

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

NEBRASKA DEPARTMENT OF HEALTH  
AND HUMAN SERVICES; et al.,

Plaintiffs,

and

AIMEE MELTON, BRINKER HARDING,  
and DON ROWE, in their capacities as  
individual elected Members of the Omaha City  
Council,

Plaintiff-Intervenors,

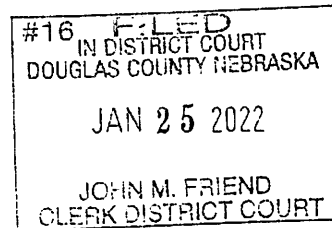
vs.

DR. LINDSAY HUSE, in her official capacity  
as Health Director of the Douglas County  
Board of Health and in her official capacity as  
the purported "Health Director" of the City of  
Omaha; City of Omaha; et al.,

Defendants.

Case No. CI 22-299

**ORDER ON PLAINTIFFS' AND  
PLAINTIFF-INTERVENORS'  
MOTIONS FOR TEMPORARY  
INJUNCTION**



This matter comes before the Court on Plaintiffs' Motion for Temporary Injunction, filed January 13, 2022, and Plaintiff-Intervenors' Motion for Temporary Injunction, filed January 18, 2022. A hearing was held by videoconferencing on January 24, 2022. Plaintiffs Nebraska Department of Health and Human Services, Dr. Gary J. Anthone, and Attorney General Douglas J. Peterson appeared by counsel, Assistant Attorneys General James Campbell, Jennifer Huxoll, Phoebe Gydesen, and Justin Hall. Plaintiff-Intervenors; City Council Members Aimee Melton, Brinker Harding, and Don Rowe; appeared by counsel, David Lopez and Jennifer Sturm.



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Defendants City of Omaha; Jean Stothert, in her official capacity as Mayor of the City of Omaha; the Omaha Police Department; and Todd Schmaderer, in his official capacity as the Chief of Police of the Omaha Police Department, appeared by counsel Deputy City Attorney Bernard J. in den Bosch. Defendants Dr. Lindsay Huse, in her official capacity as Health Director of the Douglas County Board of Health, and all remaining Douglas County, Nebraska, Defendants appeared by counsel, Deputy Douglas County Attorneys Joshua R. Woolf and Theresia Urich. Defendant Dr. Lindsay Huse, in her official capacity as the Health Director of the City of Omaha, appeared by counsel, Robert Slovek and Edward Fox.

Exhibits 1-15, 18, and 21-51 were offered and received without objection. Exhibit 17 was withdrawn. The Court took under advisement objections to exhibits 16, 19, and 20. The objections to Exhibit 16 are overruled and that exhibit is now received; however, those statements contained therein which would constitute hearsay if offered for the truth of the matter asserted will be considered only for non-hearsay purposes. Exhibit 19 is also received. The objections to Exhibit 19 ¶¶ 7-11 are overruled, however, the Court does not receive them as evidence of legal conclusions but only for the purpose of state of mind. The attachments to Exhibit 19 are also received for the limited purpose of state of mind. Likewise, Exhibit 20 is received but any statement therein which would constitute hearsay if offered for the truth of the matter asserted will be considered by the Court only for non-hearsay purposes.

The Court has also received the following written authority: Brief in Support of Motion for Temporary Injunction on behalf of Plaintiffs Nebraska Department of Health and Human Services, Dr. Gary J. Anthone, in his official capacity as the Director of Public Health and Human Services of Nebraska, and Douglas J. Peterson, Attorney General of the State of Nebraska; Brief in Support of Motion for Temporary Injunction on behalf of Plaintiff-Intervenors City Council Members

Aimee Melton, Brinker Harding, and Don Rowe; Brief in Opposition to Plaintiffs' Motion for a Temporary Injunction on behalf of the City of Omaha, Jean Stothert in her official capacity as Mayor of the City of Omaha, the Omaha Police Department, and Todd Schmaderer, in his official capacity as the Chief of Police of the Omaha Police Department; Amended Brief in Opposition to Plaintiffs' Motion for a Temporary Injunction on behalf of Dr. Lindsay Huse, in her official capacity as Health Director of the City of Omaha; Brief in Opposition to Plaintiffs' and Intervenor's Motions for Temporary Injunction on behalf of County Defendants; Plaintiffs' Amended Reply Brief in Support of Motion for Temporary Injunction, and Plaintiff-Intervenor's Reply Brief in Support of Motion for Temporary Injunction. The Court has carefully considered and substantially drawn upon all of the learned written argument submitted by the parties.

At the hearing on this matter, arguments were heard and the matter was taken under advisement. Being fully advised in the premises, the Court now finds and orders as follows:

In summary, this matter involves weighty disputes between the parties about the balance of power between the City of Omaha and the State of Nebraska to regulate matters pertaining to health within the City of Omaha's city limits. This ruling is narrow; the Court does not give a final determination as to any of the parties' arguments, but only determines whether Plaintiffs are so likely to succeed and suffering such irreparable harm that the Court should enjoin the Mask Requirement while litigation continues. Given the import and strength of the arguments advanced by the parties, the Court cannot find that this is a case in which the movants' right to relief is clear and harm suffered during litigation irreparable to a degree sufficient to warrant the extraordinary remedy of a temporary injunction. The Court notes that if the City Council desires immediate change to the Mask Requirement during litigation, it retains the power to enact such changes through ordinance. Likewise, if the Nebraska Legislature wishes to clarify or change the powers

delegated to cities and to the Department of Health and Human Services, it can also enact legislation to that effect. Accordingly, the motions for temporary injunction are denied and the matter ordered to be set for further proceedings.

