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CIRCUIT COURT OF OREGON
Eighth Judicial District

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May 18, 2020

Ray Hacke
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Salem, OR 97305

Marc Abrams and Christina Beatty-Walters
Oregon Department of Justice
100 SW Market Street
Portland, OR 97201

Kevin Mannix
2009 State St.
Salem, OR 97301

Re: Opinion on Temporary Injunctive Relief
Elkhorn Baptist Church, et al v. Katherine Brown Governor of the State of Oregon
Case # 20CV17482

Dear Mr. Hacke, Mr. Abrams, Ms. Beatty-Walters, and Mr. Mannix:

This matter came before the court on May 14, 2020, on Plaintiffs' Motion for Temporary Injunctive Relief Pursuant to ORCP 79 and Defendant's Motion to Dismiss. The Plaintiffs were represented by Ray Hacke. The Defendant, Governor Brown, was represented by Marc Abrams and Christina Beatty-Walters. Kevin Mannix also appeared after filing for intervenor status pursuant to ORCP 33 on behalf of additional plaintiffs. Intervenor status was granted after Mr. Abrams, on behalf of the Governor, did not object to the intervenor status of the additional plaintiffs.

On March 8, 2020, in response to the Covid-19 pandemic, Governor Brown declared a state of emergency pursuant to ORS 401.165. She implemented Executive Order 20-03. Governor Brown implemented Executive Orders 20-03 through 20-25 between March 8 and May 14, 2020.

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The Governor has multiple “tools” (as described by counsel for the governor) at her disposal in implementing emergency orders for the State of Oregon. These include ORS 401.165 Declaration of State of Emergency, ORS 433.441 (which include ORS 433.441 through 433.452) Proclamation of Public Health Emergency, and Article X-A of the Oregon Constitution dealing with Catastrophic Disasters.

Governor Brown chose to declare a state of emergency pursuant to ORS 401.165. On March 8, 2020, Governor Brown also utilized provisions of ORS 433.441 in her original executive order (see Executive Order 20-03 sec 1. and 3.) and later orders.

Each of these provisions of Oregon law grant the Governor certain powers and limitations during times of emergencies.

ORS 401.165

This statute allows the Governor to declare a state of emergency within geographical regions of the state or throughout the whole state. It also gives her complete authority over all executive agencies of state government and full constitutional police powers. It authorizes her to direct agencies in the state government through this provision. Other aspects of the statute provide the Governor with control over emergency operations, the power to close roads and highways, and otherwise manage emergency response. This statute has no expiration clause other than upon declaration of the Governor or legislative assembly. The limitations are only in the statutory scope of authority given to the Governor. This statute was passed into law in 1949.

ORS 433.441 to 433.452

This statutory provision allows the Governor to declare a state of public health emergency. Although there are multiple definitions that can trigger a public health emergency, one that the coronavirus clearly meets is contained in ORS 433.442 (4)(a)(B) – (4) “an occurrence or imminent threat of an illness or health condition that: (a) Is believed to be caused by any of the following: (B) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin that may be highly contagious.” This statute carries additional powers than given in ORS 401.165, including those contained in ORS 433.441 (3)(d) granting the Governor the power to “Control or limit entry into, exit from, movement within and the occupancy of premises in any public area subject to or threatened by a public health emergency and necessary to respond to the public health emergency.” These provisions give the Public Health Director specific powers when authorized by the Governor. ORS 433.452 allows the Public Health Director or Local Public Health Administrator to detain an individual when the director or administrator reasonably believes a person within their jurisdiction may have been exposed to a communicable disease identified by rule of the Oregon Health Authority to be a reportable disease or condition that is the basis for the public health emergency.

This statute provides these additional powers to the Governor in a specific public health emergency. It also states in section (4) that:

“Nothing in ORS 433.441 to 433.452 limits the authority of the Governor to declare a state of emergency under ORS 401.165. If a state of emergency is declared as authorized under 401.165, the Governor may implement any action authorized by ORS 433.441 to 433.452.”

The limitations to ORS 433.441 are given in Section (5) of this provision which states:

“A proclamation of state of public health emergency expires when terminated by a declaration of the Governor of no more than 14 days after the date the public health emergency is proclaimed unless the Governor expressly extends the proclamation for an additional 14-day period.”

