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July 20, 2020

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In re: Robert Schilling et. al, v. Honorable Ralph Northam, Governor, et. al., Circuit
Court of Albemarle County CL20-799

Dear Counsel:

Thank you for your appearing remotely for this hearing.

This matter came on for hearing on July 10, 2020, on the issue(s) of preliminary Injunction and declaratory judgement concerning the lawfulness/Constitutionality of Governor Northam's Executive Orders. At the conclusion of the hearing, I took the case under advisement. I have fully considered the arguments of counsel and have reviewed the all pleadings filed by the parties along with any exhibits attached thereto. To the extent my discussion of the facts of this case today differs from a party's view of the facts of the case, my recitation of factual matters will constitute my findings of fact.

The plaintiffs are Robert Schilling and Tobey Bouch. Mr. Schilling is a resident of Albemarle County and sues in his individual capacity. Mr. Bouch is a resident of Albemarle County and member of Tobey's LLC which owns and operates pawn shops on Albemarle county and the City of Charlottesville. Mr. Bouch sues in his individual capacity and in his capacity as a member of Tobey's LLC. The plaintiffs have complained that Governor Ralph Northam,

General and James Hingeley Albemarle County Commonwealth's Attorney should be prohibited from enforcing criminal penalties announced in Governor Northam's Executive Order 63 regarding the wearing of masks.

In late 2019, a novel coronavirus, COVID-19, was detected in China and has since become a global pandemic. As of June 15, there have been nearly 8 million cases of COVID-19 reported worldwide and more than 434,000 deaths. In the United States, there have been more than 2 million reported cases and more than 115,000 deaths. Oliver Aff.. Many people with COVID-19 are asymptomatic or mildly symptomatic and can spread the disease without knowing they have it. Id. at ¶ 5. There is no known treatment and severe cases require hospitalization and ventilation and often result in death. Since March of this year, Virginia has experienced a growing crisis related to the spread of COVID-19. As of June 15, there are more than 54,000 cases of COVID-19 across the Commonwealth. There have been 290 cases of COVID-19 in Albemarle. In the week from June 8 to June 15, 2020, there were more than 3,600 new cases in Virginia. The number of reported cases likely undercounts the actual number of positive cases because of limitations in testing capacity. The number of fatalities continues to rise as well. As of June 15, there have been over 1,550 deaths in Virginia, including 8 in Albemarle. Deaths are projected to continue to increase. In the week from June 8 to June 15, 2020, 75 Virginians died from COVID-19. Id.

COVID-19 has spurred drastic action by both state governments and the federal government. See, e.g., Lawrence v. Colorado, No. 1:20-cv-00862 at 7-8 (D. Colo. Apr. 19, 2020). Due to the risk of COVID-19 overwhelming local healthcare systems, state responses aim to "flatten the curve" of infections and slow the spread of the disease to a manageable level. Peake Aff. ¶ 8, Lewis Aff. ¶ 7. State actions have included closing schools, requiring certain types of businesses to close or limit their service, and issuing "shelter in place" orders requiring residents to remain in their homes unless for essential business. See Executive Order 55 (2020); see also Lawrence, D. Colo. at 7-8.

On February 7, 2020, M. Norman Oliver, M.D., Virginia's State Health Commissioner, identified COVID-19 as a public health threat. Order of Public Health Emergency Two (2020). On March 12, Governor Ralph S. Northam and M. Norman Oliver, M.D issued Executive Order No. 51 (EO 51)¹, declaring a state of emergency due to COVID-19. Id. On March 20, the State Health Commissioner declared a Public Health Emergency resulting from COVID-19. Id. The Governor implemented measures to limit the spread of the virus, but the virus continued to spread in Virginia. Amended Executive Order 53 (2020).

On March 23, the Governor issued Executive Order No. 53 (2020) (EO 53). Among its restrictions, EO 53 included provisions restricting certain activities. EO 53 was initially effective until April 24. However, EO 53 was amended on April 15, 2020. The amended order included the following:

The waiver of § 18.2-422 of the *Code of Virginia* so as to allow the wearing of a medical mask, respirator, or any other protective face covering for the purpose of

¹ All Executive Orders discussed in this opinion were issued by the Governor and the State Health Commissioner. All orders complied with the procedures established in Virginia Code § 44-146.17.

facilitating the protection of one's personal health in response to the COVID-19 public health emergency declared by the State Health Commissioner on February 7, 2020 and reflected in Executive Order 51 declaring a state of emergency in the Commonwealth. Executive Order 51 is so amended. This waiver is effective as of **March 12, 2020 until 11:59 p.m. on Wednesday, June 10, 2020.**

On March 30, the Governor signed Executive Order No. 55 (2020) (EO 55), ordering Virginians to remain in their homes unless for enumerated purposes. EO 55 and was also scheduled to expire on June 10. Subsequent Executive Orders have included but are not limited to 61, 63 and 65 which are all part of Virginia's phased reopening. Executive Order 61 concerned "Phase One Reopening." Executive Order 65 (EO 65), concerned "Phase Two Reopening."

