

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

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

Plaintiffs,

v.

DR. LINDSAY HUSE, in her  
official capacity as the Health  
Director of the City of Omaha, et  
al.,

Defendants.

CASE NO. CI 22-299

**BRIEF OF DR. HUSE, OMAHA CITY  
HEALTH DIRECTOR, IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR TEMPORARY  
INJUNCTION**

Defendant, Dr. Lindsay Huse, in her official capacity as Health Director of the City of Omaha, respectfully submits this Brief in Opposition to Plaintiffs' Motion for Temporary Injunction.

**I. INTRODUCTION**

In the midst of a global pandemic that has taken more than 850,000 lives nationally, including more than 3,000 lives in Nebraska, and during a record spike in cases locally that is threatening the stability of Omaha's healthcare system, the politicization of public health has complicated efforts to combat the tragic effects of the SARS-CoV-2 ("COVID-19") pandemic. While the science is clear that all possible efforts to mitigate the serious impact of the COVID-19 pandemic must be utilized, public health leaders, such as Omaha City Health Director Dr. Huse, have encountered repeated impediments to their ability to protect the public's health. Too often the response to COVID-19 has sacrificed science on the altar of politics, which would

be the case here if Plaintiffs succeed in preventing the common-sense mitigation strategies at issue. All protestations to the contrary, it is simply the case that those entities and individuals challenging Dr. Huse's public health measure are those who simply disagree with requiring the wearing of masks as a disease mitigation measure.

Ignoring the firestorm surrounding COVID-19 policy, the Omaha City Health Director, Dr. Lindsay Huse, exercised authority expressly granted to her under the Omaha Municipal Code. As the City Health Director, Dr. Huse issued a measure she reasons will be "effective for the prevention, removal or limiting of" the pandemic causing disease, COVID-19. This measure (the "Mask Mandate"), which simply requires the wearing of face masks when in public spaces, imposes minimal burden on Omaha's citizens in exchange for potentially preserving the ability of Omaha's healthcare providers to care for COVID-19 and non-COVID-19 patients alike.

Plaintiffs' primary argument is that Dr. Huse was required to seek approval from Plaintiff DHHS before issuing the Mask Mandate. In doing so, however, Plaintiffs misapply and attempt to rewrite the relevant Omaha ordinances, inexplicably fail to apply an on-point state statute that precludes the Douglas County Board of Health from acting within the City limits of Omaha, and imply limitations on Omaha authorities that do not exist under State law. The authority exercised by Dr. Huse is directed to her by the Omaha Municipal Code, as the result of ordinances passed by the democratically elected Omaha City Council, pursuant to power granted to the City of Omaha by the Nebraska Legislature.

Likewise, because the Legislature has not clearly indicated an intent to preempt local public health measures in cities of the metropolitan class, the relevant Omaha ordinances do not conflict with State law and are not preempted.

Finally, public interest supports denying Plaintiffs' Motion. A third wave of the COVID-19 pandemic is raging, with the new Omicron variant. For the first time in history, one of Nebraska's premier healthcare facilities, the University of Nebraska Medical Center, has activated its Crisis Standards of Care plan. Despite the pandemic reaching its second year, Douglas County recently saw a record number of positive COVID-19 cases, surpassing the number seen during the dark early days of the Delta wave. The Mask Mandate enacted by Dr. Huse is a rational measure intended to mitigate the number of new COVID-19 cases. The Mask Mandate is temporally limited, imposes only minor requirements on Omaha's citizens, and is rationally related to an immediate public health need that is beyond dispute.

Dr. Huse is not a political actor but is a scientist and public health professional with a legal duty to take whatever steps she can to alleviate the harmful effects of COVID-19 on Omaha and its citizens. (See Exs. 1 at ¶ 4; 1-A). Contrary to Plaintiffs' assertions, the real risk of irreparable harm related to this matter is not that certain political actors may not unilaterally set public health policy, but instead that Nebraska's largest city is denied the tools available to it to protect its citizens during a global pandemic.

## **II. STANDARDS FOR ISSUANCE OF TEMPORARY INJUNCTION**

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).

“As an injunction is an extraordinary remedy, it ordinarily should not be granted except in a clear case where there is actual and substantial injury. Stated otherwise, injunctive relief 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. As an injunction is an extraordinary remedy, it is available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury.” *Cent. Nebraska Broad. Co. v. Heartland Radio, Inc.*, 251 Neb. 929, 931, 560 N.W.2d 770, 771–72 (1997) (internal citations omitted).