ARTICLE X-A OF THE OREGON CONSTITUTION

This provision of the Oregon Constitution was added in 2012 after the voters of Oregon passed it through a ballot measure. It gives the Governor discretion to invoke the provisions of this Article if the Governor finds and declares that a catastrophic disaster has occurred. One of the definitions of a catastrophic disaster is a Public Health Emergency. It also defines a catastrophic disaster (including a public health emergency) as a natural or human-caused event that: (a) results in extraordinary levels of death, injury, property damage or disruption of daily life in this state; and (b) severely affects the population, infrastructure, environment, economy or government functioning in the state.

Clearly the coronavirus pandemic fits this definition. This provision of our Constitution gives the Governor the option and the authority to convene the legislature and allows for certain procedural voting changes in light of the catastrophic event. These include sections allowing the legislature to convene in a place other than the capitol, voting procedures for two thirds of those legislators who constitute a quorum, and allowing attendance through electronic means. Section six of Article X-A limits the time frame allowed for the Governor to exercise extraordinary powers in the case of a catastrophic disaster. Section six provided that the actions taken by the governor once invoked, shall cease to be operative not later than 30 days following the date the Governor invoked the provisions of sections 1 to 5 of the article, or on a date recommended by the Governor and determined by the legislative assembly. This constitutional provision does allow an extension when the legislative assembly extends the Governor's extraordinary powers beyond the 30-day limit upon approval of three-fifths of the members of each house who are able to attend a session described in the Article.

STATUTORY AND CONSTITUTIONAL PROVISIONS

These two statutory provisions and Article X-A of the Oregon Constitution carry with them certain powers for the Governor and certain restrictions. The general provisions of ORS

401.165 have allowed Governors since 1949 to direct state resources in times of emergencies. This is the most expansive statute of the three laws and has the least restrictions, especially as to the time limitation of the emergency declaration. However, the statute does not grant the Governor power directly over the movement of citizens and gatherings. ORS 433.441 and its various provisions gives the Governor additional and more specific powers to control or limit entry into, exit from, movement within and the occupancy of premises in any public area subject to or threatened by a public emergency in specific times of public health emergencies. See ORS 433.441(3)(d). This statute gives the Governor power over the movement and gathering of citizens. Reference to provisions of ORS 433.441 through 433.452 and more specifically ORS 433.441(3)(d) are found throughout the Governor's various executive orders. ORS 433.441(3)(d) is specifically cited in areas where the Governor has ordered that business and retail establishments are prohibited from operating. See Executive Order No. 20-12 p. 4 sec. 2 Closure of Certain Business and p. 3 sec. 1 Stay Home and Save Lives regulating non-essential social and recreational gatherings, which would include churches. Additionally, ORS 433.452 gives the Public Health Director or the Local Public Health Administrator the power to detain individuals that the director or administrator reasonably believes may have been exposed to the virus.

When granting this additional power over the movement and gatherings of citizens, the legislature saw fit to add additional time restrictions. Those time restrictions contained in section (5) of that provision only allow the Governor to extend the emergency declaration for 14 additional days from the original 14-day period. This provision makes the maximum time restriction to be 28 days by operation of law. The Governor in her original executive order 20-3 set her executive order to 60 days. This is well beyond the maximum 28-days allowed by ORS 433.441. This court finds that when the Governor utilized the provisions of ORS 433.441 in her executive order, she triggered all the provisions of ORS 433.441 including the time restrictions in ORS 433.441(5). By doing so, the executive order became null and void beyond the maximum 28-day time period allowed by the statute. Moreover, by not complying with ORS 433.441(5) timelines, the Governor's subsequent Executive Orders 20-05 through 20-25 are also null and void. (see Executive Order 20-12 extended until terminated by the Governor; Executive Order 20-24 extended for an additional 60-days; Executive Order 20-25 extended until terminated by the Governor as examples of extensions beyond 28 days).

The statutes are to be read to work together with the more specific statute governing. "Where there is a conflict between two statutes, both of which would otherwise have full force and effect, and the provisions of one are particular, special and specific in their directions, and the other are general in their terms, the specific provisions must prevail over the general provisions." *Colby v. Larson*, 208 Or 121 (1956). ORS 401.165 and ORS 433.441 are in conflict over the length of time the Governor's orders last. ORS 433.441, enacted in 2007, is the more specific statute and relates directly to public health emergencies. It is the more specific statute pertaining to the restriction of citizens in the Governor's executive orders and also carries restrictions in time that the legislature saw fit to impose. Once the Governor began utilizing the specific provisions of ORS 433.441(3)(d) in Executive Order 20-12, the rights of citizens to assemble and operate their business became significantly curtailed, thereby ensuring the need

for further justification and the statutory limitations in time which create a check on this additional power of the Governor. Although ORS 433.441(4) indicates that nothing in ORS 433.441 to 433.452 limits the authority of the Governor to declare a state of emergency under ORS 401.165, it also does not suspend the time limitations of section (5).