On May 26, 2020, Executive Order 63 was issued. EO 63 includes in pertinent part the following:

A. Face Coverings Required-Patrons

All patrons in the Commonwealth aged ten and over shall when entering, exiting, traveling through, and spending time inside the settings listed below cover their mouth and nose with a face covering, as described and recommended by the CDC:

1. Personal care and personal grooming businesses, ...
2. All brick and mortar retail businesses, including both essential and non-essential brick and mortar retail businesses, as delineated in Amended Executive Order 61 and Amended Order of Public Health Emergency Three (2020).
3. Food and beverage establishments...
4. Entertainment or recreation businesses, including but not limited to, racetracks, historic horse racing facilities, theaters, performing arts centers, concert venues, museums, and other indoor entertainment centers, bowling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, arts and craft facilities, aquariums, zoos, escape rooms, public and private social clubs, and all other places of indoor public amusement, once permitted to reopen to the public. Face coverings shall also be required when patrons are outdoors at these businesses if a distance of six feet from every other person cannot be

maintained.

5. Train stations, bus stations, and intrastate public transportation, ...

6. Any other indoor place shared by groups of people who are in close proximity to each other. This restriction does not apply to persons while inside their residence or the personal residence of another. Face coverings may be removed to participate in a religious ritual.

7. State or local government buildings when accessed for the purpose of securing public services, with the exception of students in daycare centers or participating in-person classes in K-12 education or institutions of higher education.

EO 63 also requires face coverings of employees of essential retail businesses. EO 63 excepts the face covering requirement for a wide variety of reasons which include but are not limited to persons eating or drinking; while exercising, and/or if a person has trouble breathing. EO 63 enforcement has been delegated to the Virginia Department of Health. Violations of EO 63 may be punished as a Class 1 misdemeanor.

EO 65 was amended on June 9, 2020. Amended EO 65 included the waiver of section 18.2-422 and established that the waiver would remain in effect until “11:59 PM on September 8, 2020 unless amended or rescinded by further executive order.”

Discussion

Jurisdiction

Plaintiff has asked the Court to declare Executive Order 63 is null and void. The Plaintiff's motion is proper because they have asked this Court to determine if EO 63 is valid and/or otherwise lawful and thus presents a justiciable controversy. See generally, Daniels v Mobley, 285 Va. 402 (2013) and DiGiacinto v. Rector & Visitors of George Mason University, 281 Va. 127, 137 (2011).

Sovereign Immunity

“As a general rule, the Commonwealth is immune [...] from suits in equity to restrain governmental action or to compel such action.” Afzall v. Commonwealth, 273 Va. 226, 231, 639 S.E.2d 279, 282 (2007). Such immunity can only be waived by the legislature, and such a waiver must be “explicitly and expressly announced in the statute.” Id. at 281 (internal citations omitted). The Commonwealth's sovereign immunity applies to declaratory judgement seeking to enjoin criminal prosecution. Daniels, 737 S.E.2d at 901. Sovereign immunity cannot, however, defeat the entire suit; as with the case or controversy requirement, it does not apply to the argument that EO 63 is unconstitutional, only to the requests to enjoin the government's actions. Plaintiff's argued that Virginia Code section 2.2-4026 operates as a general waiver of Sovereign Immunity. Plaintiff is in error. Section 2.2-4026 does not “explicitly and expressly announce” a waiver of sovereign immunity. As such, the plaintiffs have not identified a waiver of sovereign

immunity. Plaintiff's failure to identify as explicit and express waiver is fatal to their request for injunctive relief. For these reasons the court would deny plaintiff's requested injunctive relief.

