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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2020-CV-00266

Andrew Cooper

v.

Governor Christopher T. Sununu, in his official capacity; City of Nashua

ORDER ON PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

The plaintiff, Andrew Cooper, brings this action against the defendants, Governor Sununu ("the Governor") and the City of Nashua ("the City"), seeking declaratory and injunctive relief as well as damages for violations of his constitutional rights. Currently pending before the Court is the plaintiff's "emergency" motion for a preliminary injunction, to which the Governor and the City object.[1] The Court held a hearing on this matter on June 18, 2020. For the reasons that follow, the plaintiff's motion is DENIED.

Legal Standard Governing Preliminary Injunctive Relief

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Murphy v. McQuade, 122 N.H. 314, 316 (1982). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." DuPont v. Nashua Police Dep't, 167 N.H. 429, 434 (2015) (citation omitted). In order to obtain preliminary injunctive relief, the moving party must generally demonstrate: (1) a likelihood of success on the merits; (2) that "there is an immediate danger of irreparable harm to the party seeking injunctive relief"; and (3) that "there is no adequate remedy at law." N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "[T]he granting of an injunction is a matter within the

[1] The City did not file a written objection. However, the City's counsel orally objected at the hearing.

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sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." Dupont, 167 N.H. at 434.

I. Claims Against the City

The Court draws the following facts from the record. In response to the pandemic caused by the novel coronavirus, SARS-CoV-2, currently sweeping the world, the City's Board of Aldermen passed an ordinance at a special meeting on May 21, 2020, at the request of the City's Board of Health, requiring members of the public and business employees to use face coverings or masks under certain circumstances. Specifically, Nashua Ordinance O-20-018 (hereinafter "the Ordinance") states:

> 1. Employees of all businesses shall wear a face covering over their mouth and nose when interacting with the public and whenever they are within six feet of a co-worker or a customer.
>
> 2. Members of the public entering any business, including without limitation any outdoor area where business of any sort is conducted, work site, or government building must wear a face covering, such as a fabric mask, scarf, or bandana over their nose and mouth.
>
> 3. Members of the public entering a restaurant for the purpose of picking up food for takeout or any other purpose must wear a face covering over their mouth and nose. Members of the public dining outdoors at a restaurant may remove face covering while seated at their table.
>
> 4. Residents, visitors, and members of the public entering or present at a residential or commercial building complex of greater than two (2) units must wear a face covering over their nose and mouth while in common areas and communal spaces.
>
> 5. As used herein "face covering" means a covering made of cloth, fabric, or other soft or permeable material, without holes, that covers only the nose, mouth, and surrounding areas of the lower face. A face covering may be factory made or homemade and improvised from ordinary household material.
>
> 6. Notwithstanding the above this order does not require children under 10 years of age to wear face covering (parents should make their own

> judgment). Face covering is not recommended for children less than 2 years of age.
>
> 7. A face covering is also not required to be worn by any person if said person can show a medical professional has advised that wearing a face covering may pose a risk to said person for health related reasons.

The plaintiff seeks to enjoin the Ordinance on several grounds, including that: (1) the City lacked the authority to pass the measure; (2) the City failed to observe certain notice formalities prior to the passage of the Ordinance; (3) it is preempted by State law; (4) it violates his right to privacy; (5) it violates his right to procedural due process; and (6) it violates his rights to free speech and assembly. (See generally Compl. Prayer for Relief B.) In deciding whether preliminary injunctive relief is warranted, the Court will address each of these claims in turn.

A. Lack of Authority

The plaintiff first maintains that "the City lacked the authority to enact [the Ordinance] because the state legislature did not expressly grant it any authority to enact an ordinance requiring citizens to wear face masks or coverings." (Compl. ¶ 106.) The Court is unpersuaded. "While general statutes must be enacted by the legislature, it is plain the power to make local regulations, having the force of law in limited localities, may be committed to other bodies representing the people in their local divisions, or to the people of those districts themselves." State v. Lilley, 171 N.H. 766, 783 (2019). "Our whole system of local government in cities, villages, counties and towns, depends upon that distinction. The practice has existed from the foundation of the state, and has always been considered a prominent feature in the American system of government." Id. "Indeed, as a subdivision of the state, the City of [Nashua] may exercise such powers as are expressly or impliedly granted to it by the legislature." Id.

