue its Executive Order declaring a local state of emergency for all of Hillsborough County, which Order was extended by the Emergency Policy Group on March 19, 2020, March 26, 2020 and again on April 9, 2020; and

34. The fourth and Fifth "WHEREAS" concerned an Executive Order from the Governor issued on March 17, 2020 limiting the number of patrons in restaurants, suspending the sale of alcohol for 30 days from bars and nightclubs, and directing social distancing at public locations and that this executive order and prior orders remained in effect:

WHEREAS, on March 17, 2020 the Governor of the State of Florida issued Executive Order Number 20-68, placing restrictions on certain businesses and public gathering locations throughout the State of Florida as a result of the spread of the COVID-19 virus and its imminent threat to health and welfare of the citizens of Florida; and

WHEREAS, all three Executive Orders of the Governor remain in effect and are forecast to remain so for the foreseeable future; and

35. The sixth "WHEREAS" indicates that Hillsborough County continues to see increase in the number of persons testing positive for the COVID 19 virus:

WHEREAS, the State of Florida and Hillsborough County are continuing to experience increased reports of illnesses and persons testing positive for the virus; and

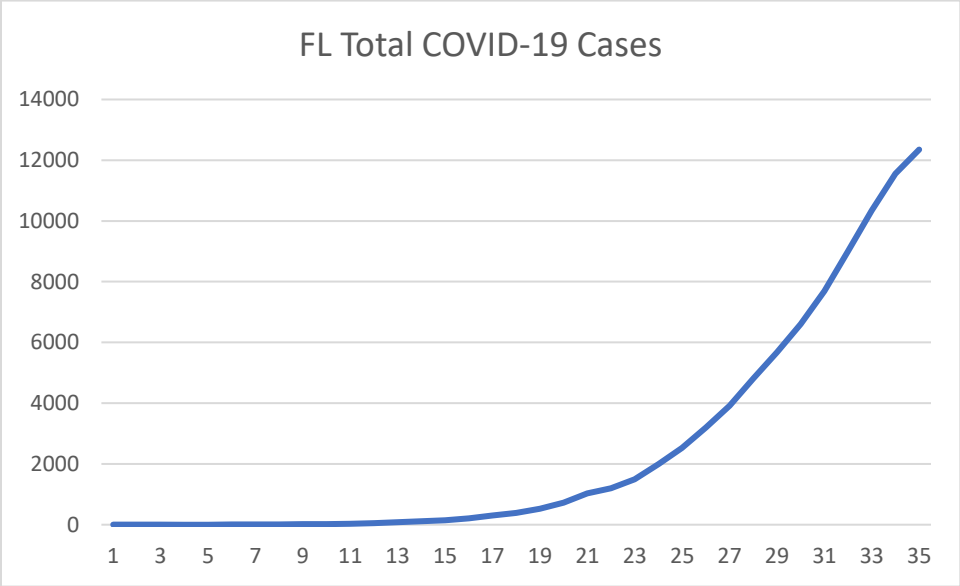
36. The seventh and eighth "WHEREAS" explains that the EPG adopted all of the Governor's previous executive orders on March 20, 2020, and that gatherings of less than 10 people should practice social distancing:

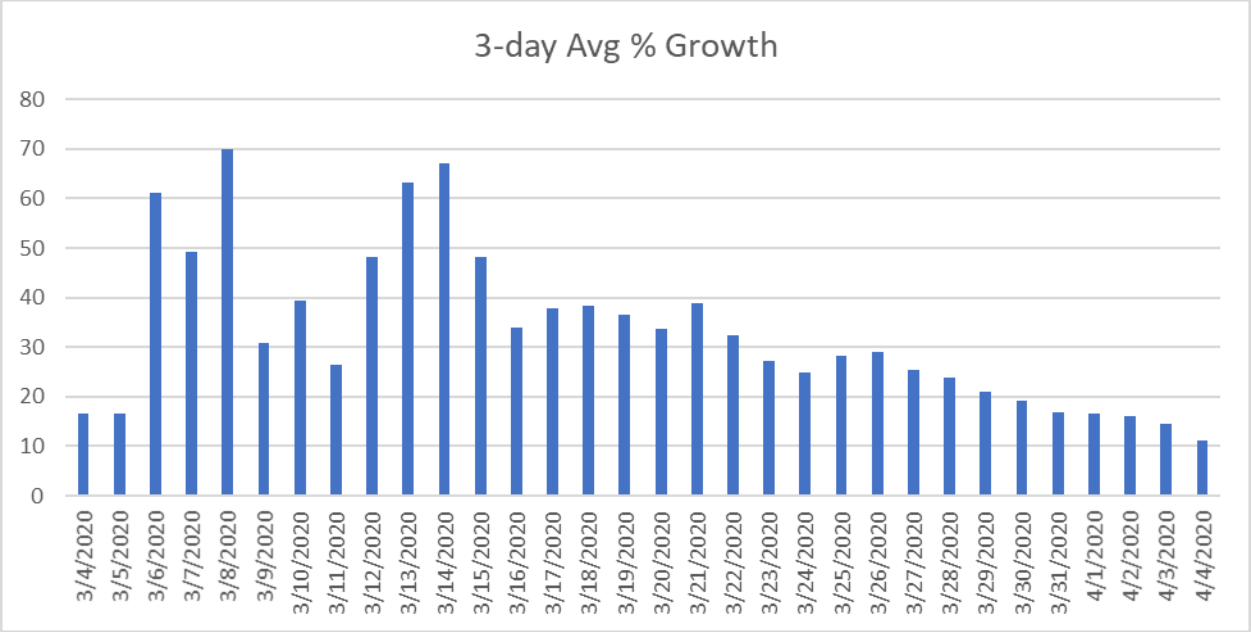
WHEREAS, on March 20, 2020, Administrator Order Number 20-05 entitled Hillsborough County Administrator Order Updating COVID-19 Limitations for Establishments and Gatherings was issued, incorporating by reference the Governor's Executive Orders 20-68 and 20-71, specifies all public or private gatherings, including community, civic, public leisure, faith-based events, sporting events, concerts and any similar events that bring together more than 10 people in a single room, single space, or any venue, at the same time are prohibited. This prohibition does not include venues that provide essential goods or services such as grocery stores, hospitals, medical facilities, pharmacies, gas stations, bank/credit unions, shelters, and government agencies and their meetings; and

WHEREAS, Administrator Order Number 20-05 specifies any gathering of 10 or less people should have the capacity to provide individuals with a 6-foot distance between each person.

37. The ninth and tenth "WHEREAS" attempts to make a statement of fact concerning the growth of COVID 19 cases in Florida and Hillsborough County that may not be supported by the actual facts on the ground at the time they were adopted. As George Box, a famous systems modeler once stated, "ALL models are wrong, but SOME are useful". The first part of the cycle is an exponential increase in cases as the spread starts. The next cycle begins at the inflection point where the rate of growth starts to decrease. There is still a positive rate of growth, but the growth rate has reached its peak and is beginning to decrease. The last phase is indicated by a negative growth rate where the rate of recoveries is higher than the rate of new cases. This phase begins at the peak number of infections minus the number of recoveries. This is the point where the maximum stress is put on the health care system and from here out the number of hospitalized patients is decreasing. So here is where we are on the curve and where we

mathematically will be in the next two to three weeks. Florida hit the inflection point on March 22, 2020. From this date there has been a steady and significant decrease in the rate of growth of the Coronavirus. From previous trends in other countries, one can anticipate the peak infection minus recovery to happen in about two weeks. Italy reached this point on April 3, 2020, and the United States has typically been behind them by about 2 weeks. If this is the case then the maximum stress point on the hospitals in Hillsborough County will be on (or about) April 19th.





WHEREAS, there has been no indication that the spread of COVID-19 is slowing in the State of Florida and Hillsborough County; and

WHEREAS, Hillsborough County must continue to take emergency action to lessen the spread of COVID-19; and

38. The eleventh "WHEREAS" gives a general explanation on how COVID 19 is transmitted from person to person. However, there is no factual support for the contention that COVID 19 virus damages property, either real or personnel:

WHEREAS, there is reason to believe that COVID-19 is spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time thereby creating a dangerous physical condition spreading from surface to person and causing increased infections to persons, and also creating property or business income loss and damage in certain circumstances; and

39. The twelfth "WHEREAS" attempts to argue that the COVID 19 virus is causing widespread infection and loss of life, and is resulting in property damage, and that business loss is specifically due to the virus attaching itself to surfaces for prolonged periods. The actual reality is as of 15 April 2020 is that the state is now reporting 870 known cases in Hillsborough County and 19 coronavirus-related deaths. Hillsborough County's population is 1.4 million.

The CDC reports that on average during a normal flu season, the number of deaths is 1907.