### **III. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR CAUSES OF ACTION**

Plaintiffs allege four causes of action in their Complaint. First, Plaintiffs contend that Dr. Huse lacks the authority under the Omaha Municipal Code to act as City Health Director when implementing the Mask Mandate. Second, Plaintiffs assert the Mask Mandate is in conflict with state law. Third, Plaintiffs allege the Mask Mandate relies on ordinances that are preempted by state law. Finally, and cumulatively with its other causes of action, Plaintiffs claim the Mask Mandate violates Article XI, Section 5 of the Nebraska Constitution. Because Plaintiffs’ claims are likely to fail on the merits for each of these causes of action, the Motion for Temporary Injunction must be denied.

#### **A. Dr. Huse Acted Pursuant to Authority Granted Her by the City of Omaha Pursuant to State Law**

Plaintiffs initially allege that the City ordinances Dr. Huse relied upon in issuing the Mask Mandate do not grant her such authority. Plaintiffs also contend that the ordinances relied upon by Dr. Huse are “general ordinances” that cannot be relied upon due to purportedly “specific ordinances” implemented by the City Council in response to COVID-19. Neither of these contentions is correct.

**1. Dr. Huse Properly Acted as City of Omaha Health  
Director When Issuing the Mask Mandate**

Omaha is a city of the metropolitan class pursuant to state law. *See* Neb. Rev. Stat. § 14-101. As a city of the metropolitan class, state law confers on Omaha the authority to:

make all such ordinances, bylaws, rules, regulations, and resolutions . . . as may be necessary or expedient . . . for maintaining the . . . welfare of the city and . . . for promoting the public health, safety, convenience, comfort, morals, and general interest, and welfare of the inhabitants of the city.

Neb. Rev. Stat. § 14-102.01. Similarly, cities of the metropolitan class are permitted to “provide all needful rules and regulations for the protection and preservation of health within the city . . . .” Neb. Rev. Stat. § 14-102(3). Based on this authority, the City of Omaha Home Rule Charter recognizes that Omaha “shall have all powers of local self-government and home rule and all other powers that it is possible for it to have at the present and in the future under the Constitution of the State of Nebraska” and those “granted by the laws of the State of Nebraska.” Omaha Home Rule Charter § 1.03. Such powers are exercised by the promulgation of ordinances. Omaha Home Rule Charter § 2.12. Using this authority, the City Council has enacted Chapter 12 of the Omaha Municipal Code, addressing Omaha Health and Sanitation.

In providing for the health of Omaha’s citizens, the City Council enacted various statutes, which together form the basis of Dr. Huse’s authority to issue the Mask Mandate for the City of Omaha. First, pursuant to Omaha Code § 12-21, the City Council directs that the “health director **shall**”, on behalf of the City, “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.” (Emphasis added). Likewise, the health director is given the “authority to adopt such rules and regulations, restrictions or measures as he shall deem necessary to protect the public health of the city.” Omaha Code § 12-23.

Despite Dr. Huse’s reputation as a well-respected medical professional with over twenty (20) years of experience and service as a public health leader, Plaintiffs repeatedly suggest Dr. Huse is acting as an unelected bureaucrat who is not responsive to the public. (*See* Ex. 1 at ¶ 4; 1-A). Dr. Huse, however, is simply exercising authority granted to her by the Omaha City Council. If the Council wishes to revise or rescind that authority, it can do so; it would not be the proper role of this Court to overturn ordinances adopted by the legislature of the City in order to preserve the authority of the legislature of the City.

In imposing such duties, the City Council defined the “health director” acting on behalf of the City of Omaha as being coterminous with the director of the Douglas County Health Department. Omaha Code § 12-1. Thus, the City, using the authority granted to it by the State, has delegated authority to act on behalf of the City, as health director, to the individual who simultaneously holds the position of director of the Douglas County Health Department. In doing so, however, such individual is not acting as the director of the Douglas County Health Department. The authority given to such individual is given by the **city**, not by the **county**.

It is also noteworthy that City ordinance also empowers the City Health Director to “appoint any and all necessary assistants to carry into effect any rule adopted by the health director, provision of this Code, ordinance of the city, or law of the state, in the city.” Omaha Code § 12-25. The City Council has no authority to act on behalf of the Douglas County Board of Health to allow for the appointment of

assistants to the Douglas County Board of Health and such assistants are only empowered to act “in the city” to enforce relevant laws. It clearly was the intent of the Omaha City Council to have a City Health Director responsible for enforcing public health measures in the City.

