THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS. **SUPERIOR COURT**

Natasha Athens

v.

Christopher Sununu, Governor of the State of New Hampshire

Docket No. 213-2020-CV-00104

ORDER

Plaintiff, who represents herself in this matter, has brought this action seeking damages as well as declaratory and injunctive relief for actions taken by Governor Sununu during the state of emergency caused by the novel coronavirus known as COVID-19. Plaintiff now moves for a preliminary injunction. The Governor objects and moves to dismiss. The Court held a hearing on June 16, 2020. For the reasons that follow, plaintiff's request for a preliminary injunction is DENIED, and the Governor's motion to dismiss is GRANTED.

Factual Background

On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. On March 13, 2020, the President of the United States declared a national emergency due to the outbreak. On that same day, pursuant to the authority given him by Part II, Article 41 of the New Hampshire Constitution and RSA 4:45, the Governor issued Executive Order 2020-04, declaring a state of emergency in New Hampshire. (Def.'s Mem. in Supp. Mot. Dismiss, Ex. A.) That Executive Order extensively detailed the justifications for the declaration, and

suspended non-essential out-of-state travel by State and municipal employees, teachers, and students, among other things. (Id.)

On March 16, 2020, the New Hampshire Supreme Court invoked its emergency powers to suspend in-person court proceedings. That same date, both the Centers for Disease Control and Prevention and the White House issued guidance recommending the cancellation of in-person gatherings of ten or more people.

On March 26, 2020, the Governor enacted Emergency Order #17, directing all non-essential businesses to close their physical workplaces and facilities until May 4, the expiration of the original state of emergency. (Id., Ex. B.) Emergency Order #17 also issued a "stay at home" order for all New Hampshire citizens, instructing all citizens to remain home unless performing a specifically delineated set of tasks or errands. (Id.)

On April 24, 2020, the Governor extended the state of emergency by twenty-one days via Executive Order 2020-08. (Id., Ex. C.) As with the first declaration, the Executive Order cited a number of bases for the extension, including scientific data, recommendations from the White House and CDC, and New Hampshire's own COVID-19 statistics. (Id.) On May 15, 2020, the Governor extended the state of emergency for an additional twenty-one days, citing, among other things, a continued increase in COVID-19 infections within the state. (Id., Ex. D.) A third extension was issued on June 5, 2020. (Id., Ex. E.)

On May 15, 2020, the Governor announced the allocation of $400 million in funds to the "Main Street Relief Fund," which is designed to provide emergency financial relief to New Hampshire small for-profit businesses. To be eligible to receive aid from this fund, a business must have its principal place of business in New Hampshire and have generated less than $20 million in revenue during the 2019 tax year. The Governor imposed a number of additional conditions, including being in operation for at least one year prior to May 29, 2020,

and not currently being in bankruptcy. The Governor also excluded sole proprietorships from being eligible for the Main Street Relief Fund.

Pursuant to her testimony at the hearing, plaintiff opened her business as a sole proprietorship in January 2020. Plaintiff testified that her last sale was made at the end of February 2020.

Analysis

Plaintiff has filed a number of motions that appear to seek immediate relief in the form of a preliminary injunction. In her "Ex Parte Motion" filed May 19, 2020, plaintiff requested an immediate termination of all emergency orders issued by the Governor. On June 11 and 12, 2020, Plaintiff filed several pleadings seeking to enjoin the Governor from further distributing money from the Main Street Relief Fund. In these pleadings, plaintiff argues the Governor has unlawfully bypassed the Joint Legislative Fiscal Committee and has unlawfully imposed restrictions on which businesses are eligible to receive said funds. Plaintiff also seeks an immediate award of $250,000 in damages.

"The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." DuPont v. Nashua Police Dep't, 167 N.H. 429, 434 (2015). "The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case." Id. (citing Kukene v. Genualdo, 145 N.H. 1, 4 (2000)). "[A] party seeking an injunction must show that it would likely succeed on the merits." Id. Significantly, "[a]n injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." Id. Federal

courts have pointed out that the likelihood of success is the "touchstone of the preliminary injunction inquiry." Maine Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 145, 152 (1st Cir. 2012). "If the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." Id.