There is no evidence offered that the COVID 19 virus produced property damage:

WHEREAS, this Executive Order is being issued because of the propensity of COVID-19 to spread from person to person causing widespread infection and loss of life, and also because COVID19 is causing property damage and business income loss due to its proclivity to attach to surfaces for prolonged periods of time and thereby creating a dangerous physical condition; and

40. The thirteenth "WHEREAS" states that COVID 19 has created a dangerous physical condition that requires regulations to stop the spread of the virus but offers no evidence to suggest that the proposed action has any nexus toward accomplishing this goal:

WHEREAS, as a governmental civil authority action, it is necessary to impose the regulations and restrictions set forth herein in response to the dangerous physical conditions that currently exists and to stop the COVID-19 virus from spreading; and

41. The fourteenth, fiftieth and sixteenth "WHEREAS" provides what the EPG believs is the legal authority to issue a curfew. However, no where in these sections can it be found that the imposition of a curfew under the facts asserted required the lack of compliance with the Florida Sunshine Laws requiring notice and a chance for the public to be heard. In point of fact, this consideration of a curfew was discussed on April 1, 2020. No mention of such an action occurred until the matter was raised at the April 13, 2020 meeting and voted on shortly thereafter.

WHEREAS, Chapter 252, Florida Statutes, and Hillsborough County Ordinance 06-13 (Hillsborough County Code of Laws and Ordinances, part A, Chapter 22, Article II, Sections 22-19 Through 22-30), authorizes Hillsborough County to declare a state of local emergency; and

WHEREAS, Chapter 22, Article I, Sections 22-22, Hillsborough County Code of Ordinances and Laws (Hillsborough County Emergency Management Ordinance), and the Hillsborough County Comprehensive Emergency Management Plan delegates authority to declare a state oflocal emergency to the Hillsborough County Emergency Policy Group; and

WHEREAS, Section 252.38, Florida Statutes, authorizes Hillsborough County to declare a state of local emergency, and further authorizes Hillsborough County to take whatever prudent

action is necessary to ensure the health, safety, and welfare of the community; and

42. The seventeenth "WHEREAS" suggests that the EPG wants to take both effective and reasonable steps to protect the health and welfare of the citizens of Hillsborough County. However, nowhere in the Curfew order is any evidence offered to suggest that a curfew during the hours of 9 pm and 5 am will do anything to stop the spread of COVID-19, or that such a step is reasonable given the harm it will present to civil liberties and fundamental rights of the 1.4 million individuals who reside in this county. The COVID 19 virus spreads through the hours where the Curfew is not in effect. No showing has been offered to suggest that there is a more substantial likelihood of spread during the nighttime hours. To the contrary, the Curfew Order will have the very opposite effect. People who may choose to run at night when there are fewer people outdoors are compelled to run during the earlier hours, when more people will be gathered. The Curfew order has the twin qualities of being patently unreasonable, especially to those adversely impacted by a loss of job and income, and utter ineffective. In fact, it has a greater likelihood to increase risks rather than reduce them:

WHEREAS, the Hillsborough County Emergency Policy Group wants to take effective and reasonable steps to protect the health of residents and the community; and

43. The eighteenth "WHEREAS" purports to assert a policy approach that is not supported by the action taken by the EPG in passing a 9 pm CURFEW that had the effect of creating greater job loss. The general public was erroneously told by the Chair of the EPC that anyone found outside after 9 pm was in violation of the Curfew, even if they "were walking their dog". Multiple Emergency Alerts where blasted throughout the County to anyone who possessed a cell phone alerting everyone to coming Curfew (both at 6:30 and 7:30 pm on 13

April 2020) with no other information other than a Curfew was in effect starting at 9 pm that same night. The impact of these announcement caused every business engaged in food delivery or take out to shutter their doors early that evening, and they have remained closed since. The Curfew announcement had the affect of stopping all commerce after 9 pm, with the general public, fearful that if they where to leave their homes would be in violation of the curfew. This action by the EPG has done more damage to the local economy then any of their previous actions to date, to achieve no objective narrowly tailored purpose to meet the asserted goals:

WHEREAS, the Hillsborough County Emergency Policy Group does not want to create longterm irreparable economic harm to our residents, businesses, and to the local and regional economy; and

44. The nineteenth "WHEREAS" purports to want to avoid confusion and panic. Indeed, the very opposite has occurred. The EPG Chair appeared himself to be patently ignorant of what he was voting in favor when he was publicly interviewed on TV and in the papers stating things that were patently untrue, to wit: "Walking your Dog past 9 pm is a violation of the Curfew". Tampa Mayor Jane Castor, who voted for the Curfew, is on record in the Tampa Bay Times saying that "the group should have waited for the clarity of a draft order before approving the curfew." (Tampa Bay Times published article April 15, 2020 entitled "Lawsuits, petitions, online outrage follow Hillsborough's nighttime curfew"). Confusion reigns supreme because the Curfew itself is vague and impossible to determine to whom it may apply:

WHEREAS, the Hillsborough County Emergency Policy Group recognizes unified action is paramount to ensure the most effective results and cause the least confusion and panic in the community; and

45. The twentieth, twenty-first, second and third "WHEREAS" each purport to assert policy determinations that would be reflected in the March 27, 2020 Safer at Home Order. This order was amended on April 1, 2020 because the Governor took action to compel changes in the

Hillsborough EPG March 27, 2020 Safer at Home Order that indicated that Church service attendance was not an "essential" activity, in violation of the United States Constitutional protections found in the 1st amendment. In point of fact, the confusion surrounding the EPC March 27, 2020 Safer at Home order that resulted in the arrest of a local pastor, who has not to date been formally charged, was what prompted the Governor to act on April 1, 2020 with executive order number 20-91. This executive order compelled the Hillsborough EPG to amend the March 27, 2020 safer at home order on April 1, 2020.

WHEREAS, the Hillsborough County Emergency Policy Group recognizes the categories and types of essential businesses and services that must remain open; and

WHEREAS, the Hillsborough County Emergency Policy Group wants the types of businesses that by definition cannot continue to remain open because they are unable to maintain the required physical distancing to keep customers safe to close; and

WHEREAS, the Hillsborough County Emergency Policy Group wants a measured, reasonable and unified direction for the entire county by the EPG as the elected representatives of residents; and

WHEREAS, the Hillsborough County Emergency Policy Group wants personal responsibility by businesses and residents to observe the mandatory behaviors that have been proven to mitigate the spread of the virus; and WHEREAS, on March 27, 2020 the Hillsborough County Emergency Policy Group has determined that a Safer-At-Home Order applicable throughout Hillsborough County is a reasonable and prudent action to take in order to ensure the health, safety, and welfare of the residents of Hillsborough County; and

46. The twenty-fourth "WHEREAS" explains why the EPC did not enact a curfew on April 1, 2020.

WHEREAS, a Safer-At-Home Order of the Hillsborough County Emergency Policy Group is an Order that:

• Is less restrictive than total lockdowns or shelter-in-place regulations which prohibit movement outside of the home or a particular location until further notice;

• Encourages citizens to stay at home as much as possible during the continued COVID-19 crisis and allows travel outside the home to essential activities (e.g. grocery shopping, outdoor activities, doctor's and pharmacy visits, and providing essential infrastructure and utility

services);

• Allows non-essential activities, so long as social distancing and other CDC Public Health Mitigation Strategies requirements are followed; and

• Applies to all of the unincorporated and incorporated areas of Hillsborough County.

47. The twenty-fifth "WHEREAS" covers the Governor's executive order that was prompted by the illegal actions taken by the Hillsborough County Sheriff in arresting a local member of clergy who was engaged in the practice of his Constitutional rights. The Sheriff, who is a member of the EPG held a news conference that garnered both national and international headlines, where he announced the issuance of an arrest warrant for a Second-Degree Misdemeanor. In attendance was the elected State Attorney. It is safe to say that never in the history of Hillsborough County has the elected Sheriff and State Attorney held a joint press conference to announce the arrest of an individual on an alleged violation of a second-degree misdemeanor. However, this was not just any ordinary second-degree misdemeanor, this was an alleged violation of a Safer-at-Home order that this very same constitutional officer voted on, in violation of the separation of powers doctrine under both the United States and Florida Constitution.

WHEREAS, on April 1, 2020 the Governor of the State of Florida issued Executive Order Number 20-91 (Essential Services and Activities During COVID-19 Emergency) and on April 3, 2020 the Governor of the State of Florida issued Executive Order 20-92 (Amending Executive Order 20- 91), placing restrictions on certain businesses and public gathering locations throughout the State of Florida as a result of the spread of the COVID-19 virus and its imminent threat to health and welfare of the citizens of Florida

48. The final "WHEREAS" moves 13 days from the last "whereas". In between those thirteen days, nothing occurred. Additionally, was failed to occur was any public notice that the EPC would take up such a drastic measure that would affect the civil liberties and personnel lives of so many people.

