IN THE DISTRICT COURT OF TULSA COUNTY STATE OF OKLAHOMA

JEFFREY A. DICKSTEIN	)	Case No.: CV-2020-00850
Plaintiff,	)	
vs.	)	Judge: Musseman
	)	
CITY OF TULSA,	)	
Defendant.	)	
	)	

PLAINTIFF'S DEMAND FOR RECONSIDERATION OF COURT'S ILLEGAL CONCLUSION THAT PLAINTIFF FAILED TO DEMONSTRATE IRREPARABLE HARM

Comes now the Plaintiff, on behalf of himself and every citizen of the City of Tulsa, who demands the Court reconsider its determination made on July 23, 2020, in ruling on Plaintiff's Second Emergency Motion for TRO, that Plaintiff failed to show irreparable harm. Said determination is contrary to decisions of the United States Supreme Court and represents nothing short of a tantamount overthrow of the Constitutions of both the State of Oklahoma and the United States.

The City of Tulsa, in response to the allegations of the pleadings and facts showing the City's emergency mask ordinance was made in the absence of jurisdiction and in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Section 1, Article I, Section 2, Article II, Section 2, Article II, Section 3, Article II, Section 7, Article II, Section 37 and Article XVIII, Section 3(a) of the Oklahoma Constitution only argued that Plaintiff, and therefore every other citizen of the City of Tulsa, did not have any right to due process of law.

Article II, Section 7, providing "No person shall be deprived of life, liberty, or property,

without due process of law," together with the shameless pronouncement in open Court by the appearing City Attorney, conclusively establishes an official policy of the City of Tulsa that it is not bound by its City Charter or the Constitution, and believes its employees may replace their oaths to support, obey and defend the Constitution of the United States and the Constitution of the State of Oklahoma per Article XV, Section 1 of the Oklahoma Constitution with political grandstanding.

Our country, The United States of America, was founded upon military overthrow of a government that refused to acknowledge that God granted certain inherent and inalienable rights. An inherent and inalienable right is a natural right that comes not from government, but pre-exists government. "This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). Thus, as the founders announced to the world: "We hold these truths to be self-evident, that all men . . . are endowed by their Creator with certain unalienable Rights . . . ." DECLARATION OF INDEPENDENCE, § 2. Government may not take from the people what they received directly from God. Further, government may not take these rights even if it be in legislation unanimously enacted by the entire General Assembly, or even if all branches acquiesce. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S., at 636. The very purpose of constitutions is to protect liberty. And although "an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected . . . constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). "To punish a person because he has done what the law plainly allows him to do is a due process

violation 'of the most basic sort.'" *Id*. Irreparable harm is sufficiently demonstrated where it is shown there is potential for the"abrogation of a concrete personal right," and where such rights are threatened with immediate impairment.

While the employees of the City of Tulsa may be acting with the best of intentions, good intentions are beside the point. However good the intentions, the question turns on the constitution and its limits. In studying the balance of what the law allows, an excerpt from Robert Bolt's play, *A Man for All Seasons*, bears mention. In it, St. Thomas More's family and his son-in-law, Will Roper, encourage him to arrest a man whom they fear, insisting that he is bad, and dangerous. St. Thomas resists, insisting that—however accurate their fear may be—the law must be respected. The discourse is instructive here:

> Roper: Then you'd set man's law above God's!
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> More: No, far below; but let me draw your attention to a fact—I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester. . . . [So, free he should go, even] if he was the Devil himself, until he broke the law!
>
> Roper: So now you'd give the Devil benefit of law!
>
> More: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Roper: I'd cut down every law in England to do that!
>
> More: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil himself benefit of law, for my own safety's sake.

To borrow words from the United States Supreme Court: "This quotation illustrates not

only the fundamental character of the rule of law . . . but also the pernicious consequences of official disobedience of [it]. . . . Repetition of that literary allusion is especially appropriate today: "The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm not God." *National Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 694–95 (2007).