### **BACKGROUND AND PROCEDURAL HISTORY**

Effective January 12, 2022, Dr. Lindsay Huse, Health Director of the Douglas County Health Department, stating that she was acting pursuant to the Omaha Municipal Code of the City of Omaha (the City), issued a Mask Requirement related to the COVID-19 pandemic. (E1; E12; E19). An amended Mask Requirement (Mask Requirement), currently in effect, was issued shortly thereafter and is the Mask Requirement document to which this Court will refer for the remainder of this order. (E2). In relevant part, the amended January 12, 2022, Mask Requirement provides:

- 1.) Any individual or entity which maintains premises open to the general public, including but not limited to educational institutions, shall require all individuals aged five (5) and older to wear a face covering over their mouth and nose while indoors unless the individual maintains at least six (6) feet of separation at all times from anyone who is not their household member, except face coverings will not be required if the individual:
  - (a) Is seeking federal, state, city, municipal, or county Government services;
  - (b) Is seated at a bar or restaurant to eat or drink, or while immediately consuming food or beverages;
  - (c) Is engaged in exercise;
  - (d) Is engaged in an occupation preventing the wearing of a face covering;
  - (e) Is obtaining a service or purchasing goods or services that require the temporary removal of the face covering;

(f) Is providing a speech, lecture, or broadcast, or officiating a religious service, to an audience so long as six (6) feet of distancing from other individuals is maintained;

(g) Cannot otherwise wear a face covering because of a medical condition, a mental health condition, or a disability that prevents the wearing of a face covering; and/or

(h) The individual is under five (5) years of age.

(E2). The Mask Requirement provides that it will remain in effect “until positive case counts for the City of Omaha are below 200 persons per 100,000 on a seven (7) day total and hospital capacity is maintained at or below 85% for seven (7) consecutive days, unless renewed, extended, or terminated by subsequent order. This Order will be reviewed at minimum every four (4) weeks for a determination of the Director on extension or expiration.” (E2, p. 2).

Omaha Municipal Code, Chapter 12, enacted in 1980, confers certain powers and duties to the “health director” with respect to the prevention of contagious disease within the City. (E18, attach. C, p. 2). Omaha Municipal Code § 12-1 defines the term “health department” as “The Douglas County health department” and the term “Director or Health officer” as “The director of the health department or his authorized representative.” (E18, attach. C, p. 1). The Omaha Municipal Code provides at § 12-21 that “[t]he health director shall take all measures necessary to prevent the introduction within the city of malignant, contagious and infectious diseases, and to remove, quarantine or otherwise dispose of any person or persons attacked or having any such disease.” (E18, attach. C., p. 2). Omaha Municipal Code § 12-24, entitled “Authority at threat of epidemic,” provides, “[i]t shall be the duty of the health director, whenever in his judgment the city is afflicted or threatened with an epidemic of contagious or infectious disease, to issue or cause

to be issued such orders, regulations and instructions as may, in his judgment, be deemed effective for the prevention, removal or limiting of such disease, which orders, regulations and instructions shall remain in full force and effect until revoked by the director.” (E18, attach. C, p. 2).

In August 2020, the City Council enacted Omaha Municipal Code, Chapter 12, Article III – “Prevention of COVID-19.” (E22, p. 3). Section 12-43 of this article required that “All individuals age five and older shall wear a face covering over their mouth and nose while indoors in a premises that is open to the general public . . .” except for in the case of several listed exceptions. (E22, pp. 4-5). Section 12-44 of this article required that:

“Any individual or entity which maintains premises that are open to the general public including, but not limited to, educational institutions, shall require all individuals age five and older to wear a face covering over their mouth and nose while indoors in said premises, unless the individual maintains a minimum of six feet of separation or social distance at all times from anyone who is not a member of the individuals’ household, except face coverings will not be required if the individual:

- (1) Is seeking federal, state, county, or city governmental services;
- (2) Is seated at a bar or restaurant to eat or drink, or while immediately consuming food or beverages;
- (3) Is engaged in an occupation preventing the wearing of a face covering;
- (4) Is obtaining a service or purchasing goods or services that requires the temporary removal of the face covering;
- (5) Is asked to remove a face covering to verify an identity for lawful purposes;
- (6) Is providing a speech, lecture, or broadcast to an audience so long as six feet of distancing from other individuals is maintained; or

(7) Cannot otherwise wear a face covering because a medical condition, a mental health condition, or a disability that makes it unreasonable for the individual to wear a face covering.

(E22, p. 5). Section 12-51 of this article, entitled “Sunset provision” provides that “The requirements imposed by this article shall expire and terminate at 11:59 p.m. on May 25, 2021, unless otherwise extended by ordinance of the city council.” (E22, pp. 7-8). The “Prevention of COVID-19 ordinances make only two references to the “health director”:

§ 12-41(1)(g) “The Director of the United States Center for Disease Control and Prevention (CDC), the health director for the city, doctors and infections disease experts from the University of Nebraska Medical Center . . . have concluded that the wearing of face coverings by every individual while in public is one of the best methods to slow and stop the spread of COVID-19.”

...

§ 12-52 – Report required.

The health director of the city shall, on every Tuesday while the provisions of this article remain in effect, prepare a report to be delivered to the mayor and the city council. The report shall contain information from the prior week on the status of COVID-19 infections in the city, and shall include information on the current number of cases in the city, the number of new cases diagnosed, the number of tests performed, the positivity rate of those tests, the number of new deaths that have occurred, the Metro Omaha area hospital occupancy rate, the ventilator utilization rate, the COVID-19 hospitalization rate, a

breakdown of cases by zip code, and any such other information that the health director deems relevant to the spread of COVID-19 within the city.