Lawfulness of Executive Order 63

On February 7, 2020 Dr. Norman Oliver, State Health Commissioner for the Commonwealth of Virginia declared COVID-19 to be a "Communicable Disease of Public Health Threat for Virginia." The State Health Commissioner acted in accord with his grant of authority as indicated in Virginia Code sections 32.1-2, 32.1-13 and 32.1-42. Once Dr. Oliver declared a public health threat, Governor Northam was free to declare an emergency, and once declared, he was free to issue [executive] orders declaring a state of emergency and any other orders, authorized by Va. Code § 44-146.17 to "address exceptional circumstances that exist relating to an order of quarantine or an order of isolation concerning a communicable disease of public health threat that is issued by the State Health Commissioner for an affected area of the Commonwealth pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1." In the current state of emergency, the Governor issued Executive Orders reflecting the Governor's judgment necessary to accomplish the purposes of this chapter. Va. Code § 44-146.17.

In general, the Governor's emergency powers are very broad and are only limited by his judgment pursuant to §44-146.17 and Virginia Constitution Article V § 7 which states in pertinent part: "The Governor shall take care that the laws be faithfully executed." It is the Court's duty to review EO 63 and any other Executive Order to assure that the Orders are not plainly wrong, grossly negligent, executed in bad faith or issued in violation of the Constitution of the United States and/or the Constitution of the Commonwealth of Virginia.

Procedurally speaking, EO 63 was appropriately issued and in general complies with Va. Code §§ 44-146-14 and 44-146.17. EO 63 does "address exceptional circumstances that exist relating to an order of quarantine or an order of isolation concerning a communicable disease of public health threat that was issued by the State Health Commissioner for an affected area of the Commonwealth pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1." EO 63 reflects the Governor's judgment necessary to accomplish the purposes of chapter. Va. Code § 44-146.17. The statute provides broad discretion and relies on the Governor's judgment to determine how to resolve the emergency. See generally, Boyd v. Commonwealth, 216 Va. 16, 19 (1975). See also, S. Bay United Pentecostal Church v Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (holding that latitude must be "especially broad" when officials act in "areas fraught with medical and scientific uncertainties")

According to Petitioner's complaint Executive Order 63 conflicts with §18.2-422 and should be declared null and void. Plaintiff is in error as §18.2-422 explicitly contemplates the wearing of masks during a public health emergency. The statute states in pertinent part:

(iv)(b) the declaration of a disaster or state of emergency by the Governor in response to a public health emergency where the emergency declaration expressly waives this section, defines the mask appropriate for the emergency, and provides for the duration of the waiver.

waives this section, defines the mask appropriate for the emergency, and provides for the duration of the waiver.

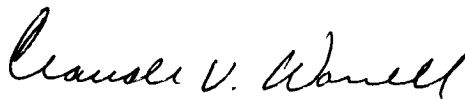
EO 63 as stated above was issued as a result of a public health emergency. EO 53 and EO63 waives this section. EO 53 defines the masks to be worn as follows “a medical mask, respirator, or any other protective face covering for the purpose of facilitating the protection of one’s personal health. Finally, the Executive Orders provide for a specific duration of the order – until September 8, 2020. The Court also notes that §18.2-422 is only applicable where a party intends intent to conceal his identity. Under the present circumstance individuals wearing a mask pursuant Executive Order 63 will not be in violation §18.2-422.

The Court finds the Governor’s Executive Orders are consistent with the Virginia Constitution and the Code of Virginia. Governor Northam’s Executive Orders are consistent with Virginia Code § 44-146.17. Further, the Orders are not plainly wrong, grossly negligent, executed in bad faith or issued in violation of the United States or Virginia Constitutions, and are consistent with Virginia laws in general. As such, there is no remaining justiciable controversy and even if there was a remaining controversy Plaintiff has not shown a basis to obtain a temporary injunction. The Court finds that the Plaintiff failed to establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief. failed to establish that the balance of equities tips in his favor and failed to establish that an injunction is in the public interest. U 555 U.S. 7 (2008) and Real Truth About Obama Inc., v. FEC. 575 F.3d 342, 346 (2009).

Plaintiff’s motion for declaratory judgment and injunctive relief are hereby denied. The Court finds that the EO 63 is lawful. The Court finds that the Commonwealth’s assertion of Sovereign Immunity is well taken and bars the issuance of an in junction and if the court is in error as to the immunity issue the Plaintiff failed to meet the requirements for injunctive relief under Winters. This matter is dismissed.

Mr. Towell please draft and circulate an order consistent with this opinion. Please return the Order to the Court for entry on or before July 23, 2020 at 4:00 pm.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Claude V. Worrell".

Claude V. Worrell
Judge