This is further reflected in recent ordinances enacted by the City Council in response to the COVID-19 epidemic. In Omaha Code § 12-52, for example, the City Council directs the “**health director of the city**” to prepare a report regarding the status of COVID-19 in Omaha. *See also* Omaha Code § 12-41(1)(g) (“the health director for the city”). It is clear from the totality of the ordinances enacted by the City of Omaha that the role of City Health Director is distinct from the role of county health director, even if the same individual fulfills both roles.

Plaintiffs assert that Dr. Huse is “usurping” authority of the director of the Douglas County Health Department (*see* Complaint at ¶ 73), but such a claim is nonsensical. First, such an argument would require construing the relevant ordinance in a way that allegedly puts it in conflict with state statute. A court, however, “has a duty to harmonize state and municipal legislation.” *Gillis v. City of Madison*, 248 Neb. 873, 877, 540 N.W.2d 114, 117 (1995). Additionally, “[w]hen 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.” *Gillis v. City of Madison*, 248 Neb. 873, 877, 540 N.W.2d 114, 117 (1995). The duty of a court to uphold legislation is particularly important when the exercise of the police powers is at issue. *State v. Hookstra*, 10 Neb. App. 199, 207, 630 N.W.2d 469, 477 (2001), *aff’d*, 263 Neb. 116, 638 N.W.2d 829 (2002).

Because the City of Omaha has **no jurisdiction** to direct the actions of the Douglas County Health Department or its director, Defendants’ suggested interpretation of that statute would be improper. This reality is even more apparent because the director of

the Douglas County Health Department, when acting in that role, **has no jurisdiction to act within Omaha** under State law. Subsection 9 of Neb. Rev. Stat. § 71-1631 expressly states that actions of county boards of health “shall have no application within the jurisdictional limits of any city of the metropolitan class.” Neb. Rev. Stat. § 71-1631(9). Thus, when enacting rules and regulations for the City of Omaha, the health director as defined by **city** ordinance is not acting and cannot act through power granted to the county board of health, which lacks jurisdiction to issue orders in Omaha, but is instead acting pursuant to authority granted by the City in the role of **City Health Director**.

Application of Neb. Rev. Stat. § 71-1631(9) demonstrates why, contrary to the recent, misguided statements of the Nebraska Attorney General, the role of City Health Director is not “fictitious.” (*See* Exs. 2 at ¶¶ 6-8; 2-B). The only fiction would be that the County Health Director has authority to act within the territorial limits of Omaha, which it does not. Because of this, Omaha has enacted its own ordinance and identified its own director to protect the health of the City’s citizens. It is that duty that Dr. Huse is responding to in enacting the Mask Mandate.

Plaintiffs repeatedly cite to subsection 10 of Neb. Rev. Stat. § 71-1631 in an attempt to negate Dr. Huse’s authority, but they **fail to even mention** subsection 9. Subsection 9 is directly applicable to what role Dr. Huse could play in implementing public health policy in Omaha, and it also demonstrates the need for Omaha to have its own health director subject to Omaha ordinance, as the county board of health, and state statutes regarding county boards of health, is inoperative within the City limits.

Pursuant to Neb. Rev. Stat. § 71-1631(9), if Plaintiffs’ interpretation of Dr. Huse’s role were adopted, that would leave the City of Omaha with no health director at all. Any county rules or regulations are ineffective inside the jurisdictional limits in Omaha.



“It is a fundamental rule of statutory construction that if possible a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.” *State v. Nance*, 197 Neb. 257, 260, 248 N.W.2d 339, 341 (1976); *see also Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 255, 729 N.W.2d 55, 63 (2007) (“If possible, we will try to avoid a statutory construction which would lead to an absurd result.”). Such interpretation would be absurd, and the Court need not accept it.

Because Neb. Rev. Stat. § 71-1631(9) restricts the ability of county boards of health from acting within the City of Omaha, every time the Health Director acts she is acting in both roles pursuant to authority granted to her by Omaha. This must be the case because she has no authority in the City derived from her role as County Health Director. In this instance, however, she is precluded from instituting a mask mandate county-wide in her role as County Health Director, because DHHS will not allow her to act county-wide, but she is still permitted to act solely for the City of Omaha in her other role as Omaha City Health Director. The circumstances in which she would have to take off one hat or the other are so rare that they are not relevant, because DHHS has not identified any other circumstances in which such a request from the County Health Director has been denied (it also goes without saying that the circumstances surrounding COVID-19 have never existed previously, so Plaintiffs’ argument that this situation has no precedent is specious).

Plaintiffs make much of the fact that there is not a City “health department.” Plaintiffs fail, however, to identify the relevance of such fact. The City ordinance clearly establishes a health director authorized to act on the City’s behalf to direct the protection of public health; no department is necessary, either legally or practically.