WHEREAS, on April 13, 2020 the Hillsborough County Emergency Policy Group has determined that a curfew throughout Hillsborough County is a reasonable and prudent action to take in order to ensure the health, safety, and welfare of the residents of Hillsborough County.

C. A DESCRIPTION OF THE CURFER ORDER AS IT RELATED TO THE PREVIOUSLY ISSSED SAFER-AT-HOME

50. The Curfew Order was voted on before it was drafted. The actual order was executed the next day. The EPG was not completely clear as to what it was they were even voting on, which explains the vast confusion in the immediate hours after the April 13 2020 vote and conflicting statements by EPG members about what is illegal. The curfew language follows:

NOW THEREFORE, BE IT RESOLVED BY THE EMERGENCY POLICY GROUP OF HILLSBOROUGH COUNTY, FLORIDA, IN A MEETING ASSEMBLED THIS 13th DAY OF APRIL, 2020 THAT:

1. There is hereby established within incorporated and unincorporated areas of Hillsborough County effective as of 9:00 p.m. on April 13th 2020, a curfew between the hours of 9:00 3 p.m. to 5:00 a.m. 7 days a week. This Order is intended to be and shall be interpreted consistent with the Governor's Orders and the Emergency Policy Group's Safer at Home Order and its amendment.

2. This Order is an addendum to the Executive Order adopted by the Emergency Policy Group of Hillsborough County, Florida, in its special meeting of March 12, 2020, as extended on March 19, 2020, March 26, 2020, April 2, 2020 and April 9, 2020, and is incorporated into that Executive Order as it may be amended.

3. It is the intent of this Order to seek voluntary compliance with the provisions contained herein and to educate and warn of the dangers of non-compliance. However, in the event voluntary compliance is not achieved then in that event and as a last resort, a violation of this Order, pursuant to the provision of section 252.50, Florida Statutes, may be prosecuted as a second-degree misdemeanor punishable as provided in section 775.082 or 775.083, F.S.

51. Subparagraph 1 is the operative paragraph, purporting to establish a 9 pm to 5 am curfew, without a sunset provision. However, the order ***shall*** be interpreted consistent with the Safer at Home orders previously established by the EPC. The Safer at Home order of March 27,

2020 as amended by the April 1, 2020 Safer at Home order provides for well over 100 exceptions for a variety of activities. Anyone engaged in an essential activity would, allegedly, not be covered by this Curfew. That includes people walking their dogs. However, it also excludes: Government employees (Federal, State and Local, to include school district employees); medical and healthcare providers; mass transit personnel, First Responders, persons involved with food delivery, persons going to and from work, and about another 100 additional exceptions. There is even an exception for people who are not covered: those individuals who are engaged in any non-essential activity, may continue to do so as long as social distancing is used, and it involves less than 10 people.

52. The March 27, 2020 Safer at Home order is 20 pages long, single spaced. The April 1, 2020 Safer at Home order is also 20 pages long, single spaced. Both of these orders are incorporated into the Curfew order, but not attached.

D. THE EPG, AS EMPOWERED, IS CONSTITUTIONALLY FLAWED AS IT VIOLATES THE NON-DELEGATION AND SEPARATION OF POWERS DOCTRINES

53. The Florida Constitution, Article VIII, § 1 states, "(c) Government. Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed only upon vote of the electors of the county in a special election called for that purpose."

54. Pursuant to the Florida Constitution, Article VIII, § 1, the County Commissioners are the governing body for the County.

55. Fla. Const. Art. VIII, § 1 states, "(g) Charter government. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating

under a charter may enact county ordinances not inconsistent with general law."

56. Pursuant to Fla. Stat. § 125.01(1), "The legislative and governing body of a county shall have the power to carry on county government."

57. Fla. Stat. § 125.01(1) states, "To the extent not inconsistent with general or special law, [County government] power includes, but is not restricted to, the power to. . . t) Adopt ordinances and resolutions necessary for the exercise of its powers and prescribe fines and penalties for the violation of ordinances in accordance with law."

58. Fla. Stat. § 125.01(1) states the governing body may, "Perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law."

59. Pursuant to Fla. Stat. § 125.011(1), "'County' means any county operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Art. VIII of the Constitution of 1885, as preserved by Art. VIII, s. 6(e) of the Constitution of 1968, which county, by resolution of its board of county commissioners, elects to exercise the powers herein conferred. Use of the word 'county' within the above provisions shall include 'board of county commissioners' of such county."

60. Pursuant to Fla. Stat. § 125.011, "(5) 'Board of county commissioners' includes all members of the board of county commissioners in a county whether their offices are created by the Constitution, the Legislature, or by any home rule charter."

61. Pursuant to Fla. Stat. § 125.66, "(1) In exercising the ordinance-making powers conferred by s. 1, Art. VIII of the State Constitution, counties shall adhere to the procedures prescribed herein."

62. Fla. Stat. § 125.66 provides that the board of county commissioners at any regular or special meeting may enact or amend any ordinance while giving ten (10) days-notice and an

opportunity for people to be heard.

63. Fla. Stat. § 125.66 allows that, "The board of county commissioners at any regular or special meeting may enact or amend any ordinance with a waiver of the notice requirements of subsection (2) by a four-fifths vote of the membership of such board, declaring that an emergency exists and that the immediate enactment of said ordinance is necessary. . . . An emergency ordinance enacted under this procedure shall be transmitted by the clerk of the board of county commissioners by e-mail to the Department of State."

64. The Hillsborough Charter was adopted solely as a County charter, and not a consolidated county and municipal charter, for Home Rule.

65. Hillsborough County Charter Sec. 1.02. defines "the county government" as the government of Hillsborough County, not include or affect any court; any constitutional officer, as defined in Section 1(d) of Article VIII, Florida Constitution; sheriff; district school board; or any municipality.

66. Sec. 2.01. of the County Charter states the county government shall have all powers of local self-government not inconsistent with general law or special law approved by the vote of the electors of Hillsborough County.

67. Sec. 3.01. of the County Charter provides that for separation of legislative and executive powers, "the county government shall be divided between legislative and executive branches. No person belonging to one branch shall exercise any powers appertaining to the other branch unless expressly provided herein."

68. Pursuant to Sec. 4.02. of the County Charter, "The board of county commissioners shall consist of seven commissioners, each of whom shall be elected from one of seven districts."

69. The County Charter Sec. 4.08. states that for enactment of ordinances and

resolutions, "The commission may take official action only by the adoption of ordinances, resolutions, or motions. [A]ll ordinances, rules and resolutions shall be adopted by at least four (4) affirmative votes, and all motions shall be adopted by majority vote of the members present. A majority of the full commission shall constitute a quorum to conduct business."

70. Hillsborough County Charter Sec. 5.01. states, "The executive responsibilities and powers of local self-government of the county not inconsistent with this Charter shall be assigned to and vested in the county administrator."

71. The County Charter requires that all Board of Commissioner meeting be held publicly.

72. County Code Chapter 22, Art. II, states in Sec. 22-19, "(a) The Board of County Commissioners of Hillsborough County, Florida finds and declares that in order to protect the emergency situations, the provisions of this article are necessary." (Ord. No. 06-13, § 1, 6-9-2006).

73. County Code Sec. 22-20 defines the Emergency Policy Group as, "that group of elected officials designated in the Hillsborough County Comprehensive Emergency Management Plan, specifically comprised of: Chairperson of the BOCC; Vice-Chairperson of the BOCC; County Commissioner (appointed by the BOCC); Mayor, City of Tampa; Mayor, City of Temple Terrace; Mayor, City of Plant City; Hillsborough County Sheriff; and the Chair of the Hillsborough County School Board."

74. County Code Sec. 22-21. states that, "A declaration by the Emergency Policy Group of a state of local emergency shall effectuate the terms and provisions of this article and the Comprehensive Emergency Management Plan." (Ord. No. 06-13, § 3, 6-9-2006).

75. Sec. 22-22. of the County Code continues, "(a) A state of local emergency shall be declared by executive order of the Emergency Policy Group if it finds that an emergency, as

defined in F.S. § 252.34, has occurred or that the threat thereof is imminent. All executive orders issued under this section shall indicate the nature of the emergency, the area or areas threatened, and the conditions which have brought the emergency about or which make possible its termination."

76. The County Code Sec 22-22 states, "(b) The duration of each state of local emergency declared shall be seven days. It may be extended, as necessary . . . by executive order of the Emergency Policy Group" who may also rescind the state of emergency by executive order.

(Ord. No. 06-13, § 4, 6-9-2006)

77. County Code Sec 22-2(b) continues, "(1) During the existence of a state of local emergency, the Emergency Policy Group shall have the power and authority to impose by executive order, restriction. . ." public assembly, business opening and closing, prohibit and regulate travel on public streets, highways or any public property; and to impose a curfew; where throughout the EPG may decide who to exempt.

