

IN THE DISTRICT COURT OF TULSA COUNTY STATE OF OKLAHOMA

JEFFREY A. DICKSTEIN)	Case No.: CV-2020-00850
Plaintiff,)	
vs.)	Noticed Hearing Date: July 22, 2020
)	Time: 1:30 p.m.
CITY OF TULSA,)	Place: Tulsa District Court, Rm. 706
Defendant.)	Judge: Musseman
_____)	

PLAINTIFF’S SECOND EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, WITH NOTICE; FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff, Jeffrey A. Dickstein hereby moves the Court to issue a Temporary Restraining Order and Preliminary Injunction enjoining the City of Tulsa’s emergency ordinance regarding the mandatory wearing of masks, and in support thereof makes the following showing.

When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

12 O.S. § 1382.

The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or, in his absence from the county or disqualification, by the county judge, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto.

The offending emergency municipal ordinance, Ordinance No. 24408 has been signed by the Tulsa Mayor and is currently in full force and effect. Thus Plaintiff, and every person with the City’s limit, except for a few non-rationally related exceptions, is subject to immediate criminal

penalty for failing to wear a mask. Thus immediate and irreparable injury awaits anyone not wearing a mask, as merely existing in a public place is subject to immediate loss of Constitutionally protected rights, potential incarceration, and other criminal penalties.

Plaintiff has a very high likelihood of success on the merits because the Emergency Order is invalid for lack of jurisdiction to declare an emergency in the first instance. A civil emergency is defined as:

1. A riot or unlawful assembly characterized by the use of actual force or violence or any threat to use force if accompanied by immediate power to execute by three (3) or more persons acting together without authority of law; or
2. Any natural disaster or man-made calamity including flood, conflagration, cyclone, tornado, earthquake or explosion within the corporate limits of the City of Tulsa resulting in the death or injury of persons or the destruction of property to such an extent that extraordinary measures must be taken to protect the public health, safety and welfare.

Tulsa Ordinance, Title 8, Ch. 1, Sections 100 A. 1-2.

The authority of the Mayor is also limited with respect to declaring an emergency:

When, in the judgment of the Mayor, **A CIVIL EMERGENCY AS DEFINED HEREIN** is deemed to exist, he shall proclaim in writing the existence of a civil emergency. [Emphasis added.]

Tulsa Ordinance, Title 8, Ch. 1, Section 200.

The City of Tulsa cites to 11 O.S. § 22-120 A. that authorizes a “municipal governing body to enact and enforce such ordinances, rules and regulations as it deems necessary for the protection of public health, not inconsistent with state law.” State law requires any municipal governing bodies to comply with its City Charter and ordinances, as well as the Constitutions of the United States and State of Oklahoma.

Article I-1 of the Oklahoma Constitution is a reminder to Oklahoma government personnel that the United States Constitution is the Supreme Law of the Land.

Article XVIII-3(a) authorizes any city to frame a charter for its own government, consistent with and subject to the Constitution and laws of the state. Once the charter is approved by the Governor, “IT SHALL BECOME THE ORGANIC LAW OF SUCH CITY,” and “ALL COURTS SHALL TAKE JUDICIAL NOTICE OF SAID CHARTER.”

Plaintiff has filed concurrently herewith a Request that the Court take judicial notice of the following:

- a. The population of the City of Tulsa, as of July, 2019, being 401,190.
https://en.wikipedia.org/wiki/Tulsa,_Oklahoma.
- b. The Oklahoma State Department of Health, as of July 21, 2020 at 9:35 a.m., shows the total reported cases of COVID 19 within the City of Tulsa, 4,383, the number of deaths is 63 and 3462 of the reported cases have recovered.
<https://looker-dashboards.ok.gov/embed/dashboards/79>.
- c. $4,383 \text{ divided by } 401,190 = 1.092 \%$.
- d. Of that 1.092 % of the City’s population, 78 % have recovered. ($3,462 \text{ divided by } 4,383$).
- e. The percentage of deaths of the City’s population from COVID is .0000157 %.

The official numbers from the State Department of Health belie the existence of a state of emergency requiring extraordinary measures to be taken to protect the public health, safety and welfare. As a matter of both fact and law, both the City Council and Mayor violated it’s organic law to declare an emergency.