(E22, pp. 3-8). The Prevention of COVID-19 ordinances make no reference to the other powers conferred to the health director under Omaha Municipal Code such as those in §§ 12-21, 12-23, or 12-24. (E22).

Following the issuance of Dr. Huse's Mask Requirement, Plaintiffs filed this action on January 12, 2022, and their Motion for Temporary Injunction on January 13, 2022. Plaintiff-Intervenors filed a Complaint to Intervene on January 14, 2022, and a Motion for Temporary Injunction on January 18, 2022. Various counsel for defendants entered appearances between January 14, 2022 and January 18, 2022. This matter was set for hearing on January 24, 2022, solely on the narrow question of whether movants can show by a preponderance of the evidence that they are entitled to the relief demanded and that during litigation they would suffer irreparable injury such that a temporary injunction should be issued until this matter proceeds to trial.

### **STANDARD OF REVIEW**

A temporary injunction is not an appealable order. *O'Connor v. Kaufman*, 6 Neb. App. 382, 387, 574 N.W.2d 513, 517, *aff'd*, 255 Neb. 120, 582 N.W.2d 350 (1998). An order denying or dissolving a temporary injunction or restraining order is not a final order as defined in § 25-1902. *Waite v. City of Omaha*, 263 Neb. 589, 592-93, 641 N.W.2d 351, 354 (2002).

### **ANALYSIS**

Further proceedings will be held in this matter – trial on the Complaint for declaratory relief and request for permanent injunction, at which time the Court, after the parties have been afforded the full due process of litigation, can determine the allocation of powers to enact measures related to communicable diseases in the City of Omaha. However, the issue before the Court on



the present motions is a narrow one – whether the Court should enter a temporary injunction that would stay the effect of the City of Omaha’s Mask Requirement while this litigation proceeds.

In deciding whether to grant or deny preliminary injunctive relief, the court must consider (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. See Neb. Rev. Stat. § 25-1063; see also *Gahan ex rel. Gahan v. U.S. Amateur Confederation of Roller Skating*, 382 F. Supp. 2d 1127, 1129 (D. Neb. 2005). “An injunction is an extraordinary remedy, and it ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.” *County of Cedar v. Thelen*, 305 Neb. 351, 357, 940 N.W.2d 521, 526 (2020).

As all parties agree – this case has nothing to do with the wisdom or efficacy of mask mandates – only whether the January 2022 City of Omaha Mask Requirement was issued lawfully. The key issue in this case involves a debate over State powers versus City powers to enact health measures within the limits of the City of Omaha. Having carefully considered the arguments of the parties and text of the statutes and ordinances involved, the Court cannot find that this is a case where movants’ likelihood of success is clear and harm during litigation so irreparable such that a temporary injunction should be issued. The Court’s analysis in reaching this decision is set forth below.

### **I. Likelihood of Success**

Under Nebraska law, a Court may issue a temporary injunction staying an action during the course of litigation when “it appears by the complaint 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 great or irreparable injury to the plaintiff Neb. Rev. Stat. § 25-1063 (Reissue 2016). Therefore, the Court must consider whether, at this early stage, Plaintiffs and Plaintiff-Intervenors can show they are likely to succeed in demonstrating that the January 2022 City of Omaha Mask Requirement was issued unlawfully.

In issuing the Mask Requirement, Dr. Huse relied upon Omaha Municipal Code providing that “[i]t shall be the duty of the health director, whenever in his judgment the city is afflicted or threatened with an epidemic of contagious or infectious disease, to issue or cause to be issued such orders, regulations and instructions as may, in his judgment, be deemed effective for the prevention, removal or limiting of such disease, which orders, regulations and instructions shall remain in full force and effect until revoked by the director,” and that “[t]he health director shall take all measures necessary to prevent the introduction within the city of malignant, contagious and infectious diseases, and to remove, quarantine or otherwise dispose of any person or persons attacked or having any such disease.” (E18, attach. C., p. 2). Plaintiffs, who are associated with the State, argue that notwithstanding these Omaha Municipal Code provisions, the Health Director of the Douglas County Health Department can never enact health measures without State Department of Health and Human Services (DHHS) approval under several provisions of Nebraska Revised Statutes Chapter 71. In contrast, all parties associated with the City and County, including Plaintiff-Intervenors, assert that the City holds the authority to enact disease control measures within City limits and that the City validly delegated that authority to the unilateral discretion of the Health Director, at least until August 2020. (See, e.g., Br. of Plaintiff-Intervenors at p. 6 “All these ordinances were enacted in 1980. And until August 11, 2020, they uncontestably delegated to the health director a broad and general grant of authority over public health in Omaha

to take measures against a presumably unlimited universe of ‘malignant, contagious and infectious diseases.’”).

The Court therefore begins its analysis by examining the source and extent of City authority over disease control measures within city limits. The Court then considers whether the City validly delegated its authority over disease control measures to the unilateral discretion of the Health Director before August 2020. Next, the Court considers whether any such delegation was preempted by State law, and whether the City Council’s August 2020 COVID-19 ordinance revoked authority of the Health Director. Finally, the Court addresses the argument that the Mask Requirement violates Nebraska’s Constitution.

**A. Does the City of Omaha hold Authority over Disease Control Measures?**

All parties, including Plaintiffs, agree that the City of Omaha, acting through the City Council, has authority to enact disease control measures for the City. The City of Omaha is authorized to adopt a home rule charter under Article XI, Sec. 5 of the Nebraska Constitution. Further, Nebraska state statutes give cities of the metropolitan class (Omaha is a city of the metropolitan class) broad authority to promote the health, safety, and welfare of the City and its inhabitants. Nebraska Revised Statute Neb. § 14-101 (Reissue 2012) provides in relevant part:

Each city of the metropolitan class shall be a body corporate and politic and shall have power . . . (4) to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers, and (5) to exercise such other and further powers as may be conferred by law. The powers hereby granted shall be exercised by the mayor and city council of such city except when otherwise specially provided.