There is United States Supreme Court precedent on the very question of using emergency powers during times of calamity, *i.e.*, *Ex parte Milligan*, 71 U.S. 2 (1866). Milligan was arrested during the time our country was embroiled in civil war. Citing the emergent needs of war, and the necessity to quickly deal with those engaged in sedition, the executive claimed power to dispense with Constitutional safeguards, pointing to various statutes that he contended granted authority for him and his agents to so act. The executive claimed it had emergency need to dispense with constitutional rights in times of grave peril. Here is part of the Supreme Court's answer:

> Time has proven the discernment of our ancestors . . . . Those great and good men foresaw that troublous times would arise, when rulers and people would . . . seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism....

Ex parte Milligan, 71 U.S. at 120-121.

Under our constitutions, government may not uproot liberty on a hope that it can hide

society from pathogens. Individuals, not government, should decide if the risk of walking out their front door is worth the potential reward. Adhering to constitutional constraints is sometimes unpleasant. Sometimes it may result in freeing one who was accurately—but unconstitutionally—convicted of a heinous crime. Sometimes it may prevent prosecution altogether, or even arrest. But, just as the Constitution may not be cut down to protect people from a criminal, it must not be cut down to protect them from a virus. If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects[123], or is, beyond all question, a plain, palpable invasion of

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1. As recent as May, 2020, the CDC issued its report stating it found no significant reduction in influenza transmission with the use of face masks either when worn by the infected person for source control or when worn by uninfected persons to reduce exposure. CDC, EMERGING INFECTIOUS DISEASES JOURNAL, VOL 26, Number 5, published May, 2020 entitled Nonpharmaceutical Measures for Panbdemic Influenza in Nonhhealthcare Settings - Personal Protective and Environmental Measures. https://drive.google.com/file/d/18XslfPNxgID0tE9_a1XJfRrCi-iOl-XG/view?usp=sharing

2. Dr. Anthony Stephen Fauci is described at one of the world's leading experts on infectious diseases. Dr. Fauci's medical opinion is that face masks do nothing to prevent the spread of COVID-19, but people should wear them if it makes them feel good. https://www.youtube.com/watch?time_continue=4&v=Ji5nYvLziYo&feature=emb_logo

3. On June 8th, the World Health Organization ("WHO") announced that "From the data we have, it still seems to be rare that an asymptomatic person actually transmits onward to a secondary individual," casting serious doubt on the rationality and effectiveness of wearing masks in public places. William Feuer, Asymptomatic spread of corona virus is 'very rare,' WHO says, CNBC, June 8th, 2020, at1, https://www.cnbc.com/2020/06/08/asymptomatic-coronavirus-patients-arent-spreading-new-infections-who-says.html. *See also* June 7th, the WHO specifically

(continued...)

rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905).

> **THE LOSS OF FIRST AMENDMENT FREEDOMS, FOR EVEN MINIMAL PERIODS OF TIME, UNQUESTIONABLY CONSTITUTES IRREPARABLE INJURY.** *See New York Times Co. v. United States*, 403 U.S. 713 (1971). Since such injury was both threatened and occurring at the time of respondents' motion and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief. *See Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 67 (1963). [Emphasis added.]

Elrod v. Burns, 427 US 347, 373-74 (1976); 11 C. Wright & A. Miller, Federal Practice and Procedure (1973) § 2948.

The ordinance on its face amends the City's Penal Code, Title 27, by adding a new section 409. It also states that it creates penalties for non-compliance, i.e., for not wearing a mask. The Tulsa City Code of Ordinances, Title 27 is the City's Penal Code. Chapter 4 is entitled "Offenses Against the Person." Thus not wearing a mask is considered by the City of Tulsa as a

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3. (...continued)
addressed popular cloth masks when it said, "Non-medical, fabric masks are being used by many people in public areas, but there has been limited evidence on their effectiveness and WHO does not recommend their wide spread use among the public for control of COVID-19." In fact, the WHO has warned of the potential risks and disadvantages that should be taken into account during any decision-making process regarding the use of masks. Ultimately, the WHO said that "At the present time, the widespread use of masks everywhere is not supported by high-quality scientific evidence." World Health Organization, Q&A: Masks and COVID-19, June 7th, 2020 at 1, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-on-covid-19-and-masks.

crime despite the City Attorney's protestations to the contrary. Section D of the emergency mask ordinance states:

> **Penalty for Violation of Subsection C.** There is no specific penalty for violation of this ordinance. However, persons refusing to wear a face covering into a Place of Public Accommodation, Educational Institution, or Public Setting as defined herein shall be subject to prosecution under criminal trespass, disturbing the peace, disorderly conduct or similar offenses as circumstances warrant.

