STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

Bright Red Group, LLC , d/b/a Smack Shack, 90's MINNEAPOLIS, LLC, d/b/a The Gay 90's, PJ Hafiz Club Management Inc, d/b/a Sneaky Pete's, Urban Entertainment, LLC , d/b/a Wild Greg's Saloon, MikLin Enterprises Inc, d/b/a Jimmy John's et. al.,

Plaintiff,

vs.

CITY OF MINNEAPOLIS, Jacob Frey, in his official capacity as Mayor of the City of Minneapolis,

Defendant.

Court File No.: 27-CV-22-867

ORDER ON PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

The above-entitled matter came on for a hearing, held remotely via Zoom, before the Honorable Laurie J. Miller on January 26, 2022, on Plaintiffs' motion for a temporary restraining order.

Christopher Renz, Esq., appeared on behalf of Plaintiffs.

Mark Enslin, Esq.; Rebekah Murphy, Esq.; and Tracey Fussy, Esq., appeared on behalf of Defendants.

The Court took the matter under advisement at the conclusion of the hearing.

After considering the Complaint, the memoranda of law, the affidavits submitted by the parties, the arguments of counsel, and the entire file in this matter, the Court enters the following:

ORDER

1. Plaintiffs' motion for a temporary restraining order is **DENIED**.

2. The attached memorandum is incorporated herein.

BY THE COURT:

Miller, Laurie
2022.01.28
20:08:00 -06'00'

Dated: January 28, 2022

Laurie J. Miller
Judge of District Court

MEMORANDUM

I. Factual Background

These facts are taken as true for the purposes of this order only and do not constitute findings of fact.

The COVID-19 pandemic, which began to cause worldwide concern in early 2020, was first recognized as the basis for emergency governmental action in the State of Minnesota on Friday, March 13, 2020, when Governor Timothy Walz signed Emergency Executive Order 20-01, declaring a peacetime emergency. Three days later, on Monday March 16, 2020, Mayor Jacob Frey of the City of Minneapolis ("the City") declared a local public health emergency in response to COVID-19. (Declaration of Mark Enslin ["Enslin Decl."], Ex. A.) At the same time, exercising his powers to address a declared local public health emergency, Mayor Frey ordered the temporary closure of bars, restaurants, and other places of public accommodation. (*Id.*, Exs. B-F, Emergency Regulations Nos. 2020-1, 2020-2, 2020-3, 2020-4, and 2020-5).) On March 19, 2020, the Minneapolis City Council approved Mayor Frey's declaration of a local emergency, ratified the five Emergency Regulations ordered by Mayor Frey, and extended them "throughout the duration of the

declared state of local public health emergency . . .” (*Id.*, Ex. G.) Subsequently, the Minneapolis City Council affirmed and extended the March 2020 declaration of local public health emergency multiple times. (*Id.*, Exs. H-X.)

During the course of the COVID-19 pandemic, the City has imposed various restrictions in the interest of public health and safety, including temporary closures of certain types of businesses, mask-wearing requirements, and more recently, requirements relating to proof of vaccine status and negative COVID-19 test results. These restrictions have been modified from time to time, in response to changes in public health risk levels, as the number of COVID-19 patients has waxed and waned.

Effective July 1, 2021, by action of Governor Walz and the State Legislature, the statewide peacetime emergency ended. The City, however, decided to ratify and extend its declaration of a local public health emergency beyond the termination of the statewide emergency declaration. (*Id.*, Ex. R.) The City continued to issue additional extensions thereafter, and its declaration of a local public health emergency has remained in place continuously since the pandemic began in March 2020.

The number of COVID cases, hospitalizations, and deaths has varied widely over the course of the past two years. The City and the State of Minnesota experienced a significant surge in the late fall of 2020, followed by a significant decline in early 2021. (Declaration of Heidi Ritchie [“Ritchie Decl.”], at p. 9, chart of 7-day case rate in Minnesota and Minneapolis, March 11, 2020 – January 11, 2022). In July 2021, when the State of Minnesota ended the statewide emergency declaration, case rates were at their lowest point since the pandemic began. (*Id.*) In the fall of 2021, cases began trending upward, and by late

December to early January, they had reached levels three times as high as the spike previously seen in November 2020. (*Id.* at p. 8.)