In addition, Nebraska statute also provides:

A city of the metropolitan class may make all such ordinances, bylaws, rules, regulations, and resolutions not inconsistent with the general laws of the state, as may be necessary or expedient, in addition to the special powers otherwise granted by law, for maintaining the peace, good government, and welfare of the city and for preserving order, securing persons or property from violence, danger, and destruction, for protecting public and private property, for promoting the public health, safety, convenience, comfort, morals, and general interests, and welfare of the inhabitants of the city.

Neb. Rev. Stat. § 14-102.01(Reissue 2012).

With specific respect to the “Regulation of Public Health,” Neb. Rev. Stat. § 14-102 (Reissue 2012) provides that cities of the metropolitan class “shall have power by ordinance . . . (3) To provide all needful rules and regulations for the protection and preservation of health within the city . . . .” State statute also grants the Mayor specific enforcement powers and duties related to the preservations of the peace, health, and welfare of the City. See Neb. Rev. Stat. § 14-219 (Reissue 2012) (discussing enforcement including enforcement of “health” and “quarantine” ordinances).

The City has exercised its Constitutional and Statutory authority through enacting the Home Rule Charter of the City of Omaha and Omaha Municipal Ordinances. The Home Rule Charter of the City of Omaha provides the City Council with the power and authority to respond to and manage public health emergencies. Home Rule Charter § 2.04 states that:

All legislative powers of the city shall be exclusively vested in the Council and shall be exercised by it in the manner and subject to the limitations hereinafter set forth. The Council shall have the power to pass, amend, or repeal any and all ordinances necessary or proper to execute or carry into effect any of the provisions of this charter or any of the

powers herein granted, except as otherwise provided in this charter. Laws of the State of Nebraska affecting matters of local concern but otherwise not inconsistent with the charter shall have the force and effect of ordinances of the city until declared inoperative by an ordinance enacted by the Council. In the event of conflict between any statute affecting a matter of local concern and any ordinance or resolution enacted by the Council, the ordinance or resolution shall prevail and control. In addition to exercising its general legislative powers, the Council shall make or confirm appointments as required by this charter; adopt the budget, undertake necessary investigations, provide for an independent audit, and take such other actions as it deems necessary and as are consistent with this charter.

(E28, pp. 6-7).

In summary, all parties agree that the City of Omaha's legislative body enjoys broad powers with respect to health and contagious diseases within the City, independent of State Department of Health and Human Services (DHHS) approval. (See, e.g. Plaintiff's Br. p. 7, "state law permits the Omaha City Council to create "rules and regulations for the care, treatment, regulation, and prevention of all contagious and infectious diseases.""). All parties also agree that in August 2020, the Omaha City Council validly enacted a mask mandate through ordinance. (See *id.*). The parties disagree, however, on whether Omaha municipal ordinances contained in Chapter 12 validly delegate the City's health powers to the Health Director of the Douglas County Health Department. The parties further disagree as to whether the municipal code provision allow the Health Director to exercise the City's authority and issue disease control measures for the City unilaterally. These issues are explored in more detail below.

**B. At least prior to August 2020, did Omaha City Code give the County Health Director Power to Unilaterally Impose Disease Control Measures within Omaha City Limits?**

As analyzed above and agreed by the parties, the City holds the power, through ordinance, to issue public health measures related to contagious diseases. The next question before the Court is whether the City, by enacting certain provisions of the Municipal Code contained in Chapter 12 in 1980, validly delegated the City's power to issue disease control measures to the unilateral discretion of the Health Director. All Defendants assert that Omaha Municipal Code §§ 12-1, 12-21, and 12-24 vested the City's power and duty to issue disease control measures in the unilateral discretion of the Health Director. The City Council member Plaintiff-Intervenors concede that until August 2020, Omaha Municipal Code §§ 12-1, 12-21, and 12-24 vested this power in the Health Director, but they contend that the City Council's August 2020 Covid-19 ordinance revoked this power with respect to Covid-19 mask mandates. Plaintiffs, in contrast, assert that the Health Director never had the power to unilaterally issue health measures. Plaintiffs read the relevant provisions of Chapter 12 not as a separate grant of City authority to the Health Director, but as a decision by the City to cede its authority for disease control to the County Department of Public Health under Neb. Rev. Stat. § 71-1635 (Reissue 2018). Plaintiffs argue that under State law, disease control measures taken by the Health Director are always subject approval of the State DHHS. In examining this issue, the Court begins with the relevant statutory provisions of Nebraska Revised Statutes Chapter 71.

***State Statutes on Local Health Departments and State DHHS Approval***

The Douglas County Health Department is generally governed by the statutes contained in Chapter 71, Article 16, of the Nebraska Revised Statutes, among other authority. Under Chapter

71, when a county health department is established, the county board is required to appoint a “board of health.” Neb. Rev. Stat. § 71-1630(1) (Reissue 2018). The board of health “shall consist of the following members: (a) One member of the county board; (b) one dentist; (c) one physician; and (d) six public-spirited men or women interested in the health of the community.” *Id.*

Neb. Rev. Stat. § 71-1631(10) (Reissue 2018) sets forth duties of local boards of health. The county board of health is required to secure the approval of the county board when it carries out its duties. § 71-1631. In relevant part, the board of health statute provides that the local board of health shall have the power to:

(7) Enact rules and regulations, subsequent to public hearing held after due public notice of such hearing by publication at least once in a newspaper having general circulation in the county or district at least ten days prior to such hearing, and enforce the same for the protection of public health and the prevention of communicable diseases within its jurisdiction, subject to the review and approval of such rules and regulations by the Department of Health and Human Services;

...