In addition to the general authority to promote the general health of the City, the City Health Director has specific powers and duties with respect to communicable diseases and combating epidemics. Specifically, the Code requires 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.

Omaha Code § 12-24. Dr. Huse was acting pursuant to the authority granted her by the Omaha City Council to fulfill the duties imposed upon her by that Council in responding to the COVID-19 pandemic and to protect the public health. Plaintiffs have not identified any statutory limitation on a city of the metropolitan class's ability to appoint a health director or to implement rules and regulations intended to combat pandemics, with or without DHHS's approval.

Instead, the Legislature specifically limited county board authority in cities of the metropolitan class and did not impose a DHHS approval requirement on such cities, which suggests an intent not to require such approval for city public health measures. *See Stewart v. Nebraska Dep't of Revenue*, 294 Neb. 1010, 1019, 885 N.W.2d 723, 730 (2016) ("The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.").

Plaintiffs also note that Dr. Huse previously sought consent from DHHS to issue a mask mandate for Douglas County, prior to her issuance of the Omaha Mask Mandate. Plaintiffs suggest that Dr. Huse should have known better, having been denied leave to issue

a **county-wide** mandate. There is no dispute that Dr. Huse could not issue such a county-wide mandate without approval, which is precisely why she **did not issue that mandate**. Instead, she used wholly separate authority to act for the City of Omaha, not the county board of health, making Neb. Rev. Stat. § 71-1631(10) inapplicable. Plaintiffs continue to conflate Dr. Huse's dual roles and fail to recognize that she acts in different roles, and pursuant to different grants of authority, when she issues mandates for the City versus for the county. Any suggestion that Dr. Huse knowingly violated the law is improper and should be rejected out of hand.

Finally, it is important to note that Omaha's decision to create a position for a City Health Director is entirely logical given the state statutes discussed above. Absent Omaha's adoption of City ordinances empowering a City Health Director, no such role would exist. Because of Neb. Rev. Stat. § 71-1631(9), the county health department lacks jurisdiction. It would be untenable for Omaha to go without such an individual empowered to act to protect the public health. Likewise, given the delays required for City Council action, *see* Home Rule Charter §§ 2.12-2.13, empowering an expert health director to act in the case of emergencies or pandemics is sound public policy.

Plaintiffs' interpretation of the relevant Omaha ordinances is inconsistent with the ordinances themselves and the very statutory section Plaintiffs misapply to challenge Dr. Huse's authority. Their interpretation would also tragically leave the City of Omaha without a health director in the middle of a global pandemic. Because Dr. Huse properly acted under the authority granted her by the City of Omaha, pursuant to its authority under State law, Plaintiffs are unlikely to succeed on their claims.

## 2. No Conflict Exists Between Omaha Ordinances Related to Dr. Huse's Authority and Previously Issued Mask Mandates

Plaintiffs next argue that Dr. Huse was precluded from issuing a mask mandate because the Omaha City Council, more than a year ago, issued its own mandate that it then allowed to expire. Plaintiffs contend the City Council ordinance establishing the prior mask mandate is a “specific” statute that governs over the “general statutes” relied upon by Dr. Huse. In outlining their position, however, Plaintiffs truncate the rule of law they rely upon. In matters of statutory construction, “the specific statute controls over the general statute” only “to the extent there is a **conflict** between two statutes on the same subject.” *TDP Phase One, LLC v. Club at the Yard, LLC*, 307 Neb. 795, 802, 950 N.W.2d 640, 646 (2020) (emphasis added). Essential to application of such rule, however, is that there must be some conflict between two statutes. When no such conflict exists, the rule is inapplicable. *Id.* at 803, 950 N.W.2d at 646.

In this case there is no conflict between the relevant statutes. Under the law of the City of Omaha, each branch of government, and those otherwise delegated such authority, is empowered to take actions to protect the public health. For example, the Omaha Home Rule Charter and Omaha Municipal Code confer authority to respond to public health emergencies to each of the Mayor, *see* Home Rule Charter § 8.12, the City Council, *see* Home Rule Charter § 2.13, and the City Health Director, *see* Omaha Code § 2.24. Each can enact relevant public health measures within their sphere of influence without precluding the others from doing the same.