Although there exists no express authority for a city to enact an ordinance requiring the wearing of face masks during a pandemic, RSA 47:17, XV gives the City "the power to 'make any other bylaws and regulations which may seem for the well-being of the city' so long as 'no bylaw or ordinance' is 'repugnant to the constitution[2] or laws of the state.'" Id. at 783–84. "Moreover, the governmental authority known as the police power is an inherent attribute of state sovereignty." Id. at 784. "The police power is broad and 'includes such varied interests as public health, safety, morals, comfort, the protection of prosperity, and the general welfare.'" Id. "The express and implied powers granted to towns by the legislature must be interpreted and construed in light of the police powers of the state which grants them." Id. As such, municipalities are empowered "to make bylaws for a variety of purposes which generally fall into the category of health, welfare, and public safety." Id.

Here, it is obvious that the purpose of the Ordinance is to slow or prevent the spread of a highly contagious and deadly virus. In other words, the Ordinance is clearly for the "well being" of the City's residents, visitors, and businesses. It follows that the Board of Aldermen was authorized to pass the Ordinance pursuant to RSA 47:17, XV[3] as well as its general authority to enact laws protecting "health, welfare, and public safety." Id. Based on this analysis, it is unlikely that the plaintiff will prevail on the merits of this claim. This is fatal to his request for a preliminary injunction. See Mottolo, 155 N.H. at 63.

[2] As will be discussed below, the Court does not find that the plaintiff has demonstrated a likelihood of success of demonstrating that the Ordinance violates any of his constitutional rights.

[3] In his memorandum, the plaintiff only relies on case law addressing RSA 31:39, which governs the authority of towns to pass local legislation. Nashua, however, is a city, and the legislature has afforded cities additional authority to pass legislation pursuant to RSA 47:17.

B. Notice Requirements

The plaintiff next argues that the City and its Board of Aldermen failed to observe certain notice requirements prior to the passage of the Ordinance. Specifically, the plaintiff argues that "the Board of Aldermen did not comply with the requirements of RSA 47:18: it failed to provide the proposed ordinance to the City Clerk to be kept on file (as late as May 19, 2020), or publish notice of it in any newspaper before the special meeting on May 21, 2020." (Compl. ¶ 90.) This argument is without merit. Even assuming that the City failed to comply with the notice requirements of RSA 47:18, it would not render the ordinance invalid or void. RSA 47:18 explicitly states that "[t]he sufficiency of the published notice shall not affect the validity of the ordinance." (Emphasis added); see also Dover Hous. Bd. v. Colbath, 106 N.H. 481, 483 (1965) (holding that city ordinance was valid even in absence of publication); State v. Wimpfheimer, 69 N.H. 166, 171 (1897) (holding that "a failure to comply with [publication requirement] does not render an ordinance invalid"). The plaintiff is therefore unlikely to succeed on the merits of this claim and is not entitled to a preliminary injunction. See Mottolo, 155 N.H. at 63.

C. Preemption

Next, the plaintiff argues that "even if the City had the authority to enact [the Ordinance], Governor Sununu's numerous Emergency Orders addressing the Coronavirus preempt it." (Compl. ¶ 107.) He contends that, "[t]hese Orders comprise a comprehensive regulatory scheme governing the state's response to the Coronavirus, and it demonstrates the state's intent to preempt this field by placing exclusive control in the state's hands." (Id. ¶ 108.) The Court disagrees.

"The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, state law." Girard v. Town of Plymouth, 172 N.H. 576, 585 (2019). "Preemption may be express or implied." Id. Here, the plaintiff's argument appears to be "based upon implied preemption, which may be found when the comprehensiveness and detail of the State statutory scheme evinces legislative intent to supersede local regulation." Id. (emphasis added). "State law also impliedly preempts local law when there is an actual conflict between the two." Id. "A conflict exists when a municipal ordinance or regulation permits that which a state statute prohibits or vice versa." Id. (emphasis added). "Moreover, even when a local ordinance does not expressly conflict with a state statute, it will be preempted when it frustrates the statute's purpose." Id. (emphasis added).

As a preliminary matter, the Court notes that the Governor's Executive and Emergency orders are not a "statutory scheme." The plaintiff has cited no New Hampshire authority establishing that executive orders are the same as a "statutory scheme" for the purposes of the preemption doctrine. However, even if the Court were to agree that the Governor's Executive Orders related to this pandemic should be treated the same as statutory schemes for the purposes of a preemption analysis, the Court is not convinced that the Ordinance's mask requirement conflicts with, or runs counter to the intent of, any of those Orders In fact, based on the Court's review of the Orders, it appears that the Ordinance is actually in alignment with them. For instance, pursuant to Exhibit C to Emergency Order 40, "[a]ll staff [of retail stores] must wear cloth face coverings at all times when in the retail facility and in public locations or shared staff areas (e.g. break rooms), even if other individuals are not immediately present."

