

FILED
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JOAN M. GILMER
CIRCUIT CLERK
ST. LOUIS COUNTY

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

THE STATE OF MISSOURI)
ex rel. ERIC S. SCHMITT,)
Plaintiffs,)
vs.) Cause No. 22SL-CC00250
ST. LOUIS COUNTY,) Div.: 2
Defendant.)

ORDER

On February 8, 2022, the Court called for hearing Defendant's Motion to Dismiss Plaintiff's Petition and Plaintiff's Motion for Preliminary Injunction. The parties appeared by and through counsel. The Court heard legal argument on the motions.

Defendant moves to dismiss Plaintiff's underlying Petition (1) for lack of standing and (2) because it fails to state any claim for which relief can be granted.

Plaintiff's Motion for Preliminary Injunction moves this Court to enjoin Defendant St. Louis County ("the County") from enforcing or publicly posting its January 5, 2022 "Face Covering Order" ("the Order"), (1) on the basis that it is prohibited by §67.265 RSMo (Count I), (2) because it cannot be enforced against school districts (Count II), and (3) is an unlawfully enacted ordinance (Count III).

As the issues in both motions require interpretations of the law based on Plaintiff's Petition and Motion, the Court will analyze the motions in tandem.

Neither party presented evidence at the hearing. Neither party presented evidence of the efficacy of the County's Face Covering Order at the hearing. Despite the overly politicized

nature of this dispute, the issue brought to the Court is solely a question of whether the County *could* issue the Face Covering Order under the circumstances, not whether it *should*.

The Court, being fully apprised in the matter, rules as follows:

I. STANDARDS

A. Motion to Dismiss

“A motion to dismiss for failure to state a claim on which relief can be granted is solely a test of the adequacy of the petition.” *Bromwell v. Nixon*, 361 S.W.3d 393, 398 (Mo. banc 2012). “When considering whether a petition fails to state a claim upon which relief can be granted, [the] Court must accept all properly pleaded facts as true, giving the pleadings their broadest intendment, and construe all allegations favorably to the pleader.” *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 424 (Mo. banc 2019) (quoting *Bromwell*, 361 S.W.3d at 398).

B. Motion for Preliminary Injunction

Missouri Supreme Court Rule 92.02 governs the issuance of preliminary injunctions. “When considering a motion for a preliminary injunction,” Missouri courts “should weigh ‘[1] the movant’s probability of success on the merits, [2] the threat of irreparable harm to the movant absent the injunction, [3] the balance between this harm and the injury that the injunction’s issuance would inflict on other interested parties, and [4] the public interest.’” *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996) (quoting *Pottgen v. Mo. State High Sch. Activities Ass’n*, 40 F.3d 926, 928 (8th Cir. 1994)). “The likelihood of success on the merits is ‘[t]he most important of the [preliminary-injunction] factors.’” *Craig v. Simon*, 980 F.3d 614, 617 (8th Cir. 2020) (per curiam) (quoting *Shrink Mo. Gov’t PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998)). “It is the movant’s obligation to justify the court’s exercise of

such an extraordinary remedy.” *Gabbert*, 925 S.W.2d at 839, citing 2 *Am.Jur.2d Administrative Law* § 600.

I. ANALYSIS

A. COUNT I – Application of §67.265 RSMo.

In its prior order denying Plaintiff’s Motion for Temporary Restraining Order, this Court analyzed §67.265 RSMo as it applies to the Order. See January 19, 2022 Court Order. The Court again declines to adopt Plaintiff’s expansive interpretation of the statute and apply it beyond its plain language.

The County Council’s act of terminating or rescinding prior orders does not preclude it from enacting similar new orders, as Plaintiff argues §67.265.5 RSMo requires. In addition, the express language of §67.265.1(1) RSMo excludes its application to the Order. After considering the additional briefs and arguments of the parties, the Court’s analysis and finding on this issue has not changed from its prior order. The Order is not prohibited by §67.265.5 RSMo.

B. COUNT II – Application to School Districts.

As in its Motion for a Temporary Restraining Order, Plaintiff moves the Court to enjoin the County from enforcing its Order against school districts. The Order specifically exempts schools, among other institutions. Also, the Order contains no enforcement mechanisms. Plaintiff’s motion requests the Court to enjoin the County from action it is not taking, against an institution it is not regulating. Plaintiff presents no justiciable controversy and no threat of irreparable harm. Further, Count II of Plaintiff’s motion seeks an advisory opinion, which this Court cannot issue in a preliminary injunction.