Moreover, in the City Council's enactment of a prior mask mandate it could have, had it wanted, limited the authority of the City Health Director to enact future mask mandates. The City Council did not do so. Under Nebraska law, the City Council is presumed to have acted with full knowledge of the conditions related to the subject of its

legislation – such as the authority of the City Health Director. *Malone v. City of Omaha*, 294 Neb. 516, 524, 883 N.W.2d 320, 328 (2016). This authority is itself confirmed by one of the Plaintiffs-Intervenors, Councilwoman Melton, when she informed the prior City Health Director, Dr. Pour, that Councilwoman Melton would support her legal authority to issue a mask mandate. (*See* Ex. 2 at ¶¶ 2-4). Moreover, the authority granted in Dr. Huse as the City Health Director has been affirmed by Mayor Jean Stothert, Chris Rogers, the President of the Douglas County Board of Health and Douglas County Commissioner, and Pete Festersen, the President of the City Council and the Vice President of Community and Government Affairs for CHI Health. (*See* Exs. 1 at ¶¶ 9-10; 2 at ¶¶ 9-10; 2-C).

Instead of speaking to the City Health Director's authority to issue mask mandates, or simply giving itself exclusive authority to issue mask mandates, all the City Council did was enact a mandate during a period of time when cases were spiking and then allowed it to expire when that particular phase of the pandemic had passed. Nothing in that action suggests an intent to prohibit mask mandates in the future and nothing in the statute purports to limit the authority of the City Health Director to fulfill her legal duty to combat the pandemic as it currently exists. The Plaintiffs' position would improperly write provisions into the prior mask mandate that do not exist. Instead, the Court should interpret both sets of statutes in a way that gives effect to the authority of both the City Health Director and the City Council.

Additionally, if the City Council wishes to intervene to eliminate the City Health Director's authority to issue a mask mandate, or if it wishes to terminate the mandate issued by Dr. Huse now, the City Council can do so through the normal legislative process. The City Council is not without power to reallocate duties regarding the city's COVID-19 response. That the City Council said nothing about the City Health Director's authority to issue a mask mandate when it

issued its own mandate, and that the City Council remains empowered to do so, should counsel against the Court intervening when not otherwise necessary. The fact that a minority of the City Council now disagree with the Mask Mandate and now seek to preclude Dr. Huse as City Health Director from enacting one, despite prior statements to the contrary, is not relevant to whether the City Health Director does possess such authority.

Because Dr. Huse acted within authority properly conferred upon her in her role as current City Health Director by the City of Omaha, pursuant to authority the City has as a city of the metropolitan class, Plaintiffs are unlikely to succeed on the merits of their claims otherwise and the Motion should be denied.

Plaintiffs' fourth cause of action, alleging violation of Article XI, Section 5 of the Nebraska Constitution, is simply cumulative and assumes that Plaintiffs are successful on their first three causes of action. If, as is the case here, Dr. Huse acted pursuant to her authority and that authority was consistent with the powers granted cities of the municipal class in Chapter 12 of the Nebraska Revised Statutes, then the ordinances were enacted in compliance with Constitutional requirements.

**B. The Omaha City Ordinances Authorizing Dr. Huse's Actions Do Not Conflict With State Law and Are Not Preempted**

Defendants next assert that Dr. Huse's issuance of the Mask Mandate "conflicts with state law," specifically Neb. Rev. Stat. § 71-1631(10), and that, to the extent Dr. Huse acted pursuant to City ordinances, such ordinances would be preempted by that same statute. Plaintiffs assert both conflict preemption and (in a conclusory fashion) field preemption. Plaintiffs are again incorrect. "Courts generally presume that legislative or rulemaking bodies, when enacting ordinances or rules, are acting within their authority. The burden to

show otherwise rests on the party challenging the validity of the ordinance or rule.” *Malone v. City of Omaha*, 294 Neb. 516, 524, 883 N.W.2d 320, 328 (2016). In addition to the arguments below, Dr. Huse also specifically incorporates the analysis of the Douglas County Defendants in opposition to the Motion for Temporary Injunction in response to any alleged conflict between State law and Omaha ordinances.

### **1. No Conflict Exists To Support a Claim for Conflict Preemption**

Conflict preemption arises when a court infers the Legislature’s intent to preempt local laws “to the extent that a local law actually conflicts with state law.” *Hauptman, O’Brien, Wolf & Lathrop, P.C. v. Auto-Owners Ins. Co.*, 310 Neb. 147, 154, 964 N.W.2d 264, 270 (2021). “When reviewing preemption claims, a court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments . . .” *Malone*, 294 Neb. at 521, 883 N.W.2d at 327. As noted above, there can be no conflict here because the Omaha Code authorizes actions on the part of a City Health Director; it does not, and cannot, direct the actions of the county health director. Dr. Huse was acting in her capacity as Health Director for the City of Omaha, not County Health Director, when she issued the Mask Mandate. Neb. Rev. Stat. § 71-1631(10), which applies only to the actions of county boards of health, is therefore inapplicable. Plaintiffs’ reliance on Neb. Rev. Stat. § 71-1632 is likewise misplaced as it only addresses the power of a health director of a county health department, not a City Health Director, such as Dr. Huse.