(9) In counties having a population of more than four hundred thousand inhabitants as determined by the most recent federal decennial census, enact rules and regulations for the protection of public health and the prevention of communicable diseases within the district, *except that such rules and regulations shall have no application within the jurisdictional limits of any city of the metropolitan class* and shall not be in effect until (a) thirty days after the completion of a three-week publication in a legal newspaper, (b) approved by the county attorney with his or her written approval attached thereto, and (c) filed in the office of the county clerk of such county. A county shall comply with this subsection within six

months after a determination that the population has reached more than four hundred thousand inhabitants as determined by the most recent federal decennial census;

...

(10) Investigate the existence of any contagious or infectious disease and *adopt measures, with the approval of the Department of Health and Human Services, to arrest the progress of the same;*

...

Neb. Rev. Stat. § 71-1631 (emphasis supplied).

In addition to a board of health, a local public health department “shall have a health director at its head who is required to give his or her entire time to the duties of the office and such other necessary qualified full or part-time health officers, environmental health specialists, public health nurses, health educators, and clerical assistants as may be necessary to carry on the activities pertinent to the health department.” Neb. Rev. Stat. § 71-1627 (Reissue 2018). The health director by statute shall have the power and duty to:

(1) be the executive officer of the local boards of health; (2) appoint, subject to any applicable county or city civil service laws, rules, or regulations, a properly functioning staff and other personnel as may be necessary, whose qualifications shall conform to the United States Public Health Standards and whose remuneration shall conform to an established compensation schedule set by such local board of health and which is reviewed and approved annually by such board; (3) review annually, with the local board of health, the proposed budget of the department; (4) organize, with the approval of the local board of health, a citizens' advisory health council that will aid in developing a public health program to meet the particular needs, hazards, and problems of the health district; and (5)



organize, with the approval of the local board of health, a medical and dental advisory committee.

Neb. Rev. Stat. § 71-1632 (Reissue 2018)

The Court notes that the statutory scheme of Chapter 71 contemplates three separate entities relevant here: a county health department, a health director at the head of the health department, and a board of health. The Court also notes that § 71-1631(9) withholds from the board of health's general rulemaking powers the power to make rules and regulations effective in the city limits of a city of the metropolitan class. This section reserving powers relating to cities of the metropolitan class speaks only to "rules and regulations" and is silent as to the board of health's power to take "measures" to arrest communicable disease.

Plaintiffs note that Neb. Rev. Stat. § 71-1635 (Reissue 2018) provides for the option that a "county or district health department may be given full control over all health matters in the county or counties, including all municipalities in the county in conformity with the rules, regulations, and policies of the Department of Health and Human Services." Plaintiffs assert that Omaha Municipal Code provisions in Chapter 12 represent the City choosing to exercise the option to give the county health department full control over all health matters in the City, "in conformity with the rules, regulations and policies of the Department of Health and Human Services." See § 71-1635; (Plaintiffs' Amend. Reply Br. p. 2). In contrast, Defendants assert that Chapter 12 of the Omaha Municipal Code represents the City giving augmented and separate powers and duties to the Health Director of the Douglas County Department of Health. (See Douglas County Br., p. 11). Douglas County Defendants further argue that "[t]he Omaha Municipal Code is replete with instances where the Director or Department is empowered or tasked to take action within the City. If Plaintiffs' Count One argument is successful, the entire system within Douglas County and the

City falls apart. *See* Omaha Municipal Code §§ 6-266, 6-267, 6-268, 6-269, . . . 12-91, and 12-93 . . . Each of these separate grants of authority augment - instead of supplant - the authorities given to the Douglas County Health Director who fills the separate and distinct role of City Health Director.”

Given these contrasting characterizations of Omaha Municipal Code Chapter 12, it falls to the Court to determine whether the language of the Code or other evidence before this Court clearly demonstrates which characterization is correct; does the Chapter 12 of the Omaha Municipal Code cede “full control over all health matters” in the City to the County Department of Health under § 71-1635, or does it instead represent a separate and supplemental grant of power, drawn from the City’s Home Rule Charter, to the Health Director to act on behalf of the City of Omaha? To address this issue, the Court turns to the text of ordinance.

### ***Omaha Municipal Code Chapter 12***

In analyzing the text of the Omaha Municipal Code, the first issue before the Court is the nature of the powers conferred to the Health Director in Chapter 12; in particular, does Chapter 12 of the Omaha Municipal Code cede “full control over all [City] health matters” to the county health department as permitted by Neb. Rev. Stat. § 71-1635, or does it instead represent a separate and supplemental grant of power to act on behalf of the City?

Omaha Municipal Code § 12-1 defines the terms “health department” as “The Douglas County health department” and “Director or Health officer” as “The director of the health department or his authorized representative.” (E18, attach. C, p. 1). The Omaha Municipal Code provides at § 12-21 that “[t]he health director shall take all measures necessary to prevent the introduction within the city of malignant, contagious and infectious diseases, and to remove, quarantine or otherwise dispose of any person or persons attacked or having any such disease.”

(E18, attach. C., p. 2). Omaha Municipal Code § 12-24, entitled “Authority at threat of epidemic,” provides, “[i]t shall be the duty of the health director, whenever in his judgment the city is afflicted or threatened with an epidemic of contagious or infectious disease, to issue or cause to be issued such orders, regulations and instructions as may, in his judgment, be deemed effective for the prevention, removal or limiting of such disease, which orders, regulations and instructions shall remain in full force and effect until revoked by the director.” (E18, attach. C, p. 2).