On January 10, 2022, the Minneapolis City Council extended the local public health emergency indefinitely. (Enslin Decl., Ex. X.) On January 14, 2022, Mayor Frey issued Emergency Regulation No. 2022-5 ("ER 2022-5"), which is the subject of the present request for a temporary restraining order. (*Id.*, Ex. Y.) Under this regulation, businesses that serve food and drink (including the Plaintiff bars and restaurants) may serve food and drink for on-site consumption only to patrons who provide proof of complete vaccination against COVID-19, or who provide proof of a negative COVID-19 test within three days prior to entry. As of January 26, 2022, the Minneapolis City Council had not yet ratified and extended ER 2022-5, but counsel for the City anticipated that such action might occur as early as the next day, January 27, 2022.

Plaintiffs own and operate a number of bars and restaurants in the City. They have been hard-hit by the pandemic, but have managed to keep operating throughout the peacetime emergency. Plaintiffs do not deny the existence or seriousness of COVID-19, nor do they oppose the efficacy of vaccines or the public interest in encouraging vaccinations. Plaintiffs contend that ER 2022-5 is an unnecessary added burden for them to bear, unfairly using them as a weapon to prod more people to get vaccinated. They claim that ER 2022-5 is unwarranted as an emergency measure, given the length of time the pandemic has been going on. They contend that an emergency cannot endure for 2 years, and that Mayor Frey cannot keep wielding emergency powers to regulate businesses unilaterally, instead of presenting proposed regulations for approval by the City Council in the ordinary course of municipal governance.

The harm claimed by Plaintiffs if their motion is denied is economic harm, which they assert is irreparable, as the City's immunity will prevent them from collecting any money damages from the City if the regulation is later found to be improper. Plaintiffs allege two types of economic harm: (1) the expense of hiring and training the new employees needed to implement the requirement that they screen all of their patrons for proof of vaccination or proof of a negative test, and (2) the lost profits from patrons who either refuse or are unable to comply with ER 2022-5's vaccine/testing requirement.

Gregory Urban, who owns and operates Plaintiff Urban Entertainment LLC, stated that he was already having trouble hiring enough staff, and that ER 2022-5 would force him to hire an additional employee to work at the door to enforce the regulation's customer-screening requirement. (Declaration of Gregory Urban, ¶ 3.) Mr. Urban is worried that it will be difficult to hire such an employee, and that he lacks any guidance about what such an employee should be doing to know whether vaccine cards and test results are legitimate. (*Id.*, ¶ 4.) He also expressed concern that such an employee would be at risk of backlash from patrons who might refuse to provide the required information. (*Id.* , ¶ 5.)

Jeffrey Zeitler, the owner of Plaintiff Urban Forage, LLC, testified that his taproom would be forced to hire another employee to implement ER 2022-5's patron screening requirement, which would make his business less economically viable. (Declaration of Jeffrey Zeitler, ¶ 3.) Mr. Zeitler also expressed concern about the lack of guidance from the City about how bar employees are supposed to discern which vaccine cards are real and which are forgeries and which test results are legitimate. (*Id.*, ¶ 5.) He also worried that groups of patrons are likely to avoid going to bars and restaurants in the City, and instead will take their business to surrounding suburbs that do not have comparable requirements,

placing him at a competitive disadvantage. (*Id.*, ¶¶ 7-8.) Because of these concerns, Mr. Zeitler temporarily closed his taproom on January 19, 2022, and he plans to remain closed as long as ER 2022-5 remains in effect. (*Id.*, ¶ 11.)

Peter J. Hafiz, who owns and operates three Plaintiff establishments, including The Gay 90's, Smack Shack, and Sneaky Petes, expressed "significant concerns that this is going to result in significant financial losses, layoffs of employees, and perhaps even permanent loss of customers." (Declaration of Peter J. Hafiz, ¶ 2.) Mr. Hafiz cited a significant decrease in net sales at these establishments after ER 2022-5 went into effect. (Supplemental Declaration of Peter J. Hafiz, ¶¶ 2-7.) He offered his opinion that the regulation "is having a significant adverse impact on my businesses." (*Id.*, ¶ 8.)