This court finds that the Governor was not required to invoke the provisions of Article X-A of the Oregon Constitution. Article X-A clearly states that the Governor has discretion to implement the constitutional provisions because the Governor “may invoke the provisions of this article.” See Article X-A, Section 1(3). However, because the Governor implemented statutory provisions, she is bound by them. Thus, once the maximum 28-day time provisions of ORS 433.441(5) expired, the Governor’s Executive Order and all other orders were rendered null and void.

STANDARD OF REVIEW FOR PRELIMINARY INJUNCTION

In order to obtain a preliminary injunction, the plaintiffs must demonstrate that (1) they are likely to succeed on the merits, (2) that they are likely to suffer irreparable harm in the absence of a preliminary injunction, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def Council, Inc.* 555 U.S. 7, 20 (2008).

SUCCESS ON THE MERITS

The Plaintiffs have demonstrated that the Governor was beyond her statutory authority in ORS 433.441 when she exceeded the ORS 433.441(5) timelines required pursuant to a public health proclamation. This court finds that once the provisions of ORS 433.441 were triggered, especially including the provisions of section (3)(d) relating to the Governor’s powers to restrict the movement of citizens, the time limitations of section (5) are required. Based on these provisions this court finds the Plaintiffs’ likelihood of success on the merits is high.

IRREPARABLE HARM

The United States Supreme Court has recognized that “the loss of freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347 (1976). Plaintiffs have alleged that without the preliminary injunction, their freedom of religion will be infringed because they will be prevented from gathering for worship at their churches, including this next Sunday and thereafter. Moreover, many intervenor plaintiffs have provided affidavits indicating that with the current restrictions in the Governor’s orders they are unable to maintain their businesses and provide for their families. This court finds that the Plaintiffs have made a sufficient showing of irreparable harm.

BALANCE OF EQUITIES TIPS IN THEIR FAVOR

Plaintiffs have shown that they will be harmed by a deprivation of the constitutional right to freely exercise their religion. Other Plaintiffs have also shown great economic harm to their

businesses and their ability to seek a livelihood. Indeed, criminal penalties can be imposed if they violate current restrictions that are in place. This court understands that the current pandemic creates an unprecedented crisis in our state as well as in this country. The Governor has an enormous responsibility to protect the lives of the citizens of our state balanced against the citizens' constitutional rights to freedom of religion which includes how he or she chooses to worship. The Governor's orders are not required for public safety when Plaintiffs can continue to utilize social distancing and safety protocols at larger gatherings involving spiritual worship, just as grocery stores and businesses deemed essential by the Governor have been authorized to do. This court finds that based on these factors the balance of equities tips in favor of Plaintiffs.

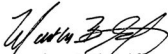
INJUNCTION IS IN THE PUBLIC INTEREST

The public interest is furthered by allowing people to fully exercise their right to worship and conduct their business. Additionally, the utilization of social distancing protocols without additional restrictions is in the public interest to restore individual liberties and the ability to restore economic viability in our communities.

Based on this opinion, Plaintiffs' Motion for Preliminary Injunctive Relief is granted. Defendant's Motion to Dismiss is denied. The court is not awarding attorney fees.

The court has prepared the order in conformance with this opinion.

Truly yours,



Matthew B. Shurtleff
Circuit Judge

STATE OF OREGON)
) ss
County of Baker)

CERTIFICATE OF MAILING

I, Amy Swiger, Judicial Assistant, for the Eighth Judicial District, Oregon, hereby certify that the foregoing was emailed to the parties herein below named:

Case No. 20CV17482

Opinion

Ray Hacke, attorney for plaintiffs
Kevin Mannix, attorney for intervenor-plaintiffs
Marc Abrams, Assistant Attorney General
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Dated at Baker City, Oregon this 18th day of May, 2020.



Judicial Assistant



I hereby certify that the foregoing is a true and correct copy of the original in its entirety.

Dated this 18th day of May, 2020.

Judicial Assistant