Chapter 12 of the Omaha Municipal Code does not mention § 71-1635, nor copy its language about giving the county health department “full control over all health matters [within the municipality].” (E22). Footnotes in the Omaha Municipal Code with State law references generally cite Nebraska statute Chapter 71 (some parts of which Plaintiffs rely upon), and Neb. Rev. Stat. § 14-102(3) (which Defendants rely upon). (E22).

The Court notes that Omaha Municipal Code § 12-23 grants the health director the power to make “rules and regulations” within the City, which is the power withheld from the county board of health with respect to cities of the metropolitan class under § 71-1631(9) (“rules and regulations [enacted by the county board of health] shall have no application within the jurisdictional limits of any city of the metropolitan class”). This provision partially supports Plaintiffs’ interpretation that the thrust of Chapter 12 is to restore power to the county health department. However, it is significant that § 12-23 gives the power and duty to make “rules and regulations” to the *health director* rather than to the county *board of health*. Thus, reading together § 71-1631(7) and (9) and OMC § 12-23, the county *board of health* holds rulemaking authority for Douglas County outside the city limits, while the county *health director* has rulemaking authority within the City of Omaha. This suggests that these rules together create two alternative processes for rulemaking.

Although Plaintiffs have submitted evidence that the City has previously amended its code to remove references to the “Omaha Douglas Health Department” and rescind various health related provisions of Omaha Municipal Code Chapter 12 (see E40), the entirety of Chapter 12 cannot be read *solely* as a provision under § 71-1635 to cede to the Douglas County Health Department “full control over all health matters [within the municipality].” As noted by the brief of Douglas County Defendants, several of the duties placed upon the health director by Chapter 12 are not items given to the health director in Neb. Rev. Stat. § 71-1632, but are powers belonging to the City under its Home Rule Charter and statutory powers to regulate public health. See Neb. Rev. Stat. §§ 14-101, 14-102. Thus, when reading the provisions of Chapter 12 in *pari materia* with one another, it appears that at least some of the Chapter 12 duties placed on the Health Director stem from the City separately and affirmatively vesting powers and duties derived from its Home Rule Charter in the office of the Health Director, and do not stem from the county board of health’s powers under Nebraska statutes Chapter 71.

At this early stage, it is not for the Court to conclusively determine whether the City Council, when it enacted Chapter 12 of the Omaha Municipal Code in 1980, meant to cede control of health matters to the County Health Department, meant to supplement the Health Director’s powers within the City, or some hybrid thereof. Rather, it is only for the Court to determine whether Plaintiffs’ right to relief and likelihood of success on this argument is so clear that this Court should take the extraordinary step of issuing a temporary injunction while litigation proceeds. Given the weighty arguments advanced by all parties and the lack of clarification in the plain text of the Omaha Municipal Code, this Court cannot say that Plaintiffs have met their burden to show that they are so likely to succeed on this argument that a temporary injunction is appropriate.

**C. To the Extent the Omaha Municipal Code Grants the Health Director Unilateral Authority, are such Provisions Preempted by State Law?**

The Court next turns to the issue of preemption. Plaintiffs argue that “[b]y purporting to allow a county health official to unilaterally issue orders addressing a communicable disease, these ordinances are preempted by state law.” (Plaintiffs’ Br. p. 15). For the reasons below, this Court cannot find that preemption is sufficiently established so as to justify the granting of a temporary injunction.

Courts generally presume that legislative or rulemaking bodies, when enacting ordinances or rules, are acting within their authority. *Malone v. City of Omaha*, 294 Neb. 516, 524, 883 N.W.2d 320, 328 (2016). The burden to show otherwise rests on the party challenging the validity of the ordinance or rule. *Id.* A court has a duty to harmonize state and municipal legislation on the identical subject. *Gillis v. City of Madison*, 248 Neb. 873, 877, 540 N.W.2d 114, 117 (1995). When an ordinance is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes the ordinance clearly valid will be given. *Id.*

There are three types of preemption: 1) express preemption, (2) field preemption, and (3) conflict preemption. *Hauptman, O'Brien, Wolf & Lathrop, P.C. v. Auto-Owners Ins. Co.*, 310 Neb. 147, 153, 964 N.W.2d 264, 270 (2021). In all three cases, the touchstone of preemption analysis is legislative intent. *Id.*

Only the latter two types are at issue in this case; no parties argue that a State law provision expressly preempts Chapter 12 of the Omaha Municipal Code.

### ***Conflict Preemption***

The Court first addresses conflict preemption. In conflict preemption, legislative intent to preempt local laws is inferred to the extent that a local law actually conflicts with state law. *Id.* Plaintiffs assert that Chapter 12 of the Omaha Municipal Code conflicts with provisions of State law in that Chapter 12 of the Omaha Municipal Code purports to authorize the Health Director to act unilaterally in issuing disease control measures, while State law only authorizes a county board of health to adopt disease control measures when it obtains “the approval of [DHHS].” § 71-1631(10).

Relevant to this discussion is that the parties agree that the City has the power, through ordinance, to pass disease control measures including mask mandates. It follows that the City, through ordinance, also has the power to delegate its authority. There is no actual conflict with State law where the City chooses to delegate to the Health Director powers that the City has, even if the board of health does not enjoy those powers under State law. The Court is mindful of its duty to harmonize municipal ordinance and state statute if they are susceptible of a harmonized interpretation. See *Gillis v. City of Madison, supra*. It appears possible to harmoniously interpret § 71-1631(10) as a grant of state power to the county board of health to issue countywide measures, subject to certain processes and approvals, and Omaha Municipal Code § 12-24 as a separate grant of city power to the county health director to issue measures within city limits without the same processes and approvals as are required of the county board under § 71-1631(10). The two provisions may be read as alternative procedures for enacting disease control measures. Cf. *Gillis v. City of Madison, supra*, (construing state statute and municipal ordinance with different processes for removal of a city administrator to be “alternative procedures for removal that are not contradictory and that can coexist.”).