78. Nothing in the County Code Sec. 22 allows for any oversight or supervision of the EPG law-making body by the BOCC or any other entity.

79. No county resident has the voting power to remove all the members of the EPG from their separate elected offices that are not related to the EPG.

80. County Code Sec. 21-22 provide no right to hearing or notice by the people.

81. Nothing in Fla. Stat. § 252 for emergency management authorizes delegation of law-making to any other entity beside the authorizations to the County Board of Commissioners as contained in the Florida Constitution and relevant Florida statutes above.

82. Contrary to the facts in paragraphs above regarding the authorities conferred by the Florida Constitution and Statutes, and the County Charter, the EPG advertises on its web page

under www.hillsboroughcounty.org to the Hillsborough County citizenry that in addition to County Code CH 22, Art. II, the Florida Constitution, Article VIII; and Fla. Statutes Sec 125.66 and CH 252 grant authority for the EPG powers and law-making.

MEMORANDUM OF LAW

I. CONSIDERATIONS FOR THE ISSUANCE OF INJUNCTIVE RELIEF

A temporary injunction should be granted where there is a showing of:

(1) the likelihood of irreparable harm and the unavailability of an adequate remedy at law, (2) the substantial likelihood of success on the merits, (3) that the threatened injury to petitioner outweigh any possible harm to the respondent, and (4) that the granting of the preliminary injunction will not disserve the public interest. See *Cosmic Corp. v. Miami-Dade County,* 706 So.2d 347 (Fla. 3d DCA, 1998). The same considerations generally apply to the issuance of a Temporary Restraining Order, usually an emergency procedure to maintain the status quo until an injunction hearing can be held. In this submittal, the Plaintiffs will set forth a substantial and sufficient basis to show that each of these separate criteria are met and the facts and law set forth herein clearly justify the injunctive relief sought.

II. THE ENFORCEMENT OF THE CHALLENGED CURFEW HAS CAUSED AND IS CAUSING PLAINTIFFS IRREPARABLE HARM AND PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW

The Plaintiffs in this action are residents who seek judicial review, due to the unlawful powers to legislate being exercised by the EPG, and the vague nature of the Curfew Order and in the manner in which it was passed in violation of Florida Statutes. The pertinent portions of this legislation, all of which point to its unconstitutionality even if legislative authority to the EPG was Constitutional, are set forth in the following section, but the bottom line is that the County, with no

authority and on the basis of a completely unconstitutional scheme, has now put Plaintiffs on the precipice of being taken into custody of law enforcement, in violation of their civil liberties, for otherwise lawful activities, with no adequate legal remedy. And there is no end to the EPG's ability to repeat enactment of laws that violate the Plaintiffs' rights and liberties.

The EPC Curfew Order manifests a clear and present threat to the civil liberties of Plaintiffs' resulting in several forms of irreparable harm, vastly exceeding any form of harm simply compensable with money damages. The most egregious form of the irreparable harm occasioned by the challenged Curfew is found in the loss of constitutional rights and freedoms manifest in the Plaintiffs' rights to engage in the conduct of their lives without excessive government interference with Orders that have no nexus to the goals they attempt to achieve. In every case, the Curfew Order is not narrowly tailored, as it applies to the entire population of Hillsborough County, and fails to obtain the compelling interest it asserts. That is to stop the spread of COVID 19. As stated earlier, the Curfew in reality has the opposite effect, because it pushes people to engage in activities during periods of time when more people would be engaging in similia activities. These rights and freedoms include, generally, the right to due process of law, the right to equal protection of the law, and the right to earn a living and enjoy the fruits of one's labors, as well as the ownership and use of private property without undue governmental interference. The loss of any constitutional right or freedom, in and of itself, constitutes irreparable harm. See *Tampa Sports Authority v. Johnston,* 914 So.2d 1076 (Fla. 2d DCA 2005). Even more importantly, the loss of customers for business impacted adversely by the Curfew, and the loss of business goodwill and threats to a business' vitality are also irreparable harm, all of which clearly justify injunctive relief.

The irreparable harm described above is the direct result of the threatened enforcement of the EPC Curfew, and the application of the unconstitutional provisions of the order against

Plaintiffs. Plaintiffs have no adequate remedy at law because there is no plain, certain, prompt, speedy, sufficient, complete, practical, or efficient way to attain the ends of justice without enjoining *immediately* the threatened enforcement of curfew. This threat could only come from improper review and/or insufficient training of the law enforcement agencies charged with the responsibility to enforce the curfew. Relief is sought on the basis of the likelihood of success set forth in the arguments in that section. Plaintiffs have met this requirement for the issuance of a temporary restraining order or, in the alternative, a temporary injunction, against the enforcement of the unconstitutional Curfew.

III. THE MAINTENANCE OF THE STATUS QUO IS JUSTIFIED AND NECESSARY WHILE THIS MATTER IS LITIGATED

The status quo in this matter should be maintained while litigation is ongoing, that being that Plaintiffs be allowed to continue in their lawful pursuits absent the threat of a curfew that purports to confine the entire population into their homes through an effective psychological operation that has been wildly successful, until the Curfew has been fully evaluated by this Court. Plaintiffs should continue to live peaceably, without fear of arrest or other harassment by the County, or any functionary assigned by the County to "enforce" or "inspect" the subject activities. Plaintiffs' other constitutional rights and the maintenance of the status quo require the issuance of a TRO and subsequent temporary injunction:

> ... The status quo preserved by a temporary injunction is the last peaceable non-contested condition that preceded the controversy, *Bowling v. National Convoy & Trucking Co.*, 135 So. 541 (Fla. 1931). One critical purpose of temporary injunctions is to prevent injury so that a party will not be forced to seek redress for damages after they have occurred. *Lewis v. Peters*, 66 So.2d 489 (Fla. 1953). ... *Bailey v. Christo*, 453 So.2d 1134 (Fla. 1st DCA 1984).

In the instant action, the last "peaceable non-contested condition" that preceded this controversy was that the Plaintiffs were enjoying their rights to engage in both their business and property rights and the fruits of their pursuits, unencumbered by governmental interference. Obviously, no such status quo would give any Plaintiffs the right to violate any other existing statutes or Safer-at-Home order. The status quo should be preserved by the issuance of a TRO and subsequent temporary Injunction.

IV. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS INVALIDATING THE CHALLENGED LEGISLATION

The second consideration in evaluating the grant of injunctive relief is whether the party seeking the injunction shows a substantial likelihood of success on the merits. In the instant action, Plaintiffs can and will show numerous grounds supporting the relief requested, any one of which would be sufficient to justify the injunctive relief sought herein, and all of which clearly establish that the challenged legislation is invalid and unconstitutional.

The fact that legislation of a penal nature would operate to deprive a person of due process does not, of itself, justify the invocation of the injunctive machinery in relation to that suit. However, ***when a criminal statute or ordinance is invalid, and its enforcement will result in injury to, or destruction of, property or personal rights, equity may intervene.*** *Deeb v. Stoutamire*, 53 So. 2d 873 (Fla. 1951); *Metropolitan Dade County v. Florida Processing Co.*, 218 So. 2d 474 (Fla. Dist. Ct. App. 3d Dist. 1969). The circumstances must be exceptional and the danger of irremediable loss must be great and immediate. *Pohl Beauty School v. City of Miami*, 118 Fla. 664, 159 So. 789 (1935). Both conditions are present in this action.

Equally as dominant a "general rule" is the fact that the injunctive remedy is appropriate,

on proper showing of injury, to ***restrain the enforcement of an invalid law.*** *Daniel v. Williams*, 189 So. 2d 640 (Fla. Dist. Ct. App. 2d Dist. 1966); *Board of Com'rs of State Institutions v. Tallahassee Bank & Trust Co*., 100 So. 2d 67 (Fla. Dist. Ct. App. 1st Dist. 1958). The injury may consist in the infringement of a property right. See *Louisville & N.R. Co. v. Railroad Com'rs*, 63 Fla. 491, 58 So. 543 (1912). It may also exist in the right to earn a livelihood and continue in one's employment. *Watson v. Centro Espanol De Tampa*, 158 Fla. 796, 30 So. 2d 288 (1947). Persons who are the subject of harassment by overzealous, improper, or bad-faith use of valid statutes may be afforded the protection of injunctive relief. *Kimball v. Florida Dept. of Health and Rehabilitative Services*, 682 So. 2d 637 (Fla. Dist. Ct. App. 2d Dist. 1996).

The instant action manifests all these components. As will be shown in the sections below, this case is one deserving of the grant of injunctive relief.

COUNT I

A. THE EPG CURFEW ORDER IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD

There are innumerable components of the EPG Curfew that leave unlimited discretion to County officials whereby the order is impermissibly vague for a "criminal" form of legislation.