As an initial matter, to the extent plaintiff requests an immediate termination of the Governor's orders, such relief is inappropriate for a preliminary injunction. As noted above, the purpose of a preliminary injunction is to preserve the status quo until a trial on the merits can take place. Rather than preserving the status quo, plaintiff's requested relief would dramatically alter the current circumstances. As the Governor argues, this amounts to a mandatory preliminary injunction, which "alters rather than preserves the status quo." Braintree Labs., Inc. v. Citigroup Global Markets, Inc., 622 F.3d 36, 41 (1st Cir. 2010). Mandatory injunctions "normally should be granted only in those circumstances when the exigencies of the situation demand such relief." Id. As set forth below, plaintiff has not met this burden, as she has failed to demonstrate a likelihood of success on the merits of her claims.

In her complaint,[1] plaintiff broadly declares that all of the emergency and executive orders issued by the Governor are "illegal." Plaintiff argues these orders violate "the Constitution," specifically referring only to the First Amendment of the Federal Constitution. However, during states of emergency, such as the current pandemic, restrictions on constitutional rights are permitted for the benefit of the community at large.

More than a hundred years ago, the United States Supreme Court held that "a community has the right to protect itself against an epidemic of disease which threatens the

1 Plaintiff filed several pleadings at the outset of this litigation, including a Complaint, an Ex Parte Motion, a Motion to Amend, and a second Complaint, all of which contain various claims for relief. The Court will consider these pleadings collectively as plaintiff's complaint.

safety of its members." Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 27 (1905). In that case, Massachusetts had mandated the vaccination of the inhabitants of Cambridge against a growing smallpox epidemic. The plaintiff challenged the law, claiming it violated his rights to due process under the Fourteenth Amendment. The Supreme Court rejected the argument, and stated:

> If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some—if nothing more could be reasonably affirmed of the statute in question—the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. . . . [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 28-29. "To be sure, individual rights secured by the Constitution do not disappear during a public health crisis, but the Court plainly stated that rights could be reasonably restricted during those times." In re Abbott, 954 F.3d 772, 784 (5th Cir. 2020). Specifically, the Supreme Court has upheld restrictions on fundamental rights protected by the First Amendment in the interest of public welfare. See Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) ("The right to practice religion freely does not include liberty to expose the community . . . to communicable disease."). As the Abbott case very recently noted:

> The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

954 F.3d at 784-85 (quoting Jacobson, 197 U.S. at 358).

Accordingly, the Court restricts its review of plaintiff's challenge to the constitutionality of the Governor's executive and emergency orders "to a determination whether the executive's actions were taken in good faith and whether there is some factual basis for the decision that the restrictions imposed were necessary to maintain order." Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996), abrogated on other grounds by Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998). Executive Orders 2020-04, 2020-08, 2020-09, and 2020-10 clearly set forth an extensive factual and scientific basis for declaring or extending a state of emergency based on a threat to the entire populace of the state. The regulations imposed by the Governor's orders, including social distancing measures, the closure of non-essential businesses, and the requirement of masks, are all intended to limit person-to-person contact for the purpose of reducing the spread of the virus.

Although plaintiff appears to discount or downplay the risks posed by COVID-19, she provides no factual or scientific support for her claims. On the other hand, the Governor's declaration of a state of emergency is supported by numerous prominent individuals and institutions, including the CDC, the head of the National Institute of Allergy and Infectious Diseases, and our own Department of Health and Human Services. The Governor's orders have appropriately adapted to changing information, and the restrictions plaintiff complains of have recently begun to be relaxed in response to a science- and fact-based analysis of the virus's progression in this state.

"The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." South Bay United Pentecostal Church v. Newsom, 140 S.Ct. 1613 (2020). "Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect." Id. "When those officials undertake

to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." Id. "Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." Id. at 1613-14.