II. Legal Standard and Analysis

Minnesota courts have discretion to grant temporary restraining orders or preliminary injunctions. Minn. R. Civ. P. 65.01. Injunctive relief is an equitable remedy, which may not be granted in the absence of a showing of irreparable harm. The "failure to demonstrate the threat of irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction." *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. Ct. App. 1990). In determining whether to grant injunctive relief, either in the form of a temporary restraining order ("TRO") or preliminary injunction, courts consider the following five factors:

> (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief;
> (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;
> (3) The likelihood that one party or the other will prevail on the merits;
> (4) Relevant public policy considerations; and
> (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros. v. Ford Motor Co., 137 N.W.2d 314, 321–22 (Minn. 1965). The question of irreparable harm is intertwined with the second factor, the balance of harm as between the parties. District courts have broad discretion in determining whether to issue temporary injunctive relief. *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. Ct. App. 2002). The Court considers each factor in turn.

A. The Parties' Preexisting Relationship

The relationship between Plaintiffs and the City is that of regulated businesses, subject to regulation by the municipality in which they operate. While acknowledging that cities have extraordinary regulatory powers during a declared emergency, Plaintiffs argue that the first *Dahlberg* factor favors preserving the status quo as it existed before the issuance of ER 2022-5. In their view, ER 2022-5 is an overbroad *ultra vires* regulation which Mayor Frey lacked authority to promulgate, because COVID-19 no longer qualifies as an emergency. The Court will address the parties' relative likelihood of success on the merits of that argument in subsection C below.

The City argues that Plaintiffs' acknowledgement that the City acts as regulator to their businesses weighs ag7ainst issuance of a TRO. The City describes ER 2022-5 as simply another regulation issued by the City, with which Plaintiffs must comply. The City also notes that Plaintiffs' suggestion that Mayor Frey somehow deprived them of their right to be heard does not raise a viable due process claim, because the due process clause applies only "when the government makes an individualized determination, not when the government commits a legislative act equally affecting all those similarly situated." *Let Them Play MN v. Walz*, 517 F.Supp.3d 870, 887 (D. Minn. 2021) (quotation omitted). At the hearing, Plaintiffs did not make a due process claim, and the Court does not reach that issue.

For purposes of the first factor, the Court finds that the relationship between the parties does not weigh in favor of the issuance of a TRO.

B. Balance of Harm

Plaintiffs claim that ER 2022-5 is causing them serious economic harm, due to the added personnel and training requirements that it requires of them and due to its deterrent effect on their patrons. They argue that this harm is irreparable, because they have no remedy at law to seek compensation from the City for their claimed added personnel costs and lost revenue from patrons deterred by the regulation.

Defendants respond that Plaintiffs have not proven any economic loss to date specifically traceable to ER 2022-5. Defendants suggest that some patrons perhaps may be encouraged that the new regulation will make going out to bars and restaurants safer for them, which may offset any lost patronage by customers who do not wish to comply with the vaccine or testing requirements. Defendants also contend that Plaintiffs have overstated the burden of compliance. Plaintiffs are already required to check the cards of patrons to verify they are old enough to consume alcohol, and this is simply another card to be checked. Finally, Defendants argue that the reason Plaintiffs have no ability to collect any damages against the City is because the City has done nothing wrong. The City has made a policy decision with which Plaintiffs disagree, but that does not give rise to a claim for damages against the City.

The Court finds that the evidence presented by Plaintiffs of their claimed harm due to ER 2022-5 is speculative, and does not support the issuance of a TRO. The Court recognizes that the pandemic has had a devastating economic impact on bars and restaurants, but the City cannot be held responsible for general pandemic-related business

losses. The Court commends Plaintiffs for their ability to continue operating through the pandemic, surmounting all the challenges they have faced over the past two years. To the extent that sales may have dropped recently from one week to the next, however, Plaintiffs have not submitted evidence, other then their own opinions, to identify the reason for that drop in sales. Perhaps some patrons are staying away because they fear the rapid spread of the Omicron variant. Perhaps some patrons are staying home due to the weather. Perhaps some patrons have chosen to stay away from Plaintiffs' establishments solely due to their desire to avoid having to comply with ER 2022-5, but that has not been shown on the record before the Court. It is also unclear that additional personnel will be needed to enforce this regulatory requirement. Plaintiffs already have employees trained to check for compliance with the drinking age, and checking to make sure patrons have either a vaccine card or a proof of testing is arguably just another compliance check process.