The vagueness of the Curfew at issue further establishes the Plaintiffs' clear legal right to the relief they seek and a substantial likelihood of success on the merits. The Supreme Court of the United States has ruled on the subject of vague and indefinite statutes and has held that if the act of which a "Defendant" (or "any person" who stands accused) had not previously been construed by the State Courts to fall within the activities proscribed by the act, then until after such construction has occurred, no person can be convicted of a crime that is described in indefinite and vague terms:

> "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court. As was said in *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989.
>
> "The constitutional requirement of definiteness is violated by a criminal statute that fails to gives a person of ordinary intelligence fair notice that his conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.
>
> "Thus we have struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' *Connally v. General Const. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. We have recognized in such cases that `a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law," *ibid*., and that "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, *Bouie v. City of Columbia*, 84 S.Ct. 1697 (1964)

The Florida Courts have entered similar holdings:

> ... The ordinance is also unconstitutionally overbroad. By its language the ordinance criminalizes conduct which is beyond the reach of the city's police power inasmuch as conduct "in no way impinges on the rights or interests of others" Lazarus *v. Faircloth*, 301 F.Supp. 266, 272 (S.D. Fla. 1969) Effective law enforcement does not require that citizens be at the "mercy of the officers; whim or caprice," *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879, 1890 (1949); and the just concerns of the public regarding crime must take rational expression and not become a mindless fear that erodes the rights of a free people, *Hayes v. Municipal Court of Oklahoma City,* 487 P.2d 974, 980 (Okla.Crim.App.1971). A penal statute that brings within its sweep conduct that cannot conceivably be criminal in purpose or effect cannot stand. ... *City of Pompano Beach v. Capalbo,* 455 So.2d 468 (Fla. 4th DCA 1984)

Because of the vagueness and overbreadth of the challenged legislation, perhaps most exemplified by the excessive provisions, and the lack of any limitation on what is allowed or not allowed, Plaintiffs have a substantial likelihood of success on the merits and a clear legal right to an injunction against the enforcement of the EPG Curfew, and injunctive relief should issue.

Additionally, the cases of *ABC Liquors, Inc. v. City of Ocala,* 366 So.2d 146 (Fla. 1st DCA 1979), cert. denied, 376 So.2d 69 (Fla.1979) and *Effie, Inc. v. City of Ocala,* 438 So.2d 506 (Fla. 5th DCA 1983), are instructive in the instant action:

> "*Effie* filed an action below seeking a determination that the applicable provisions of the Code were unconstitutional on their face, or were unconstitutionally applied. In this appeal from the trial court's ruling that the code provisions are valid, Effie contends that the challenged provisions are invalid because they fail to provide any standards or guidelines upon which the city council may act, thereby permitting the exercise of unbridled discretion by the council, thus denying Effie equal protection of the law...
>
> **…**
>
> "The granting or withholding of a permit to engage in a legitimate business should not depend on the whim or caprice of the permitting authority. This principle is applicable equally to a highly regulated business such as the one involved here, ABC Liquors v. City of Ocala, supra; City of Jacksonville v. Goodbread, 331 So.2d 350 (Fla. 1st DCA 1976); or to businesses not so closely regulated. Eskind v. City of Vero Beach, 159 So.2d 209 (Fla.1863); Broward County v. Narco Realty, Inc., 359 So.2d 509 (Fla. 4th DCA 1978). In Drexel v. City of Miami Beach, 64 So.2d 317 (Fla.1953), permits for parking garages could only be issued after a public hearing at which "due consideration" was to be given to the "effect upon traffic." In determining that the ordinance was void for insufficiency of standards upon which the City could exercise its discretionary authority, the Supreme Court stated:
>
> "We think a City Council may not deprive a person of his property by declining a permit to erect upon it a certain type of garage where the only restriction on the use of the police power is that it shall not be exercised before "due consideration" is given by someone, presumably the councilmen, to the effect of the building upon traffic. Both the quoted words, as well as their synonyms, could be construed to allow all manner of latitude in the grant of a permit in one case and the denial of a permit in a similar one, and would give every opportunity for the exercise of the power with partiality.

> "The present ordinance could easily become such an instrument of discrimination…"
> …
> "Clearly, the opportunity for the exercise of unbridled discretion is present here, and whether so exercised or not, renders the ordinance unconstitutional. Because we find the ordinance in question to be invalid, we do not address the issue of whether the city has the legal authority to impose any additional restrictions for the issuance of a permit beyond those contained in the general zoning laws.
>
> "The final judgment is reversed and the cause is remanded to the trial court with directions to enter a judgment for appellant."

The conduct at issue with ***these*** *Plaintiffs,* , "gives no offense to any ***recognized*** standards."

See *Prior v. White,* 180 So. 347, 352 (Fla. 1938).

> "It has been the trend of the decisions of this court to give effect to the constitutional guaranties of personal liberty and private property when the common good ***did not fully justify or require*** their abridgement or curtailment to some extent by legislative measures, or to protect those rights fully and completely when they were of that inalienable and sacred character which the language of the Constitution protects from any invasion whatever, ***regardless of the temporary will of majorities*** or the ***supposed*** requirements of the general welfare. Indeed, our decisions recognize the fact that the principles embodied in our Declaration of Rights have their roots deep in the past and are the rich fruitage of centuries of bitter struggle by our forefathers against the exercise of arbitrary, oppressive, and autocratic governmental power in all its forms." *Id*. at 354. Emphasis added.

As noted, the EPG Curfew is unconstitutionally vague and overbroad, both the United States and Florida constitution, which requires criminal laws to state explicitly and definitely what conduct is punishable. Criminal laws that violate this requirement are said to be void for vagueness. Vagueness doctrine rests on the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. By requiring fair notice of what is punishable and what is not, vagueness doctrine also helps prevent arbitrary enforcement of the laws. Additionally, under vagueness doctrine, an order of this nature is also void for vagueness if an order's delegation of authority to police and/or administrators is so extensive that it would lead to arbitrary prosecutions.

With respect to criminal statutes, of which the EPG Curfew most certainly is, one of the most fundamental principles of law is that penal statutes must be strictly construed according to their letter. *Polite v. State*, 973 So.2d 1107 (2007). The "rule of lenity" is generally applicable where the language of a criminal statute (or ordinance) is susceptible to differing interpretations, thus allowing for construction in favor of the accused. *The Florida Bar v. St. Louis*, 967 So.2d 108 (2007), clarified.

The State of Florida has embraced this concept so intensely that it has even statutorily mandated that, "criminal statutes must be strictly construed and when the language is susceptible of differing constructions, it must be construed most favorably to the accused." Sec. 775.021(1), Fla. Stat.

Also, criminal statutes must be strictly construed most favorably to the accused when they are subject to competing, albeit reasonable, interpretations. *Damien v. State*, 743 So.2d 611 (5th DCA 1999); *Polite v. State*, 973 So. 2d 1107 (Fla. 2007), as clarified, (Jan. 24, 2008). Typically, this doctrine, known as the rule of lenity, applies only in the criminal context. *The Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007), clarified, (Oct. 11, 2007). The rule of lenity applies not only to the substance of criminal prohibitions but also to the penalties imposed. *Albernaz v. U.S.*, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981); *McGhee v. State*, 847 So. 2d 498 (Fla. 4th DCA 2003); *State v. Hansen*, 404 So. 2d 199 (Fla. 1st DCA 1981), decision approved, 421 So. 2d 504 (Fla. 1982); *Albernaz v. U. S.*, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981).

In the instant action, one is susceptible to prosecution for the Curfew's violations without ever even showing that they have violated any of the substantive statutory regulations set forth above. This lack of "personal blameworthiness" renders the threatened criminal prosecution of the Plaintiffs entirely unlawful, because of the vague nature of the Curfew, and the potential that

individual engage in the same exact conduct are subject to differing outcomes depending on the discretion of the arresting officer:

> 3. It is the intent of this Order to seek voluntary compliance with the provisions contained herein and to educate and warn of the dangers of non-compliance. However, in the event voluntary compliance is not achieved then in that event and as a last resort, a violation of this Order, pursuant to the provision of section 252.50, Florida Statutes, may be prosecuted as a second-degree misdemeanor punishable as provided in section 775.082 or 775.083, F.S

.

According to the U.S. Supreme Court in *Connally v. General Construction Co*. (1926), a law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning." Whether or not the law regulates free speech, if it is unduly vague it raises serious problems under the due process guarantee, which is applicable to the federal government by virtue of the Fifth Amendment and to state governments through the Fourteenth Amendment.

Thus, in overturning a California loitering law that required persons who wander or loiter on the streets to provide "credible and reliable" identification in *Kolender v. Lawson* 461 U.S. 352 (1983), the Supreme Court explained that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory treatment."