Plaintiffs also point to § 71-1627, which requires that the county health director “give his or her entire time to the duties of the office.” Plaintiffs assert that to the extent that Dr. Huse was acting in a separate capacity as a City Health Director, she was violating § 71-1627. In response, Defendants urge the Court to read the municipal ordinance to give additional powers and duties to the office of the county health director rather than to create a separate office. The Court notes that § 71-1627 does not specifically contain a prohibition upon a county health director being assigned expanded duties and powers related to a municipality within its county. Douglas County Defendants assert that as the City of Omaha is part of Douglas County, duties pertaining only to the City of Omaha are not inconsistent with the duties of the office of Douglas County Health Director.

It is not for this Court to finally determine the construction of these provisions at this time. However, since it appears at least possible that the provisions at issue of the Omaha Municipal Ordinance can be harmonized with Nebraska Revised Statutes Chapter 71, Plaintiffs have not shown sufficient likelihood of success based upon conflict preemption to satisfy the stringent temporary injunction standards.

### ***Field Preemption***

The Court now turns to field preemption. In field preemption, legislative intent to preempt local laws is inferred from a comprehensive scheme of legislation. *Hauptman, O'Brien, Wolf & Lathrop, P.C. v. Auto-Owners Ins. Co.*, 310 Neb. 147, 154, 964 N.W.2d 264, 270 (2021). The mere fact that the Legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted. *Id.* While Chapter 71 of the Nebraska Revised Statutes includes a number of statutory provisions related to the protection of public health, the Legislature reserved several powers and duties related to public health to various localities. This includes the powers

granted to the City and City Council as discussed in section A above. Although Chapter 71 gives the Nebraska Department of Health and Human Services (DHHS) broad powers over public health regulation in Nebraska, see, e.g., Neb. Rev. Stat. § 71-502, no provision states that DHHS is granted *exclusive* control over public health. These exceptions and reservations prevent this Court from holding, at the temporary injunction stage, that the Legislature intended to exclusively occupy the public health arena to the exclusion of local actors. For all of the reasons above, the Court does not find that preemption is sufficiently clear to justify the extraordinary remedy of granting a temporary injunction.

**D. To the Extent Chapter 12 Granted Unilateral Health Control Measure Authority to the Health Director, did the City Council’s August 2020 Covid-19 Prevention Ordinance Revoke that Authority?**

Plaintiffs and Plaintiff-Intervenors next argue that even if the Health Director enjoyed unilateral authority to issue disease prevention measures within the City of Omaha prior to August 2020, the August 2020 Prevention of COVID-19 ordinance, codified at Omaha Municipal Code §§ 12-41 through 12-52, (COVID-19 Prevention ordinance) revoked that authority. (E22 pp. 3-8). Although Plaintiff-Intervenors make a cogent argument, the Court ultimately does not find the text of the COVID-19 Prevention ordinance to so clearly revoke authority from the Health Director as to justify a temporary injunction.

The COVID-19 Prevention ordinances were passed by the City Council in August 2020. Section 12-43 required that “All individuals age five and older shall wear a face covering over their mouth and nose while indoors in a premises that is open to the general public . . .” except for in the case of several listed exceptions. (E22, pp. 4-5). Section 12-44 of this article required that: “Any individual or entity which maintains premises that are open to the general public including,



but not limited to, educational institutions, shall require all individuals age five and older to wear a face covering over their mouth and nose while indoors in said premises, unless [listed exceptions exist].” Section 12-51, the “sunset clause” provides for the expiration, termination, or extension of the COVID-19 Prevention ordinance: “The requirements imposed by this article shall expire and terminate at 11:59 p.m. on May 25, 2021, unless otherwise extended by ordinance of the city council.” (E22).

Dr. Huse’s January 12, 2022, Mask Requirement measure bears striking similarities to the City Council’s COVID-19 Prevention ordinance. The Mask Requirement provides in part: “Any individual or entity which maintains premises open to the general public, including but not limited to educational institutions, shall require all individuals aged five (5) and older to wear a face covering over their mouth and nose while indoors unless [listed exceptions exist].” (E2). Although there is slight variation in the exceptions and structure between the ordinance and the Mask Requirement measure, the above requirements are nearly identical for individuals or entities maintaining premises open to the general public. The Court notes that unlike the COVID-19 Prevention ordinance, the present Mask Requirement does not contain a provision directly requiring individuals to wear face coverings.

Plaintiff-Intervenors argued that when they enacted the “sunset clause” providing that “[t]he requirements imposed by this article shall expire and terminate at 11:59 p.m. on May 25, 2021, unless otherwise extended *by ordinance of the city council*,” they reserved for the City Council perpetual *and exclusive* power to re-enact the measures contained in the COVID-19 Prevention ordinance. However, the Court finds that any such exclusive reservation is not stated plainly enough for the Court to determine that likelihood of success is so clear as to justify a temporary injunction.

The sunset clause plainly states that the requirements of the article will “expire” and “terminate” unless “extended by ordinance of the city council.” This plain language would have prevented the health director from issuing an order extending the requirements of Article III relating to COVID-19 Prevention. However, the sunset clause is silent as to the process for re-enacting similar COVID-19 Prevention face covering requirements after the expiration of the initial ordinance. No action of the Health Director interfered with the “expir[ation]” and “termina[tion]” of the COVID-19 Prevention ordinance. The current Mask Requirement does not purport to “extend” the COVID-19 Prevention ordinance; although it mirrors the language of part of the COVID-19 Prevention ordinance, other provisions are quite different including the lack of an individual mandate and inclusion of harsher penalties. In short, the current Mask Requirement does not directly conflict with the operation of the sunset clause; the COVID-19 Prevention ordinance was extended by the City Council and eventually expired and terminated, as the sunset clause requires.