Likewise, that same Exhibit states that, "[c]ustomers should wear cloth face coverings at all times when inside the store. Signage and staff should request this before customers enter the store." These provisions are nearly identical to Paragraphs 1 and 2 of the Ordinance. It is therefore difficult to discern how the Ordinance conflicts with, or frustrates the purpose of, any of the Governor's Orders.

There are two other reasons that support the Court's finding. First, if Governor Sununu intended to preempt all local control related to face coverings during this pandemic, he could have used language to that effect. For instance, in Mississippi, the governor's executive order related to the pandemic stated:

> any order, rule, regulation or action by any governing body, agency, or political subdivision of the state that imposes any additional freedom of movement or social distancing limitations on Essential Business or Operation, restricts scope of services or hours of operation of any Essential Business of Operation, or which will or might in any way conflict with or impede the purpose of this Executive Order is suspended and unenforceable during this COVID-19 state of emergency.

First Pentecostal Church of Holly Springs v. City of Holly Springs Miss., No. 3:20CV119 M-P, 2020 WL 2495128, at *2 (N.D. Miss. May 14, 2020) (suggesting that local ordinance was preempted based on that language in executive order). As far as the Court can discern, there is no similar language in any of the Governor's Orders. Second, the Governor is a party to this action and he appeared through counsel at the hearing on the plaintiff's motion. If the Governor believed that the Ordinance was preempted by his Emergency Orders, the Court would have expected him to say so at the hearing. However, he made no such representation. For all of these reasons, the Court finds it unlikely that the plaintiff will prevail on the merits of his preemption claim. He is therefore not entitled to preliminary injunctive relief. See Mottolo, 155 N.H. at 63.

E. Constitutional Claims

Before addressing the plaintiff's constitutional challenges to the Ordinance, it is important to note that a deferential standard of review governs these claims during an emergency public health crisis. Over one hundred years ago, the Supreme Court established a framework governing the emergency exercise of state authority during a public health crisis. Jacobson v. Massachusetts, 197 U.S. 11 (1905). In Jacobson, the Court addressed whether a compulsory vaccination law, enacted during the smallpox epidemic, violated the Fourteenth Amendment. In rejecting that argument, the Court noted that the "liberty secured by the Constitution ... does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." Id. at 26. Rather, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Id. at 28. The Court further explained that, "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." Id. at 26–27. Under such emergency public health circumstances, "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 violation of rights secured by the fundamental law.'" In re Abbott, 954 F.3d 772, 784–85 (5th Cir. 2020) (quoting Jacobson, 197 U.S. at 31).

The New Hampshire Supreme Court has embraced the holding of Jacobson in several cases. See, e.g., Barber v. Sch. Bd., 82 N.H. 426 (1926); Cram v. Sch. Bd., 82 N.H. 495, 496 (1927); State v. Drew, 89 N.H. 54 (1937). Indeed, in Cram, the supreme

court explicitly used the "real or substantial relation" test and the "palpable violation of rights" test in upholding a school vaccination law. 82 N.H. at 496. In Drew, the supreme court eloquently explained why an individual's constitutional rights may have to yield to the greater good during a public health emergency. In that case, the defendant sought to justify his refusal to vaccinate his son upon the basis of rights of conscience and religious freedom guaranteed by Articles 4 and 5 of Part I of the New Hampshire Constitution. Id. In holding that this justification was not persuasive, the court stated: "The defendant cannot claim constitutional rights under Articles 4 and 5 of the Bill of Rights without making concessions of some of his natural rights under [Part I,] Article 3." Part I, Article 3, in turn, states: "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others." As such, particularly during a public health crisis, the rights of the plaintiff under "the Bill of Rights are conditioned upon 'concessions of some of [his] natural rights under Article 3.'" State v. Pinsince, 105 N.H. 38, 40 (1963). Against this legal framework—which the plaintiff fails to acknowledge in his motion or complaint—the Court will briefly address the plaintiff's constitutional arguments.

i. Right to Privacy

The plaintiff first argues that the Ordinance violates his right to privacy under Part I, Article 2-b of the New Hampshire Constitution. Specifically, he contends that the Ordinance violates that provision because it requires him "to wear a face mask or covering while [he is] in [his] own residences or the private residences of others, or in 'communal spaces' such as bathrooms, ***even if [he is] not in the presence of anyone else***, without exception." (Compl. ¶ 115 (bolding and italics in original).) As a threshold

matter, the Court does not read the Ordinance to require the plaintiff to wear a mask while he in his own home. But, even putting that issue aside, the plaintiff's claim based on Part I, Article 2-b fails for a much more obvious reason. That provision of the State Constitution, which was added in December 2018, states: "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." (Emphasis added). Although the New Hampshire Supreme Court has not yet had an opportunity to interpret this newly-enacted amendment, it is clear that it only implicates a right to privacy with regard to private and personal information. The Court fails to discern how the Ordinance has any bearing whatsoever on "information." The plaintiff is therefore not entitled to a preliminary injunction based on this provision of the State Constitution.