English jurist Sir Edward Coke stated that all laws, but especially serious penal laws, "ought to be . . . plainly and perspicuously penned. . . ." A century later Sir William Blackstone in his Commentaries on the English Constitution explained the requirement that every law clearly define and articulate "the right to be observed, and the wrongs to be eschewed. . . ." (Blackstone relates that a man who stole one horse was not penalized under a statute which forbade "stealing horses.") In France, Montesquieu's Spirit of the Laws urged that laws be

concise, simple, and devoid of "vague expressions."

These examples undoubtedly were known to early American commentators and jurists, who often reiterated the importance of clarity in criminal statutes. James Madison in Federalist No. 62 warns of the "calamitous" results if laws are "so incoherent that they cannot be understood. . . ." In an early federal court case, *United States v. Sharp* (1815), the Court argued that laws that "create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid."

The Court has shown three reasons vague statutes are unconstitutional. A fundamental explication of the modern Supreme Court's concerns regarding overly vague statutes is found in *Grayned v. City of Rockford* , 408 U.S. 104 (1972). The Court upheld a city ordinance restricting any "noise or diversion" that would disrupt activities at a public school against claims of vagueness. Because Rockford's ordinance was aimed at disruptive speech and was grounded in the interest of ensuring the order needed for a proper education, the Court found no constitutional violation. But the Court did suggest three reasons why overly vague statutes are unconstitutional.

First, due process requires that a law provide fair warning and provides a "persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Here, the EPC Curfew is impossible to understand, in part because the exceptions it claims to part of the order cannot be found within the order. Furthermore, the exceptions are so numerous (and as amended) and subject to interpretation, that an ordinary citizen cannot know whether or not they are violating the curfew (See arrest of Pastor Ronnie Browne for violating the March 27, 2020 Safer-at-Home order).

Second, the law must provide "explicit standards" to law enforcement officials, judges,

and juries so as to avoid "arbitrary and discriminatory application." In this particular case, the curfew is so confused, that individuals engaging in like conduct are subject to differing results based on the arbitrary whims of law enforcement.

Third, a vague statute can "inhibit the exercise" of First Amendment freedoms and may cause speakers to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." It is here that one surmises that any protest greater than 10 individuals, in the exercise of their constitutional rights, may run afoul of the Curfew, because protesting is not listed as an essential activity.

Thus, the modern Supreme Court, while retaining the lack of fair notice concern prominent in earlier vagueness cases, has come to stress, as stated in Smith v. Goguen, 415 US 566 (1974), that "perhaps the most meaningful aspect of the vagueness doctrine is not actual notice but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement."

The Court reemphasized this position in *City of Chicago v. Morales*, 527 US 41 (1999). A Chicago ordinance required gang members to disperse if ordered to do so by a police officer if the officer reasonably believed that at least one person in a group of two or more was a gang member and these individuals were loitering. Failure to do so could lead to imprisonment.

Justice John Paul Stevens stressed the vagueness of the ordinance's definition of loitering (being in a place for no apparent purpose) as well as the uncertainty of the behavior needed to avoid arrest (if one moves down the block or goes around the block and comes back, has one dispersed?). Most troubling for Justice Stevens was the immense discretion given police officers in determining whom to arrest when. Justice Sandra Day O'Connor stated the fundamental concern (in the *Kolender* case, cited above) when she warned that if "the legislature fails to

provide . . . minimal guidelines [to govern law enforcement], a criminal statute may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections."

At least three Florida Supreme Court cases have declared Florida statutes unconstitutional on substantive due process grounds. *Schmitt v. State*, 590 So.2d 404, 413 (Fla. 1991); *State v. Walker*, 444 So.2d 1137 (Fla. 2d DCA 1984), aff'd 461 So.2d 108 (Fla. 1984); *State v. Saiez*, 489 So.2d 1125 (Fla. 1986). In *State v. Saiez*, 489 So.2d at 1128 the Court invalidated a statute which prohibited possession of credit card embossing machines under Section 817.63, F.S. (1983). Though the statute had a permissible goal, attempting to curtail credit card fraud, the means chosen, prohibiting possession of the machines, did not bear a rational relationship to that goal. Criminalizing the mere possession of the machines interfered with "the legitimate personal and property rights of a number of individuals who use [them] for non-criminal activities." *Id*. at 1129. In other words, the statute criminalized activity that was otherwise inherently innocent.

In the *Saiez* case, the Court rejected overbreadth and vagueness, but found that Section 817.63 was nevertheless unconstitutional. It ruled that the statute violated substantive due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution. The Court stated:

> "The due process clauses of our federal and state constitutions establish a 'sphere of personal liberty' for every individual subject only to reasonable intrusion by the state in furtherance of legitimate state interests. *See Del Percio*, 476 So.2d at 202 (quoting from *Richards v. Thurston*, 424 F.2d 1281, 1284 (1st Cir.1970)).
>
> "The legislature enacts penal statutes, such as section 817.63, under the state's 'police power' which derives from the state's sovereign right to enact laws for the protection of its citizens. *See Carroll v. State,* 361 So.2d 144, 146 (Fla.1978). Such power, however, is not boundless and is confined to those acts which may be reasonably construed as expedient for protection of the public health, safety, welfare, or morals. *Hamilton v. State,* 366 So.2d 8, 10 (Fla.1978); *Newman v. Carson*, 280 So.2d 426, 428 (Fla.1973). The due process

> clauses of our federal and state constitutions do not prevent the legitimate interference with individual rights under the police power, but do place limits on such interference. *State v. Leone,* 118 So.2d 781, 784 (Fla.1960). *See also Coca-Cola Co., Food Division v. State, Department of Citrus,* 406 So.2d 1079, 1084-85 (Fla.1981), *appeal dismissed sub nom. Kraft, Inc. v. Florida Department of Citrus,* 456 U.S. 1002, 102 S.Ct. 2288, 73 L.Ed.2d 1297 (1982); *State ex rel. Walters v. Blackburn,* 104 So.2d 19 (Fla.1958); *Conner v. Sullivan,* 160 So.2d 120, 122 (Fla. 1st DCA 1963), *cert. denied,* 165 So.2d 176 (Fla.1964). *See generally* W. LaFave and A. Scott, Handbook on Criminal Law § 20, at 136-137 (1972).
>
> "Moreover, in addition to the requirement that a statute's purpose be for the general welfare, the guarantee of due process requires that the means selected shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary, or capricious. *See Nebbia v. New York,* 291 U.S. 502, 525, 54 S.Ct. 505, 510, 78 L.Ed. 940 (1934); *Lasky v. State Farm Insurance Co.,* 296 So.2d 9, 15 (Fla.1974); *L. Maxcy, Inc. v. Mayo,* 103 Fla. 552, 139 So. 121, 129 (1931).

In the instant action, the "means selected" of a Curfew has no reasonable relation to the "object to be attained," if that object is to "prevent the increase in COVID 19 cases."

See also *Robinson v. State,* 393 So.2d 1076 (Fla.1980). (a statute that prohibited the wearing of any mask or covering "whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer" was deemed unconstitutional); *State v. Walker,* 444 So.2d 1137 (Fla. 2d DCA), *affirmed and lower court opinion adopted,* 461 So.2d 108 (Fla.1984) (the defendant had been charged with violating section 893.13(2)(a)7, Florida Statutes (1981), which prohibited the possession of a lawfully dispensed controlled substance in any container other than that in which the substance was originally delivered was ruled unconstitutional: "Nevertheless, despite a state's wide discretion, and the cautious restraint of the courts, there remain basic restrictions and limits on a state's legislative power to intrude upon individual rights, liberties, and conduct. To exceed those bounds without rational justification is to collide with the Due Process Clause").

In the instant case, as in *Delmonico, Robinson,* and *Walker,* the County has chosen a means

which is not reasonably related to achieving ***any*** legitimate legislative purpose. It was unreasonable to criminalize being outside of one's residence during certain hours, as if the COVID 19 virus was more potent during certain hours of the day. It is not the Government job to treat its citizens as though they were children, and the elected official are the only adults in the room. It should equally be found unconstitutional to use EPG Curfew to achieve whatever purpose it was purportedly designed to advance, since it seems improbable that it will have any remedial impact, other than putting honest people out of work.

As Judge Grimes phrased it in *Walker,* "without evidence of criminal behavior, the prohibition of this conduct lacks any rational relation to the legislative purpose" and "criminalizes activity that is otherwise inherently innocent." 444 So.2d at 1140. Such an exercise of the police power is unwarranted under the circumstances and violates the due process clauses of our federal and state constitution.

The EPG Curfew, is a perfect example of legislation that fails the rational relationship test, and thus violates equal protection of the law. This flaw supports the Plaintiffs request for injunctive relief. It is also for these reasons, that the EPG Curfew should be found unconstitutionally vague.

In the instant action, the EPG Curfew provisions are not minor, they do violence to any Plaintiffs civil liberties. Based on the foregoing, the TRO and temporary injunction are appropriate to stop this unprecedented and invidious Order.