Based on the record before it, the Court finds that the Governor's orders were made in good faith and are well supported by facts and science. Courts in other jurisdictions have recognized the dangers posed by COVID-19 and upheld similar executive orders. See, e.g., Cassell v. Snyders, No. 20-C-50153, 2020 WL 2112374, at *7 (N.D. Ill. May 3, 2020) ("Today, COVID-19 threatens the lives of all Americans. The disease spreads easily, causes severe and sometimes fatal symptoms, and resists most medical interventions. . . . Based on the plethora of evidence here, the Court finds that COVID-19 qualifies as the kind of public health crisis that the Supreme Court contemplated in Jacobson and that the coronavirus continues to threaten the residents of Illinois."); Geller v. de Blasio, No. 20cv3566, 2020 WL 2520711 (S.D.N.Y. May 18, 2020) ("Given the severity of the public health crisis, the City has taken measures that are reasonable and narrowly tailored in temporarily prohibiting public gatherings. While a measure restricting all public group activity may not likely be found narrowly tailored in ordinary times, these times are extraordinary."); see also Def.'s Mem. in Supp. Mot. Dismiss, Ex. H (collecting cases). Accordingly, the Court finds plaintiff has failed to demonstrate a likelihood of success on the merits of any claim that the Governor's orders unlawfully infringe upon her constitutional rights.

With respect to the distribution of money from the Main Street Relief Fund, the Court similarly finds plaintiff has failed to establish a likelihood of success on the merits. Plaintiff first argues that the Governor has unlawfully bypassed the Joint Legislative Fiscal Committee

in expending the funds, citing separate litigation brought by the members of the Fiscal Committee against the Governor alleging the same claim. See Wallner, et al. v. Sununu, Hillsborough Cty. Super. Ct. North, No. 216-2020CV-342. However, in the most recent order issued in that case, the court found that the Fiscal Committee members had failed to establish a likelihood of success on the merits of their claims, and thus declined to issue a temporary injunction. See id., June 5, 2020 (Order, Anderson, J.). Plaintiff here has offered no facts or law in support of this argument, let alone any that would cause this Court to come to a conclusion different than that reached in Wallner.

Similarly, plaintiff's argument that the Governor did not have authority to impose restrictions on the distribution of the Main Street Relief Funds, such as requiring small for-profit businesses to have been in operation for at least one year, lacks support. Pursuant to the CARES Act:

> A State . . . shall use the funds provided under a payment under this section to cover only those costs of the State . . . that--
> (1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
> (2) were not accounted for in the budget most recently approved as March 27, 2020, for the State or government; and
> (3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

42 U.S.C. § 801(d). The CARES Act thus provides the Governor with very broad discretion in the distribution of these funds. Moreover, the Main Street Relief Fund is not infinite, and in order to ensure that said funds provide the greatest support for New Hampshire small businesses, conditions on their expenditure are required. For example, at the June 16, 2020 hearing, the Governor explained that the requirement that a qualifying entity be in business for one year was to ensure the business could properly assess its financial needs. Plaintiff

has identified no law that prevents the Governor from imposing any of the restrictions he has. Therefore, she has failed to demonstrate a likelihood of success on the merits of this claim.

In light of the foregoing, the Court finds it need not address the remaining preliminary injunction requirements. Due to the clear lack of a likelihood of success on the merits, plaintiff's motion for preliminary injunction is DENIED.

II. Motion to Dismiss

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The Court "need not, however, assume the truth of statements that are merely conclusions of law." Id. "The trial court may also consider documents attached to the plaintiff's pleadings, or documents the authenticity of which are not disputed by the parties[,] official public records[,] or documents sufficiently referred to in the complaint." Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 711 (2010). "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

The Governor moves to dismiss the entirety of plaintiff's complaint, alleging she has failed to state a claim. As noted above, plaintiff's complaint largely consists of blanket allegations that the Governor's executive and emergency orders are unlawful. Plaintiff first argues the orders violate the First Amendment. However, as addressed in the previous

section, plaintiff's allegations that the Governor's orders unlawfully infringe on her constitutional rights lack any merit.

Plaintiff also alleges the orders are in violation of the Interstate Commerce Act of 1887, which she claims "prohibits any lockdown for any reason." (Compl. at ¶ 3.) However, the Interstate Commerce Act does no such thing. The Governor appears to interpret plaintiff's reference to the Act as more broadly stating a claim that the Governor's orders violate the Commerce Clause of the Federal Constitution. To the extent this was plaintiff's intent, the Court agrees with the Governor that plaintiff lacks standing to bring such a claim. "The Commerce Clause reserves to Congress the right to 'regulate Commerce with foreign Nations, and among the several States.'" Eby v. State, 166 N.H. 321, 335 (2014) (quoting U.S. CONST. art. I, § 8, cl. 3). "The Commerce Clause also has a 'negative aspect' that prohibits states from unjustifiably discriminating against or burdening insterstate and foreign commerce." Id. "The core purpose of the dormant Commerce Clause is to prohibit economic protectionism, that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Id.