On the other side of the balance of harm equation, Defendants presented evidence from the City's Interim Commissioner of Health, Heidi Ritchie, MAL, BSN, RN, PHN, that the Omicron variant has produced a sharp spike in new COVID-19 cases, placing significant stress on the City's health care system, to the extent that "the health system is overwhelmed." (Ritchie Decl., ¶ 19.) Adult ICU bed availability in the Twin Cities from January 19-21, 2022 was less than 1%. (*Id.*) Data also shows that the rate of hospitalization is three times higher for unvaccinated persons as compared to vaccinated individuals. (*Id.*) COVID-19 vaccines reduce the likelihood of individuals experiencing a symptomatic infection, and they also have been shown to reduce asymptomatic infection and transmission. (*Id.* at ¶ 12.) The City has been advised that ER 2022-5 is an important and necessary public health strategy to mitigate the spread of COVID-19 as well as to address

hospitalizations and the strain on the health system. (*Id.* at ¶ 4.) Thus, to balance the claimed economic harm Plaintiffs fear they may suffer, Defendants offer the claimed public health harm of failing to adopt this measure to help slow the spread of the Omicron variant.

The Court finds that the economic harm feared by Plaintiffs does not outweigh the City's documented public health concerns. Therefore, this factor does not weigh in favor of issuance of the TRO sought by Plaintiffs.

C. Likelihood of Success on the Merits

Plaintiffs argued that this is the most important *Dahlberg* factor. Defendants did not disagree. The Court agrees that this factor is the linchpin of Plaintiffs' motion.

Plaintiffs argue that ER 2022-5 should be declared void and unenforceable as an *ultra vires* action taken by Mayor Frey, meaning that it was an action beyond the limits of his mayoral powers. The general framework for Mayor Frey's exercise of emergency powers is not in dispute. Under Minnesota law, a mayor can declare a local emergency. *See* Minn. Stat. § 12.29. The City's ordinances likewise provide emergency powers to the Mayor, consistent with state law. *See* Minneapolis Ordinance 128.50. The ordinance places a time limit on an emergency declared by the Mayor to last no more than three days, unless it is ratified and extended by the City Council. Here, Mayor Frey initially declared the local emergency, and it was ratified and extended by the City Council within the three-day time limit. The City's local public health emergency declaration has been extended a number of time since the initial declaration in March 2020, and it remains in effect today.

Plaintiffs do not contend that Mayor Frey's declaration or issuance of ER 2022-5 failed to adhere to any of the procedural requirements of these provisions. Instead, Plaintiffs

contend that the COVID-19 pandemic has been with us for almost two years, and given the passage of time since its inception, it can no longer fairly be characterized as an emergency.

Plaintiffs acknowledge that they have found no statutory or other definition under Minnesota law of the phrase "public health emergency." They rely upon the general statutory definition of an "emergency" as "an unforeseen combination of circumstances that calls for immediate action to prevent a disaster from developing or occurring." Minn. Stat. § 12.03, subd. 3. They argue that COVID-19 can no longer fairly be characterized as an "unforeseen" circumstance requiring "immediate action," since we have all been living with it for so long. Plaintiffs further argue that Minneapolis Ordinance 128.60 conveys a sense of "immediacy" as a prerequisite for an emergency regulation, in that its first example of a condition that might warrant such regulation is "protection against enemy attacks." The Court finds this phrase a curious basis for arguing that an emergency cannot extend for two years. Measures taken to protect against enemy attacks presumably may last for the duration of a war, such as the blackout, rationing, and other requirements that remained in place for extended periods of time during World War II. Just as a war may take years to reach its conclusion, so too may the battle to defeat a deadly pandemic. That analogy does not help to show that ER 2022-5 should be invalidated as an *ultra vires* regulation.