COUNT II

B. THE EPC CURFEW WAS ADOPTED IN VIOATION OF ARTICE I, SECTION 24(B) OF THE FLORIDA CONSTITUION

Section 286.0105, Florida Statutes, requires:

> Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person 24 decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. Where a public board or commission acts as a quasi-judicial body or takes official action on matters that affect individual rights of citizens, in contrast with the rights of the public at large, the board or commission is subject to the requirements of section 286.0105, Florida Statutes. Op. Att'y Gen. Fla. 81-06 (1981).

The EPG Curfew was adopted without any notice to the general public, and with no chance for the public comment. The process by which the adoption of the Curfew by the Hillsborough County Emergency Policy Group (EPG) violated multiple Florida Statutes. Article I, Section 24(b) of the Florida Constitution requires all meetings of public entities to be in public and noticed. The curfew was placed into effect with no notice, hearing or publication of the law as of April 13, 2020. The County may suggest that that the requirement of Florida Statute 286.0115(3) provides an exemption from public notice and participation in the case of emergency. However, the nature of how this Curfew Order was adopted clearly shows that the need for such actions that avoids Florida Constitutional requirements did not constitute an emergency in any sense of the word.

A public records request conducted by FOX 13 showed that between March 26, 2020 (when the Safer-at-Home Order was first put into place) and April 12, 2020, that only 42 complaints were registered with the Hillsborough County Sherriff's office between the hours of 9 p.m. and 5 a.m. That is 42 complaints over 18 days. Slightly over 2 per day in a county of 1.4 million. Note that the requirement of Florida Statute 286.0115(3) does provide an exemption from public notice and participation in the case of emergency, however the factual

findings related to a curfew of only 2 complaints after 9 p.m. on average suggests that there was no emergency requiring action without public notice or comment, especially on an order that would directly impact the daily lives of 1.4 million people.

Article I, Section 24(b) of the Florida Constitution requires all meetings of public entities to be in public and noticed. "All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution. Any exemptions from complying with this requirement must be specifically spelled out in state law.

Subsection (c) states: This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Fla. Stat. 286.0115(2) states: Members of the public ***shall*** be given a reasonable

opportunity to be heard on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is during the decision-making process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action. This section does not prohibit a board or commission from maintaining orderly conduct or proper decorum in a public meeting. The opportunity to be heard is subject to rules or policies adopted by the board or commission, as provided in subsection (4).

Florida Statute 286.0115(3) provides the following exemption: The requirements in subsection (2) do not apply to:

> (a) An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, if compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act;

This exemption applies only to an emergency situation, and it is not a blanket exemption for all acts taken during an emergency declaration. The fact that the EPG repeatedly took several days to consider and weigh a "safer at home" order vs. curfew, (done originally on April 1, 2020) and subsequently dropped the curfew provisions, circulated the draft Safer-at-Home amendment to the March 27, 2020 Safer-at-Home order and allowed for public comment, then finally published it, suggests that there was time to both consider public comment in the original order and also for this Curfew order. Pursuant to at least Florida black-letter law, acts of boards in violation of sunshine requirements do not have the force of law, unless subsequently adopted or ratified in a manner consistent with open government requirements.

Finally, Florida Stat 252 established the emergency powers of the Governor and counties. It does not provide a specific exemption for compliance with 286. In parts pertinent to this

situation, Florida Statute 252.46(2) states:

> All orders and rules adopted by the division or any political subdivision or other agency authorized by ss. 252.31-252.90 to make orders and rules have full force and effect of law after adoption in accordance with the provisions of chapter 120 in the event of issuance by the division or any state agency or, if promulgated by a political subdivision of the state or agency thereof, when filed in the office of the clerk or recorder of the political subdivision or agency promulgating the same. All existing laws, ordinances, and rules inconsistent with the provisions of ss. 252.31-252.90, or any order or rule issued under the authority of ss. 252.31-252.90, shall be suspended during the period of time and to the extent that such conflict exists.

Violations of Florida's Sunshine Law can bring stiff and far reaching consequences, some of which are not just against the board members, commissioners, etc. involved. For starters, there can be criminal penalties. If a board member, commissioner, etc. knowingly violates the Sunshine Law, the individual is likely guilty of a second-degree misdemeanor.

Furthermore, an individual can be removed from office or suspended. Specifically, the Governor may suspend elected or appointed officials who are indicted for misdemeanor violations arising out of their official duties

Section 286.011(4), Florida Statutes. Section 286.011(4) essentially states that when a violation is found, the plaintiff's reasonable attorney's fees shall be assessed. The fees can be assessed against the individual board members, commissioners, etc. unless they sought and took the advice of the board's, commission's, etc. attorney.

The Sunshine Law extends to the discussions and deliberations as well as the formal action taken by a public board or commission. There is no requirement that a quorum be present for a meeting of members of a public board or commission to be subject to section 286.011, Florida Statutes. Instead, the law is applicable to any gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which foreseeable action will be taken by the public board or commission. *Hough v. Stembridge*, 278 So. 2d 288

(Fla. 3d DCA 1973).

Section 119.11(1), Florida Statutes, mandates that actions brought under Ch. 119 are entitled to an immediate hearing and take priority over other pending cases. See, *Matos v. Office of the State Attorney for the 17th Judicial Circuit*, 80 So. 3d 1149 (Fla. 4th DCA 2012) ("[a]n immediate hearing does not mean one scheduled within a reasonable time, but means what the statute says: immediate"). See also *Clay County Education Association v. Clay County School Board*, 144 So. 3d 708 (Fla. 1st DCA 2014). "The purpose of the hearing is to allow the court to hear argument from the parties and resolve any dispute as to whether there are public records responsive to the request and whether an exemption from disclosure applies in whole or in part to the records." *Kline v. University of Florida*, 200 So. 3d 271 (Fla. 1st DCA 2016).

Because the EPC acted to pass a Curfew Order without public notice or comment, during a period of time where an emergency was not present that required forgoing of such notice, the actions taken by the EPG should be found to be both null and void. Attorney fees in such case are warranted. Additionally, based on the foregoing, the TRO and temporary injunction are appropriate to stop this unprecedented and invidious Order.

COUNT III

C. THE EPG BOARD AS CONSTITUTED VIOLATES THE SEPERATION OR POWER DOCTRINE ENSHRINED UNDER BOTH THE FLORIDA AND UNITED STATES CONSTITUION.

EPG as constituted is in violation of the Florida Constitution in that it allows an unelected body outside the County Board of Commissioners, including a Judicial Officer, the County Sheriff to enact laws in a legislative capacity. Likewise, the Count Administrator, an Executive Officer may enact law under the EPG. Anything passed by the EPG is both null and void ab initio.

As stated in Paragraphs 73-80 the EPG is an unlawfully delegated legislative authority in violation of the Florida Constitution, Florida Statues, and County Charter. The EPG membership violates the Separation of Powers envisioned in the Florida Constitution and the County Charter as it places the County Sheriff, the public face of law-enforcement, and member of judicial branch, as a law-maker while also making the County Administrator, who is of the Executive Branch, concurrently a law-maker.

As a direct and proximate result of the unconstitutional and unlawful delegation of lawmaking by the Hillsborough County Board of Commissioners, and the unlawful exercise of lawmaking by the EPG, Plaintiffs have suffered damages, including but not limited to pain, anxiety, and suffering from illegal confinement to their homes regardless of their social distancing responsible behavior, the loss of the opportunity to decide how they want to exercise their fundamental right to earn a living; loss of their fundamental right to exercise outdoor meditation and religious prayer; loss of freedom of speech and expression; loss of companionship with neighbors; anxiety associated with isolation; increases in arthritic pain and fear of going out and being arrested because there is no specificity on what is illegal and punishable by fine and jail; the anxiety about the implications an arrest may have on admission to the bar and other future jobs; and physical manifestations of headaches and the anxiety caused by government without representation where at any time the EPG may declare an emergency and further trample Plaintiffs' U.S. and Florida Constitutional rights.

The continued existence of County Code Chapter 22, Art. II, the EPG, and the associated ordinances allow the EPG to arbitrarily repeat its unconstitutional law-making whenever they so decide to declare an emergency, create a law as punishment, and to remove the rights of people who act responsibly.

This Florida Supreme Court and this Court recognize non-delegation and separation of powers doctrines as expressly set forth in the Florida Constitution that prohibit legislative delegation to another branch, and encroachment by one branch on the functions of another: The doctrine encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. See, e.g., *Pepper v. Pepper*, 66 So. 2d 280 (Fla. 1953). The second is that no branch may delegate to another branch its constitutionally assigned power. *Chiles v. Children A, B, C, etc*, 589 So. 2d 260 (Fla. 1991). The case at bar involves a compelling example of the first form of interference, through the Sheriff, as Judicial officer, enacting criminal statutes (e.g. Safer-at-Home order March 27, 2020) and then using that same order to make a high profile arrest of the Pastor of the River Church on said order (Pastor Ronnie Browne).