ii. Procedural Due Process

Next, the plaintiff argues that the Ordinance violates his "right to procedural due process under the New Hampshire Constitution" because it deprives him "from choosing whether or not to wear a face mask or covering." (Compl. ¶¶ 120, 121.) "At its most basic level, the requirement to afford due process forbids the government from denying or thwarting claims of statutory entitlement by a procedure that is fundamentally unfair." Appeal of Mullen, 169 N.H. 392, 397 (2016) (emphases added). Here, the Court fails to discern how the Ordinance implicates procedural due process. The plaintiff has not identified which statutory entitlement is implicated, what procedure is at issue, or how it is fundamentally unfair. In addition, "a successful due process claim must be based upon a protected liberty or property interest." Appeal of Bethlehem, 154 N.H. 314, 328, (2006). Here, the plaintiff has not identified a constitutionally protected property interest

or liberty interest at stake. See Talleywhacker, Inc. v. Cooper, No. 5:20-CV-218-FL, 2020 WL 3051207, at *12 (E.D.N.C. June 8, 2020) (finding that plaintiffs were unlikely "to succeed on their substantive and procedural due process claims [to governor's coronavirus-related executive orders], where plaintiffs fail to identify a constitutionally cognizable life, liberty, or property interest"). Simply put, "neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration." Guy v. Town of Temple, 157 N.H. 642, 658 (2008). That is precisely the situation here. For these reasons, the plaintiff has failed to demonstrate a likelihood of success on the merits of this claim, and he is therefore not entitled to a preliminary injunction. See Mottolo, 155 N.H. at 63.

iii. Free Speech and Assembly

The plaintiff asserts that the Ordinance prevents him "and other citizens from exercising their rights of free speech and assembly under the New Hampshire Constitution [because it] requires he and other citizens cover their mouths in public." (Pl.'s Mot. at 18.) On its face, the Ordinance does not appear to have any significant bearing on the right to assemble. The Ordinance does not prohibit gatherings, nor does it regulate when or where people may assemble. The Court therefore finds that the plaintiff is unlikely to prevail on his claim that the Ordinance violates his right to assemble under the State Constitution. See Couey v. Clarno, 305 Or. App. 29, 42–43 (2020) (rejecting free assembly challenge to statute because "[t]he statute on its face imposes no express or obvious restriction on the right to assemble for discussion of public policy"); see generally Guy, 157 N.H. at 658 ("[N]either passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by

legal argument or authority warrants extended consideration."). He is therefore not entitled to preliminary injunctive relief based on this claim. See Mottolo, 155 N.H. at 63.

Here, even assuming arguendo, that the plaintiff's right to free speech is implicated, the Court finds that he is unlikely to succeed on the merits of his claim given the deferential standard of review this Court must apply pursuant to Jacobson and Cram. As stated earlier in this Order, Jacobson provides that actions taken in response to a public health emergency should be upheld so long as they: (1) have a "real or substantial relation" to public health and safety and; (2) do not constitute "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31. Here, it is plain-as-day that the Ordinance bears a substantial relation to public health and safety. It seems common sense—to everyone except the plaintiff, his attorney, and his expert — that requiring individuals to cover their faces while indoors will help reduce the transmission of a highly contagious virus that is spread through the air. To the extent the plaintiff attempted to make an offer of proof to the contrary through his non-medical expert at the hearing, the Court did not find it persuasive.

Likewise, the Court cannot find that the Ordinance is "beyond all question" a "palpable invasion" of the plaintiff's rights. The face mask requirement is limited in scope—it only applies when the plaintiff is at a business or in a public building[4] or inside the communal area of a multi-unit building. The plaintiff is free to speak while in those places, albeit through a face covering. There is also nothing in the Ordinance requiring the use of a mask while speaking outdoors in public spaces. Finally, the Court notes that, to the extent the mask requirement stifles facial expression, it has a content-neutral effect. In the Court's view, a content-neutral regulation weighs against a finding of a

[4] The Court notes that the public is likewise required to wear a mask when inside the courthouse.