In addition, because, as discussed above, county boards of health lack jurisdiction to enact measures in cities of the metropolitan class, such as Omaha, there can be no conflict between the Omaha City ordinances and statutes that govern county health departments. *See* Neb. Rev. Stat. § 71-1631(9). The fact the State expressly reserved the right of cities of the metropolitan class to act **separate from county**

**boards** is clear indication that the Legislature did not intend to preempt such cities from enacting local health measures on their own. This lack of intent is fatal to any preemption claim on the part of Plaintiffs. *Malone*, 294 Neb. at 529, 883 N.W.2d at 331 (“[t]he touchstone of preemption analysis is legislative intent”).

Because State statute Neb. Rev. Stat. § 71-1631(10) can coexist with the City’s ordinances permitting the health director to act within the City limits, particularly given the State’s reservation of rights to the City found in Neb. Rev. Stat. § 71-1731(9), both the City ordinances and the state statutes can “coexist,” meaning there is no conflict preemption issue with the City’s ordinances. *See, e.g., Herman v. Lee*, 210 Neb. 563, 567, 316 N.W.2d 56, 59 (1982).

## **2. The Legislature Has Not Expressed an Intent to Occupy the Field of Local Public Health Protection**

In addition to asserting conflict preemption based on Neb. Rev. Stat. § 71-1631(10), Plaintiffs also make a conclusory allegation that “[f]ield preemption also applies to these ordinances.” *See* Complaint at ¶ 91. Plaintiffs fail to identify any basis to assert field preemption, however, with respect to City ordinances that direct local efforts to protect public health and to combat pandemics. Field preemption arises when “legislative intent to preempt local laws is ‘inferred from a comprehensive scheme of legislation.’” *Malone*, 294 Neb. at 529, 883 N.W.2d at 331. “The mere fact that the Legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.” *Hauptman, O’Brien*, 310 Neb. at 154, 964 N.W.2d at 270.

While Chapter 71 of the Nebraska Revised Statutes includes a number of statutory provisions related to the protection of public health, it is clear that the Legislature did not intend to exclusively occupy the public health arena at the expense of local actors. As noted above, the Legislature, in Neb. Rev. Stat. § 71-1631(9), specifically



reserved to cities of the metropolitan class the right to control their own public health decision making, separate from county boards of health, which are regulated by DHHS.

Likewise, any reliance on Neb. Rev. Stat. § 71-502 (*see* Complaint at ¶ 36) would also be unavailing. Section 71-502 provides authority for DHHS to supervise and control public health “statewide,” but such authority is not stated as being exclusive. In fact, section 71-502 clearly indicates that the State’s authority is **not** exclusive. Section 71-502 suggests DHHS’s authority is for “statewide” public health and that DHHS is otherwise empowered to act when localities fail to act, but does not itself give DHHS a veto over any measures that may have been enacted by entities such as cities of the metropolitan class.

Similarly, the Legislature chose to treat different local public health entities differently. For example, while county boards of health require DHHS approval to adopt measures to combat contagious diseases, *see* Neb. Rev. Stat. § 71-1631(10), no such restriction applies to city-county health departments. *See, e.g.*, Neb. Rev. Stat. § 71-1630(4)(d)(iii). This explains, for example, why the Lincoln-Lancaster County Health Department has been empowered to issue a mask mandate without DHHS approval. *See* Lincoln-Lancaster County Health Department, Mask Requirement Begins Saturday, January 14, 2022 (available at <https://www.lincoln.ne.gov/News/2022/1/14>, last accessed January 17, 2022). Additionally, the Legislature separately stated its intent to empower localized management of public health services, including the “prevention of illness and disease.” Neb. Rev. Stat. § 71-1626.01.

While state statute gives broad authority to DHHS regarding public health, it is not exclusive jurisdiction as reflected in numerous statutes that recognize authority of other entities, including cities of the metropolitan class, to regulate public health. As noted above,

specific statutes grant cities of the metropolitan class the authority to “make all such ordinances . . . as may be necessary or expedient . . . for promoting the public health, safety, convenience, comfort, morals, and general interest, and welfare of the inhabitants of the city,” Neb. Rev. Stat. § 14-102.1, and to “provide all needful rules and regulations for the protection and preservation of health within the city,” Neb. Rev. Stat. § 14-102(3). Such express grants of authority, in addition to the reservation of authority in Neb. Rev. Stat. § 71-1631(9), clearly demonstrate that the Legislature did not intend to preempt the field of public health regulation and Plaintiffs’ claim to the contrary is unlikely to succeed.