C. COUNT III –*Ultra Vires*.

Plaintiff contends the County enacted the Order *ultra vires*, or beyond its authority, because such an order can only be passed as an ordinance. Plaintiff did not include this count in its Motion for Temporary Restraining Order.¹

Specifically, Plaintiff points to St. Louis County Ordinance 602.020 which empowers the Director of Public Health, with the approval of the County Council, to make rules and regulations to promote the public health. SLRCO 602.020. Further, under SLRCO 602.080, “[a] violation of any provision of this chapter or any rule or regulation adopted hereunder shall constitute a violation of this chapter; and any person violating any provisions of this chapter or any rule or regulation of the Director of Public Health as herein provided, shall *upon conviction* be fined” up to \$300 dollars and may be imprisoned no less than three days and up to 90 days. SLRCO 602.080 (emphasis added).

Essentially, Plaintiff argues the Order’s expressed exclusion of criminal enforcement acts as an impermissible amendment to SLRCO 602.080. However, the Order and SLRCO 602.080 do not conflict. Plaintiff provides no authority *requiring* prosecution of all such rules enacted under SLRCO 602.020. Further, the government has “broad discretion to determine when, if, and how criminal laws are to be enforced” and “this decision is seldom subject to judicial review.” *State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. banc 2003) (citations omitted). SLRCO 602.080 provides a mechanism of enforcement. The County’s express choice not to employ that mechanism does not amount to its amendment, and therefore was not an impermissibly enacted ordinance.

¹ Plaintiff asserts in its briefing this Court “declined” to rule on this issue previously; however, Plaintiff did not plead or argue Count III in its Motion for Temporary Restraining Order.

D. Irreparable Harm, the Balance of Harm, and the Public Interest

With regard to the remaining preliminary injunction factors of irreparable harm, the public interest, and the balance of harm, Plaintiff again argues these remaining factors all weigh in its favor because it deems the Order unlawful. As illustrated above, the Court does not find the Order unlawful as alleged in Counts I, II and III in both Plaintiff's Motion and Petition.

Beyond this contention, Plaintiff provided no evidence of harm at the hearing. In addition, Plaintiff has neither denied nor presented evidence contradicting the serious nature of the COVID-19 epidemic. To the contrary, Plaintiff acknowledges "...COVID-19 threatened the world, it has affected the entire state". See Plaintiff's Petition, p.9, ¶ 53.

Accordingly, at this time, the remaining three factors continue to weigh against providing Plaintiff the "extraordinary relief" of a preliminary injunction.

E. COUNT IV – ARBITRARY AND CAPRICIOUS

Count IV of Plaintiff's Petition seeks a declaration that the Order is unreasonable, arbitrary and capricious, as the County enacted it without considering certain evidence and impacts on the community.² Defendant has moved to dismiss Count IV on the basis that Plaintiff lacks standing (for all of its claims) and has failed to state a claim for which relief can be granted.

The Court finds that Plaintiff has standing to bring the claim in Count IV.

With regard to the sufficiency of Count IV of the Petition, Defendant generally asserts that this Court should not "step out of its lane" and review the decisions of its public health officials. The Court disagrees. Under §536.150 RSMo, Plaintiff can request the Court, upon

² Plaintiff did not request injunctive relief under the claim in Count IV in either its Motion for Temporary Restraining Order or Motion for Preliminary Injunction.

review, to determine whether such decisions were made in an *unreasonable, arbitrary* or *capricious* manner.

Plaintiff's Petition, however, is both vague and conclusory, suggesting "on information and belief" the County failed to consider broad factors, unidentified harms, "large swath[s] of relevant science, data, statistics, studies, or alternatives." See Plaintiff's Petition, pp.14-15, ¶97-95. Further, Plaintiff's use of such terms as "these and other factors", "and many others" and "not an exhaustive list" further illustrate a lack of specificity in the Petition. *Id.* p.15, ¶ 91, 94, 95. Plaintiff must identify the facts upon which the claim rests. *Thomas v. Denney*, 453 S.W.3d 325, 332 (Mo. Ct. App. 2014).

WHEREFORE, based upon the foregoing, the Court orders as follows:

1. Counts I, II and III of Plaintiff's Petition are **DISMISSED**.
2. Defendant's Motion to Dismiss Count IV of Plaintiff's Petition is **GRANTED** and Plaintiff is granted leave to amend Count IV within the next 15 days.
3. Plaintiff's Motion for Preliminary Injunction is **DENIED**.

SO ORDERED:


Judge
Division 2

February 18, 2022