"palpable invasion" of his free speech rights. See Elim Romanian Pentecostal Church v. Pritzker, No. 20 C 2782, 2020 WL 2468194, at *5 (N.D. Ill. May 13, 2020) (plaintiffs did not "have even a negligible chance of success on their Free Speech and Assembly claim" where executive order was not based on content).

In sum, the Ordinance "involves reasonable measures intended to protect public health while preserving avenues for First Amendment activities." Ill. Republican Party v. Pritzker, No. 20 C 3489, 2020 WL 3604106, at *4 (N.D. Ill. July 2, 2020). For all of these reasons, the Court finds that the plaintiff is unlikely to succeed on the merits of this claim. He is accordingly not entitled to preliminary injunctive relief. See Mottolo, 155 N.H. at 63; see also Antietam Battlefield KOA v. Hogan, No. CCB-20-1130, 2020 WL 2556496, at *12 (D. Md. May 20, 2020) (denying motion for preliminary injunctive relief based on free speech challenge to face covering requirement because, "[i]n the context of COVID-19, wearing a face covering would be viewed as a means of preventing the spread of COVID-19, not as expressing any message").

F. Conclusion

"Ordinances if authorized by legislation enjoy the same presumption of constitutional validity as statutes, and they will not be declared void except on unescapable grounds." Donnelly v. Manchester, 111 N.H. 50, 51 (1971). This maxim, coupled with the deference this Court must show to the other branches of government during a public health crisis, leads the Court to one simple conclusion. The plaintiff has failed to demonstrate a likelihood of success on any of his claims underlying his challenge to the Ordinance, which is fatal to his request for preliminary injunctive relief.

His emergency motion for a preliminary injunction enjoining the enforcement of the Ordinance is accordingly DENIED.

II. The Claims Against the Governor

The plaintiff argues that two of Governor Sununu's Executive Orders, Numbers 2020-08 and 2020-09, are "null and void" because "they were not valid exercises of Governor Sununu's authority under RSA 4:45." (Compl. ¶ 103(a).) The plaintiff's entire argument is that "[t]here is no 'emergency' in New Hampshire" and therefore the Governor lacks the statutory authority to make any of those orders. (Pl.'s Mot. at 1.)

Pursuant to RSA 4:45, I and RSA 21-P:35, VIII, a "State of Emergency" exists when 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.

Here, the Court has no difficulty concluding that the Governor has properly declared that New Hampshire is in a "state of emergency." First, the Governor's Executive Orders themselves adequately establish the factual bases supporting his "emergency" finding. And, as a matter of common sense, it is clear that a state of emergency exists. As anyone not living in a cave for the past few months would know, the State, the Country, and the entire world are in the midst of a once-in-a-century pandemic event. Nearly every aspect of everyday life has changed because of the novel coronavirus, SARS-CoV-2. Millions of Americans have been infected with the virus. Hundreds of thousands of Americans have died, and the death toll is continuing to climb each day, with no clear end in sight. In the past few days, the number of new infections in this country has skyrocketed to all-time highs. Many New Hampshire citizens have lost their

jobs, while businesses and schools have closed. The tragic and fast-changing circumstances caused by the novel coronavirus clearly demand the flexibility afforded to the Governor under the emergency powers granted by RSA 4:45; 47.

Moreover, the plaintiff has made his argument in the wrong forum. To the extent the plaintiff seeks to overturn the Governor's emergency declaration, that issue is expressly left for the legislature to decide. That is, pursuant to RSA 4:45, II(c), "[t]he legislature may terminate a state of emergency by concurrent resolution adopted by a majority vote of each chamber." Indeed, as Chief Justice Roberts recently remarked, any decisions regarding the novel coronavirus pandemic are better left "to the politically accountable officials" because they are "fraught with medical and scientific uncertainties." S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of certiorari). As with his claims against the City, the Court finds that the plaintiff has utterly failed to demonstrate a likelihood of success on the merits of his claims against the Governor. His motion for a preliminary injunction to enjoin any of the Governor's Executive or Emergency Orders related to the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, is therefore DENIED. See Mottolo, 155 N.H. at 63.

III. Transfer to Merrimack County Superior Court

Chief Justice Nadeau has issued an administrative order specifying that any cases challenging the Governor's Executive and Emergency Orders related to the novel coronavirus are now specially assigned to Judge Kissinger. As such, the clerk's office is directed to transfer this case to Merrimack County Superior Court, where Judge Kissinger currently sits. The other pending motions in this matter, including the

plaintiff's motion to amend and the Governor's motion to dismiss, as well as any future motions, will be addressed by Judge Kissinger.

So ordered.

July 13, 2020
Date

Judge Jacalyn A. Colburn