#### **IV. DEFENDANTS ARE NOT IRREPARABLY HARMED SO AS TO SUPPORT ISSUANCE OF A TEMPORARY INJUNCTION**

“As an injunction is an extraordinary remedy, it ordinarily should not be granted except in a clear case where there is actual and substantial injury.” *Cent. Nebraska Broad. Co. v. Heartland Radio, Inc.*, 251 Neb. 929, 931, 560 N.W.2d 770, 771 (1997).

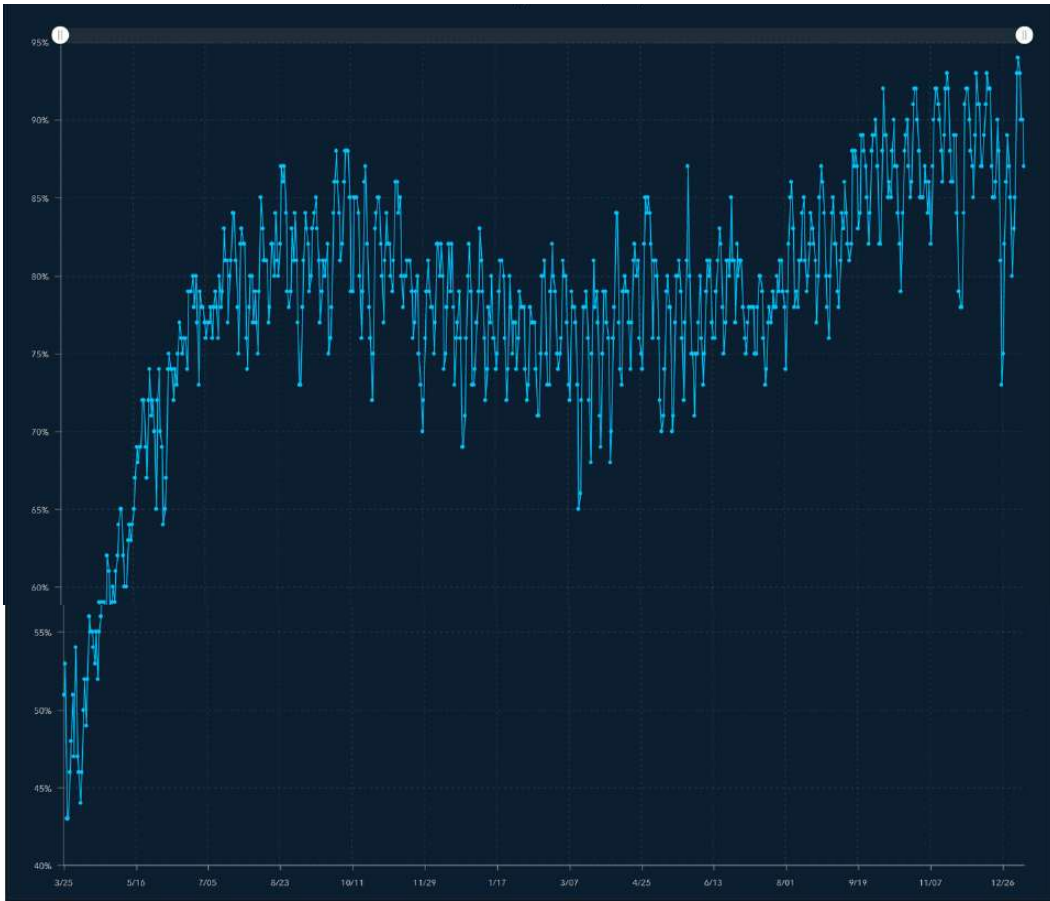
In the Complaint, Plaintiffs make the bare assertion that they will suffer irreparable injury absent a temporary injunction, but they do not plead any facts to suggest the nature of such alleged irreparable injury. Plaintiffs, in fact, have a remedy available to them after trial on the merits, with their request for declaratory relief outlining the authority of the various actors. Plaintiffs would suggest that resolving the political question is more important than implementing necessary health measures, but the most irreparable harm to be suffered will be with respect to the lives lost because of inaction during this new phase of the COVID-19 pandemic.