The offending emergency municipal ordinance also violates and infringes on numerous provisions of the Oklahoma Constitution, including, but not by way of limitation:

- a. Article I, Section 2 protecting religious liberty;
- b. Article II, Section 2 protecting the inherent right to life, liberty and the pursuit of happiness;
- c. Article II, Section 3 protecting the right to peaceably assemble;
- d. Article II-7 providing for due process of law;
- e. Article II, Section 37 preserving the right of people to choose their own health care system.

The offending emergency municipal ordinance also violates and infringes on the corresponding provisions of the United States Constitution, in addition to the equal protection clause of the Fourteenth Amendment.

The due process clause protects the individual against the arbitrary and unreasonable exercise of governmental power. The Emergency Ordinance is arbitrary and unreasonable because, in the absence of an actual emergency as defined in the City Charter, it is not backed by a compelling state interest; indeed, the actual facts show a complete absence of such interest. So too, due process of law protects against the unreasonable legislative deprivation of life, liberty, or property. Here the offending ordinance is not only unreasonable, it is *void ab inito* for lack of legal authority to implement it.

By arbitrarily requiring only a portion of the population to comply with the mask mandate, the City of Tulsa treats similarly situated people differently without a rational basis which places unique burdens on some individuals and not on others without justification.

Such a classification must bear a rational relationship to a legitimate government interest or it will violate the equal protection clause. The ordinance excludes children under the age of 18 from wearing the mask. One only need do a Google Search for the term "children under 18 and COVID-19" to see the fallacy of excluding children under the age of 18 if in fact the goal is to protect the public health, safety and welfare by preventing the spread of COVID-19. Another fallacy of the mask ordinance is patently obvious within the Court's own second floor civil filing window. The clerks don't wear face coverings. Yet they are within 6 feet of the counter on which filing stamps, staplers, paper clips, papers, credit cards, cash, etc. are handled by the clerks and passed on to the citizen. Thus every person filing a court document will be affected by any clerk breathing within six feet of the transmitted material. So now I'm wearing a mask taking potentially infected documents to other court clerks, to the post office, and back home.

No conceivable state of facts can provide a rational basis for classifying people under the age of 18 and government employees as existing in a different situation than the average citizen required to wear a mask.

The United States Supreme Court has fashioned a two-tier equal protection framework. Equal protection analysis requires strict judicial scrutiny of statutes that operate to the peculiar disadvantage of a suspect class such as a class based on alienage or ancestry or that interfere with the exercise of a fundamental right grounded in the constitution such as the right to vote, right to interstate travel and rights guaranteed by the First Amendment. *Mass. Bd. Of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976). Equal protection analysis of other statutes is the less stringent rational basis standard. The legislative class is examined for a rational relation to the objective of the statute. *Id.* at 314, 96 S.Ct. 2562. The rational relation inquiry is a "relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task" and such action by the Legislature is presumed valid. *Id.*

Jacobs Ranch, LLC v. Smith, 2006 OK 34, 148 P.3d 842, 856-57 (2006)

The emergency municipal ordinance infringes on Plaintiff's, as well as every other person with the City Limits, right to privacy and is, therefore, subject to strict scrutiny. The fundamental right to privacy and liberty embraces the right to self-determination. An integral component of self-determination is the right to make choices pertaining to one's health and to determine what shall be done with one's own body. Here, that right has been demolished.

No other remedy exists to protect Plaintiff's rights which the City of Tulsa is infringing upon. The ability to move freely has been deprived from the Plaintiff, disallowing him to be let alone and free. Unless an injunction is issued, Plaintiff will suffer irreparable harm because his Constitutional rights are being violated. The mask requirement infringes Plaintiff's right to privacy under the Oklahoma Constitution. Worse, Plaintiff could be arrested and fined if he does not comply with the unconstitutional mandate. The likelihood of irreparable harm resulting from the Emergency Order's enforcement is significant not only for the Plaintiff, but also for Tulsa City's more than 400,000 residents. A temporary injunction of the Emergency Order will serve the public interest. The citizens of the City of Tulsa are burdened by the over-reach of their local government unprecedented in Oklahoma history. The mask requirement violates both the Plaintiff's and the public's fundamental Oklahoma Constitutional rights. The public has a strong interest in protecting their rights, prohibiting a government from violating those rights, and their ability to control their own bodies and health care.

WHEREFORE, Plaintiff moves the Court for the issuance of a temporary restraining

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order prohibiting the City of Tulsa from enforcing its unauthorized and unconstitutional emergency municipal ordinance, and whether granted or denied, to set a hearing for a preliminary injunction.

Dated: July 21, 2020

Jeffrey A. Dickstein
In propria persona
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