In Eby, the New Hampshire Supreme Court addressed a challenge to a law that imposed a tax on gambling winnings. The Supreme Court found that the plaintiffs, although they had been subjected to the tax, did not claim to have "suffered an injury that has a causal nexus to a dormant Commerce Clause violation." Id. at 336. Specifically, "[n]either petitioner claims to have suffered harm under the Gambling Winnings Tax due to an unjustifiable discrimination against or burdening of interstate or foreign commerce." Id. One of the plaintiffs paid taxes on scratch ticket winnings purchased in New Hampshire, and thus suffered no injury based on his participation in interstate commerce. Id. The other plaintiff did participate in interstate commerce, but did not allege disproportionate treatment as a result,

as his out-of-state winnings were subject to the same tax rate as in-state winnings would have been. Id. As a result, the Supreme Court found that "[b]ecause the petitioners fail to show any cognizable harm related to the alleged Commerce Clause violation, they consequently lack standing to raise this challenge." Id.; see also Wine and Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 12 (1st Cir. 2007) (finding none of the plaintiffs "could conceivably have suffered any cognizable harm as a result of" residency requirement law, where all plaintiffs resided in state).

Here, plaintiff also fails to allege any harm related to the alleged Commerce Clause violation. Plaintiff does not allege that she was ever engaged in interstate commerce or suffered any unjustifiable discrimination on interstate commerce as a result of the Governor's order. Accordingly, she lacks standing to bring this claim.

Plaintiff also cites "law 18.2-422" in support of declaring the Governor's order requiring masks to be illegal. This appears to be a reference to Virginia Code § 18.2-422, which prohibits the wearing of masks with the intent to conceal one's identity in certain locations. Needless to say, Virginia law has no bearing on the authority of the Governor of New Hampshire. Plaintiff otherwise makes baseless statements that masks are unsafe and cause confusion and panic in social and business settings. The Court finds plaintiff's allegations fail to state any type of claim for relief.

Plaintiff alleges that the Governor's orders have "wiped out" her business, and other small businesses in New Hampshire. She also claims that the Governor's restrictions on the Main Street Relief Fund are unlawful. However, at the hearing, plaintiff testified that the final sale at her own business occurred at the end of February, two weeks before the Governor declared a state of emergency in New Hampshire. Therefore, the failure of plaintiff's business cannot be attributed to the Governor's actions. To the extent other small businesses *were*

harmed as a result of the Governor's order, plaintiff lacks standing to bring claims on their behalf. With respect to the legality of the Main Street Relief Fund restrictions, as noted in the previous section, the CARES Act leaves the distribution of the funds largely to the Governor's discretion. Plaintiff has failed to identify any law that prevents the Governor from determining the best means of distributing these federal funds.

To the contrary, the legislature has seen fit to grant the Governor broad authority to declare states of emergency and to act in such emergency situations. RSA 4:45, I states that

> [t]he governor shall have the power to declare a state of emergency . . . by executive order if the governor finds that a natural, technological, or man-made disaster of major proportions is imminent or has occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section.

A "state of emergency" is defined as a "condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm." RSA 21-P:35, VIII. RSA 4:45, III(e) provides that

> [d]uring the existence of a state of emergency, and only for so long as such state of emergency shall exist, the governor shall have and may exercise the following additional emergency powers: . . . [t]o perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.

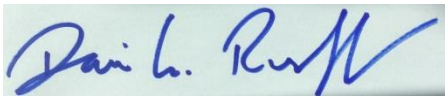
Accordingly, the Court finds plaintiff has failed to state a claim with respect to this allegation.

Finally, plaintiff makes occasional reference in her pleadings to the governor lacking authority to allow voting by mail and close polling locations, but offers no specific facts or law in connection with this allegation. Because she has failed to develop this claim, the Court need not address it.

For the foregoing reasons, the Court finds plaintiff has failed to state a claim for which relief may be granted. Accordingly, the Governor's motion to dismiss is GRANTED.

SO ORDERED.

July 14, 2020



Hon. David W. Ruoff
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 07/14/2020