**V. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST  
FAVOR DENIAL OF PLAINTIFFS' MOTION**

**A. The Public Interest Is Best Served by Measures To  
Mitigate an Ongoing Global Pandemic**

Contrary to Plaintiffs' unfair characterizations, Dr. Huse was not acting as a power-thirsty bureaucrat lusting to unilaterally exercise power over Omaha's citizens. (*See* Ex. 2 at ¶¶ 7, 11). Dr. Huse was, instead, using her significant experience and training in public health to exercise the duty imposed upon her by the City of Omaha in the middle of the greatest public health crisis of our lifetimes. (*See* Exs. 1 at ¶ 4; 1-A). In doing so, she relied upon guidance from multiple sources, including City of Omaha attorneys and the President of the Omaha City Counsel. (*See* Exs. 1 at ¶¶ 6-10; 1-A through 1-M). Far from "flouting" the law, Dr. Huse methodically analyzed the authority available to her, restricted herself to acting within the sphere available to her, i.e. within the City itself, not the county, and narrowly tailored her order to best serve the public health need.

The current status of the COVID-19 pandemic in Omaha is extremely severe, both in terms of citizen health and also with respect to the well-being of the Omaha healthcare industry. In particular, the Metro Omaha Hospital Occupancy Rate, and the use of ventilators for COVID-19 patients, has reached its highest level since the earliest days of the pandemic, when a prior mask mandate was issued, threatening not only the health of COVID-19 patients, but also the well-being of patients with other ailments who may not receive the care they need because hospital beds are unavailable. (*See* Exs. 1-G; 1-M). The visual of the situation itself is astounding:



*Id.* In fact, the hospital crisis is so severe that it has led the Division Chief of Critical Care at the University of Nebraska Medical Center to invite opponents of the Mask Mandate (including the three Plaintiffs-Intervenors in this case) to tour the COVID-19 units at such facilities so they can understand the pressure being placed on the City’s healthcare system and the suffering caused by COVID-19. (*See* Ex. 2-A).

This data, along with the multitude of other resources available to Dr. Huse, clearly demonstrated that immediate action was required and that she, as Health Director for Omaha, was both authorized and duty-bound to act. (*See* Exs. 1 at ¶¶ 6-11; 1-A through 1-M).

While Plaintiffs allege that they are injured in their roles as political actors, the truest and most significant injury would be to the citizens of Omaha if the official duly empowered to act on their behalf were precluded from doing so because political actors were resolved in prioritizing matters other than the health of Omaha's citizens in the midst of a global pandemic.

**B. Dr. Huse's Order Is Temporary and Tailored to Meet Specific Need**

When considering whether immediate injunctive relief is necessary, it is important to note the scope of the Mask Mandate at issue. The Mask Mandate itself imposes only a minor restriction, and only in limited circumstances, and for a limited time. The Mandate requires the wearing of a "face covering over" the nose and mouth only when in a "premises open to the general public," with enumerated exceptions, and only "unless the individual maintains at least six (6) feet of separation" from non-household members. (*See* Complaint at Ex. B).

Moreover, the Mandate is tied directly to public health outcomes intended to protect Omaha's citizens and the Omaha healthcare infrastructure. The Mandate remains in effect only until "positive case counts for the City of Omaha are below 200 persons per 100,000 on a seven (7) day total" and when "hospital capacity is maintained at or below 85% for seven (7) consecutive days." The Mandate is to be reviewed "at minimum every four (4) weeks" to determine if it should expire or be extended. As reflected throughout this brief, the Mandate, only applies to the City of Omaha as Dr. Huse is acting solely in her authority as City Health Director as appointed by City ordinance.

Dr. Huse implemented a narrow, tailored health measure intended to combat the record-shattering spike in COVID-19 cases and the unprecedented stress on the Omaha healthcare infrastructure. (*See* Exs. 1-G; 1-M). Given the limited nature of the requirements

imposed, and the significant, ongoing health risk faced by the citizens of Omaha, said citizens are entitled to have the City Health Director, empowered by their elected representatives on the City Council, take action to combat the clear and present danger created by COVID-19.

## VI. CONCLUSION

Dr. Lindsay Huse took seriously the duty imposed on her by the Omaha City Code to “issue or cause to be issued” an order she “deemed effective for the prevention, removal or limiting” of COVID-19. She acted specifically using authority granted her by the City of Omaha – not in her capacity as County Health Director, but as Health Director for the City of Omaha. Because cities of the metropolitan class are permitted to regulate public health under state statute and since the Legislature specifically reserved the authority of cities of the metropolitan class to act independently of county boards of health, Plaintiffs’ claims, both as to Dr. Huse’s authority and with respect to alleged preemption, are all likely to fail as matters of law. Because Plaintiffs cannot succeed on the merits, they are not entitled to temporary injunction and the current Motion must be denied.

Respectfully submitted this 19th day of January 2022.

DR. LINDSAY HUSE, Defendant

By /s/ Robert M. Slovek

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