This Florida Supreme Court has explained Florida's strict separation of powers doctrine as follows:

> The cornerstone of American democracy known as separation of powers recognizes three separate branches of government-the executive, the legislative, and the judicial-each with its own powers and responsibilities. In Florida, the constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches:
>
> > Branches of government. —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.
>
> 'This Court . . . has traditionally applied a strict separation of powers doctrine' [citation omitted], and has explained that this doctrine 'encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that 9 no branch may delegate to another branch its constitutionally assigned power' [citation omitted]. [Emphasis added.] *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004); see also Diaz v. State, 945 So. 2d 1136, 1143 (Fla. 2006).

Generally, the legislative branch enacts the law, the executive branch implements and enforces the law, and the judicial branch interprets and enforces law validly enacted by the Legislature. See generally, *Kelly v. State*, 795 So. 2d 135, 137 (Fla. 5th DCA 2001). However, '[t]he powers of the government' that are 'divided into three departments' are not defined or enumerated in the Constitution or by statute. They are to be determined, as occasion requires, by a consideration of the language and intent of the Constitution, as well as of the history, the nature, and the powers, limitations, and purposes of the republican form of government established and maintained under the Federal and State Constitutions. See *Florida Motor Lines, Inc. v. Railroad Commissioners*, 129 So. 876, 881 (Fla. 1930); see also *Simms v. Dep't of Health and Rehabilitative Services*, 641 So. 2d 957 (Fla. 3d DCA 1994); *Kelly*, 795 So. 2d at 137.

To determine whether a certain power belongs to a particular branch of government, it is the "essential nature and effect of the governmental function to be performed" which determines whether a certain power is legislative, executive or judicial in nature." Id.; *Commission on Ethics v. Sullivan*, 489 So. 2d 10, 12 (Fla. 1986); *Simms*, supra. 3 This fundamental constitutional principle is reflected in Section 20.02(1), Florida Statutes (2006): The State Constitution contemplates the separation of powers within state government among the legislative, executive, and judicial branches of the government. The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. The executive branch has the purpose of executing the programs and policies adopted by the Legislature and of making policy recommendations to the Legislature. The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws. "The judicial branch has the purpose of

determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws." Commission on Ethics, 489 So. 2d at 13.

In Bush, this Court explains the important function of the judiciary:

> The framers of the Constitution of Florida, doubtless, had in mind the omnipotent power often exercised by the British Parliament, the exercise of judicial power by the Legislature in those States where there are no written Constitutions restraining them, when they wisely prohibited the exercise of such powers in our State.
>
> That Convention was composed of men of the best legal minds in the country-men of experience and skilled in the law-who had witnessed the breaking down by unrestrained legislation all the security of property derived from contract, the divesting of vested rights by doing away the force of the law as decided, the overturning of solemn decisions of the Courts of the last resort, by, under the pretence of remedial acts, enacting for one or the other party litigants such provisions as would dictate to the judiciary their decision, and leaving everything which should be expounded by the judiciary to the variable and ever-changing mind of the popular branch of the Government.
>
> *Trustees Internal Improvement Trust Fund v. Bailey,* 10 Fla. 238, 250 (1863).
>
> * * *
>
> Under the express separation of powers provision in our state constitution, "the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power," and "the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches."
>
> *Bush v. Gore,* 885 So. 2d at 329-30 (citing *Chiles v. Children* A, B, C, D, E & F, 589 So. 2d 260, 264 (Fla. 1991)) (emphasis added).

The EPG's existence, under its given powers, where the County Board of Commissions unconstitutionally delegated legislative authority in violation of the non-delegation doctrine concurrently concurrently violates Separation of Powers. All executive orders and laws issued by the EPC are constitutionally void. The Sheriff has a duty to enforce both the Florida Constitution

and Florida state laws and statutes, and to provide for the security, safety and well-being of County citizens. This is accomplished through the delivery of law enforcement services, the operation of the County Jail, and the provision of court security. The Office of the Sheriff functions as the Executive Officer of the court. Under Florida law, the Sheriff derives his legal authority from the Constitution of the State of Florida. The Sheriff is vested with the ability to appoint and direct deputies who will act in his name and office to enforce the appropriate and applicable laws of the State of Florida.

The EPG however, is unconstitutionally delegated the legislative authority of the Hillsborough County commission as vested by the Florida Constitution Florida Stautes and a County charter. By its very nature, the elected County Board of Commissioners is within the legislative arm of State government. Authority is granted by Article 8 of the Florida Constitution, Section 125.66add 125 --- and Chapter 252, Florida Statutes. Hillsborough County enacted Hillsborough County Code of Ordinances and Laws Chapter 22, Article II, Sections 22-23 in order to protect the health, safety, and welfare of the County's residents during declared emergencies.

Accordingly, the Fact that the Hillsborough County Sheriff is voting member of this board empowered to enact orders subject to prosecution in a County Criminal Court violates the Florida and Untied States Constitution separation of powers doctrine. Because of the unconstitutional delegation of legislative powers given to the EPG, combined with its membership. Plaintiffs have a substantial likelihood of success on the merits and a clear legal right to an injunction against continued operation of the EPG and CH 22 of county code, and the enforcement of the EPG Curfew, and injunctive relief should issue.

V. THE PUBLIC INTEREST AND "BALANCING TEST"

The Constitutions of the State of Florida and the United States are the ultimate expressions of the public interest. As a result, the Plaintiffs' rights to enjoy their constitutionally protected rights to conduct their lives free from government intrusion and interference, enjoy due process of law, equal protection of the laws, and the numerous other rights articulated in the above sections cannot be lawfully abridged through the enforcement of the EPG Curfew Order. The greatest public interest lies in the freedoms and rights to due process guaranteed by the Constitution.

> ... Similarly, the public interest is served by any abatement of unconstitutional activity. *Illinois Migrant Council v. Pilliod,* 540 F.2d 1062, 1071, (7th Cir. 1976). *Decker, supra*

See, also, *DiDomenico v. Employers Cooperative Industry Trust,* 676 F.Supp. 903 (N.D. Ind. 1987) and *Zurn Constructors, supra*. Therefore, the overall public interest is served by safeguarding these Constitutional freedoms and the right to due process.

Additionally, there are volumes of state statutes in place that can and are being used to regulate Plaintiffs and deter criminal activity, of which none has been associated with the Plaintiffs' actions so the "balancing test" clearly tilts in favor of the Plaintiffs. Accordingly, the requested TRO/Temporary Injunction should issue.

VI. CONCLUSION

Plaintiffs have demonstrated their entitlement to either a TRO or a Temporary Injunction under Florida law. As shown herein, Plaintiffs will suffer irreparable harm if injunctive relief and a Temporary Injunction do not issue: as a matter of law, there is no adequate remedy at law for the current and continued deprivation of their constitutional rights and Plaintiffs have a clear legal right to the relief requested and a substantial likelihood of success on the merits in this action.

Most importantly, the public interest demands the preservation of constitutional rights and representation by the people in law-making by the officials they elect for this function. Accordingly, this Court is requested to hold an appropriate hearing and GRANT the Motions for Temporary Injunction, temporarily enjoining further enactments by the EPG, further operation of HC Code CH 22, and actions by the Defendants, and all others acting at the behest of the state, from enforcing the challenged curfew legislation against the Plaintiffs, until such time as a full evidentiary hearing can be held on the issuance of a permanent injunction

WHEREFORE, Plaintiffs respectfully request this Court grant the relief requested herein, and issue a TRO and subsequent Temporary Injunction against Defendants, enjoining the enforcement of the EPG Curfew and the code against Plaintiffs and all other citizens of Hillsborough County, pending the Court's determination of the merits of an application for a Permanent Injunction.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that this Court GRANT the following relief:

a) Declaring EPG itself as well as the EXECUTIVE ORDER of the COUNTY EMERGENCY POLICY GROUP establishing a CURFEW in response to County Wide Threat from the COVID 19 Virus, to be violative of the aforementioned Florida and United States Constitutional and statutory provisions.

b) Entertain proceedings for the issuance of a Temporary and Permanent Injunction from applying and enforcing EXECUTIVE ORDER of the COUNTY EMERGENCY POLICY GROUP establishing a CURFEW in response to County

Wide Threat from the COVID 19 Virus, in whole or in part, against Plaintiffs and all other residence of Hillsborough County.

c) Awarding any and all attorney's fees and costs as authorized by law;

d) Awarding any and all actual, consequential and special damages to which Plaintiffs are entitled.

e) Such other and further relief as this Court deems fit, just, and equitable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been furnished to Christine Beck, Esq., Hillsborough County Attorney's Office, 601 East Kennedy Blvd., 27th Floor, Tampa FL, 33602, via e-mail to Beck.C@hillsboroughcounty.org, on this _____day of April 2020

Respectfully Submitted,

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