Additionally, the City Council, when it enacted the COVID-19 Prevention ordinance, was aware of the language of Omaha Municipal Code in provisions such as §§ 12-21, 12-23, or 12-24 that confer powers upon the Health Director. (E22). As the source of any relevant powers delegated to the Health Director, the Omaha City Council also possesses the power to revoke that delegation, by passing an ordinance repealing the ordinances delegating power to the Health Director or withholding portions of that power related to COVID-19. No language in §§ 12-41 through 12-52 explicitly revokes from the Health Director authority granted in §§ 12-1 through 12-24. The City Council could have included language explicitly changing the powers of the Health Director with respect to future disease control requirements. However, §§ 12-41 through 12-52 contain no such language. It does not contain any such explicit language. It is not within the

province of the courts to read meaning into a statute that is not there. *Parks v. Hy-Vee, Inc.*, 307 Neb. 927, 944–45, 951 N.W.2d 504, 518 (2020). At this early stage in litigation, the Court cannot find that Plaintiffs and Plaintiff-Intervenors are so likely to succeed on the basis of the August 2020 COVID-19 Prevention Ordinance so as to justify imposition of a temporary injunction.

#### **E. Does the Mask Requirement violate Nebraska’s Constitution?**

Plaintiffs additionally argue that the Mask Requirement violates Article XI, Sec. 5 of the Nebraska Constitution. Article XI, Sec. 5 of the Nebraska Constitution provides that City powers exercised under a home rule charter are “subject to the Constitution and laws of the state.” Therefore, this argument is reliant upon this Court finding that the Mask Requirement violates the laws of the State. For all of the reasons discussed above, it is not sufficiently clear at this stage that the Mask Requirement conflicts with State statute. Accordingly, it is also not established that the Mask Requirement likely conflicts with Nebraska’s Constitution. For this reason and all the reasons above, the Court cannot at this stage of litigation take the extraordinary measure of enacting a temporary injunction.

#### **II. Threat of Irreparable Harm, Balance of Harms, and Public Interest**

The Court has determined above that it cannot find that Plaintiffs and Plaintiff-Intervenors are so likely to succeed in this case that the extraordinary remedy of a temporary injunction would be appropriate. However, for the sake of thoroughness, the Court also addresses the remaining factors to be considered upon an application for temporary injunction: the threat of irreparable harm to the movant; the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; and the public interest.

This case does not implicate any judgment with respect to the wisdom or efficacy of mask-wearing requirements. However, it implicates the weighty issue of State versus local power. This

case also implicates the Rule of Law itself. Plaintiffs, in discussing the “irreparable harm” element cite the harm of governments requiring compliance with invalidly enacted legislation. This is a weighty concern. However, this potential harm is counterbalanced by the consideration that if, as Defendants argue, the mask requirement at issue in this case was properly issued through the City’s delegation of its home rule powers, it would be equally odious to the Rule of Law for this Court to unilaterally stay the effect of a valid law through a temporary injunction. On balance, the Court cannot find that the threat of irreparable harm to the movants during litigation, nor the public interest favor granting a temporary injunction.

### CONCLUSION

A temporary injunction is only an interim measure while litigation continues. An order on a temporary injunction is not a final determination of the case. “An injunction is an extraordinary remedy, and it ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.” *County of Cedar v. Thelen*, 305 Neb. 351, 357, 940 N.W.2d 521, 526 (2020). While this matter is a weighty one, it is not simple. There are no previous cases analyzing the statutes and ordinances involved in this context. In the span of one and a half weeks, five separate groups of attorneys have provided the Court with 50 exhibits in support of their varied positions and approximately 144 pages of written argument. The argument provided to the Court is scholarly but divergent; there is not one clear interpretation of these provisions. This is a case which has been argued with great scholarship and integrity. After all of the foregoing analysis, the Court is left with the plain text of Omaha Municipal Code § 12-21 which requires that “[t]he health director shall take all measures necessary to prevent the introduction within the city of malignant, contagious and infectious diseases, and to remove, quarantine or otherwise dispose of any person or persons attacked or having any such disease.”

(E18, attach. C., p. 2). This plain text appears, at least at this stage, to support the authority Defendants assert Dr. Huse possesses. For all of these issues, the pending declaratory judgment action offers an adequate remedy at law.

In making this difficult decision, the Court takes into consideration the fact that even as litigation progresses, Intervenor, as members of the City Council, maintain legislative power. The City Council retains the power to alter or amend the ordinances in Chapter 12, or to issue an ordinance nullifying Dr. Huse's current mask requirement. Likewise, the Nebraska Legislature retains legislative power to clarify or modify the delegation of public health power between cities and the Nebraska Department of Health and Human Services. It appears that the Nebraska Legislature has already begun to consider some changes to the powers of local health departments. See, e.g., 2022 LB 859. To the extent that immediate action needs to be taken in this matter, it can and should be taken by the City and State's respective legislative powers.

For all of the reasons explained above, Plaintiffs' and Plaintiff-Intervenor's Motions for Temporary Injunction are Denied. The parties are ordered to obtain dates to set this matter for further proceedings on the pending Complaint for Permanent Injunction and action for Declaratory Judgment.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Plaintiffs' and Plaintiff-Intervenors' Motions for Temporary Injunction are **denied**.

DATED this 25<sup>th</sup> day of January 2022.

BY THE COURT:



SHELLY R. STRATMAN  
DISTRICT JUDGE