The contention that not wearing a mask will not subject one to criminal prosecution is pure poppy-cock.[4] "The threat of prosecution for engaging in one or more constitutionally-protected acts is sufficient to demonstrate irreparable harm". *See*, *e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974).

In addition, the penalty provision is vague and ambiguous as a matter of law. "[O]r similar offenses as circumstances warrant" hardly puts anyone on notice of what the actual crime may be, and therefore is a due process violation under the Fourteen Amendment to the United States Constitution:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And 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. *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221; *Collins v. Kentucky*, 234 U.S. 634, 638.

Connally v. General Constr. Co., 269 US 385, 391 (1926).

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4. The Tulsa Chief of Police states they will be enforcing the failure to wear a mask. https://www.publicradiotulsa.org/post/police-chief-mayor-provide-further-clarity-mask-ordinance-enforcement?fbclid=IwAR2hPRKg5qCs9zfhgTVIcN32lpbubAu5Cp-cFeNo8JgRO9ANZMPWs6arJc0

While the following was stated by the United States Court of Appeals for the 4th Circuit, it relies on United States Supreme Court authority and correctly states the applicable point of law:

> The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right. *See Clemons v. Board of Education*, 6 Cir., 228 F.2d 853, 857; *Board of Supervisors of Louisiana State University, etc. v. Wilson*, 340 U.S. 909, 71 S. Ct. 294, 95 L. Ed. 657, affirming D.C., 92 F. Supp. 986; *Morgan v. Com. of Virginia*, 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317

Henry v. Greenville Airport Commission, 284 F. 2d 631, 633 (4th Cir. 1960).

In *Bowen v. City of New York*, 476 U.S. 467 (1986) it was alleged that the City of New York had adopted an unlawful, unpublished policy under which countless deserving claimants were denied benefits, such denials being based on arbitrary, capricious presumptions violative of the Constitution. The supreme court held that since health issues were involved, a waiver of the exhaustion doctrine was necessary to prevent irreparable harm. In this case, now, the illegal emergency ordinance requires the Citizens to wear a mask when in public despite the fact that the World Health Organization has declared it could be dangerous and the CDC states wearing of masks is ineffective to control the spread of COVID-19. The ordinance also interferes with the basic liberty to decide on one's own health protocols.

While numerous lower federal and state cases have declared certain constitutional violations to sustain a finding of irreparable harm, there can be no question but governmental action in violation of legal authority is null and void. As a matter of law, no person can be required to obey a void law. Furthermore, when that void law, on its face[5] violates fundamental

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5. For example, the ordinance exempts children under the age of 18 from wearing a (continued...)

liberties, that law (ordinance) cannot be enforced. Since the City of Tulsa is now enforcing said ordinance, the Citizens of the City of Tulsa are being irreparably harmed. Demanding that elected city officials obey the law they swore an oath to defend is a fundamental right that cannot be abridged. "Every time we turn our heads the other way when we see the law flouted, when we tolerate what we know to be wrong, when we close our eyes and ears to the corrupt because we are too busy or too frightened, when we fail to speak up and speak out, we strike a blow against freedom and decency and justice." – Robert Kennedy

This Court's finding there was no showing of irreparable harm at the hearing on Plaintiff's Second Emergency Motion for TRO is patently wrong.

WHEREFORE Plaintiff, on behalf of himself and all the Citizens of the City of Tulsa, demands the Court reconsider its ruling there was no showing of irreparable harm, and grant Plaintiff's Second Emergency Motion for a Temporary Restraining Order.

Dated: July 27, 2020

Jeffrey A. Dickstein
In propria persona
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5. (...continued)
mask when the facts of which the Court was required to take judicial notice shows 10 percent of the known cases in Tulsa involved children under the age of 17.

PROOF OF SERVICE

I declare that I served a copy of the foregoing document upon the Tulsa City's Attorney office by attaching it as an e-mail attachment addressed to gbender@cityoftulsa.org and personally delivering a copy to the Tulsa City Clerk's Office located at 175 E. 2nd Street, Tulsa, OK 74103 on this date.

Dated: July 27, 2020.

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Jeffrey A. Dickstein