Plaintiffs next argue that the termination of the statewide emergency declaration on July 1, 2021 somehow removed the City's authority to keep its public health emergency declaration in place. Plaintiffs point to language used by the City Council in deciding to extend the City's emergency declaration beyond the July 1, 2021 termination of the statewide, as expressing the City's intent to "provide a planned, phased elimination of its Emergency Regulations promulgated during the COVID-10 Local Public Health

Emergency . . .” (Enslin Decl., Ex. R.) They contend that the issuance of a new and onerous regulation through ER 2022-5 is contrary to the City’s stated plan last summer, to phase out and eliminate the City’s COVID-19 emergency regulations.

In response to questioning at the hearing, Plaintiffs’ counsel acknowledged that the COVID-19 pandemic has gone through peaks and valleys, and that the low case counts seen in the City last July (which is when the City Council wrote the language quoted in the prior paragraph) have risen recently to higher levels than ever seen before. Plaintiffs’ counsel did not dispute that during a pandemic, emergencies may come and go. But Plaintiffs’ counsel contended that the Omicron wave may have peaked, as the chart produced by the City appears to show a drop-off in its most recent case count data, and as a result, Mayor Frey should not have issued an emergency regulation to address a crisis that is now abating.

Defendants respond that Mayor Frey acted well within his authority in declaring the public health emergency in March 2020, which was soon ratified and extended by the City. He also acted within his authority in proposing a variety of emergency regulations to respond to the emergency. To the extent that Plaintiffs are concerned that Mayor Frey has acted unilaterally, his actions have all been of brief duration, subject to review by the City Council. In each instance since the initial emergency declaration in March 2020, the City Council has promptly reviewed and ratified Mayor Frey’s actions every step of the way. ER 2020 as promulgated by Mayor Frey may be rescinded or extended by the City Council at any time within thirty days, at which point the regulation will terminate. Defendants argue that Plaintiffs may be heard by the City Council in that process, and that the same “checks and balances” that exist in any municipal process will operate here to keep Mayor Frey from extending beyond the scope of his powers.

The Court finds that Plaintiffs have not shown they are likely to succeed on the merits in this action. They argue that Mayor Frey acted outside his powers in promulgating ER 2022-5, but both state statute and city ordinance authorized the emergency declarations made by Mayor Frey in the wake of the COVID-19 pandemic. Plaintiffs have identified no instances in which Mayor Frey's actions violated the letter of any state or municipal law. Their argument rests on their contention that COVID-19 no longer represents an emergency. While they stated at the hearing that they do not seek to substitute their definition of an emergency for the Mayor's, in essence that is what they are asking this Court to do. Yet they have provided no precedent to guide the Court in undertaking such a daunting task. The Court has no independent public health expertise, but must rely on the facts as set forth in the parties' submissions. The City's public health expert offered facts and figures to support the City's rationale in adopting ER 2022-5, and Plaintiffs offered no evidence to the contrary. The Court is bound to follow the law as established by statutes, ordinances, and published decisions of Minnesota's appellate courts. Plaintiffs identified no legal authorities to provide any guideposts for the Court to use in deciding that the Mayor's declaration of a public health emergency, as repeatedly ratified and extended by the Minneapolis City Council, is illegal, such that regulations adopted to address that emergency are *ultra vires* and therefore void.

The cases cited by Plaintiffs to support their *ultra vires* argument are inapposite. In *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995), the court noted that an *ultra vires* governmental action is without legal force or effect, but the underlying issue concerned a municipal action allegedly in conflict with a state statute. Here, the termination of Minnesota's statewide emergency declaration did not include a prohibition on

continuation of local emergency declarations. Plaintiffs have identified no conflict existing between the State's action and the City's action. The 19th century case of *Newberry v. Fox*, 33 N.W.333 (Minn. 1887), notes that the doctrine of *ultra vires* has been applied more strictly to municipalities than to private corporations, but likewise provides no authority to suggest that Mayor Frey acted beyond his authority in acting on the public health emergency issue presented by this case.

The cases cited by Plaintiffs' counsel at the hearing, as supportive of their position that this Court should find the COVID-19 public health emergency has come to an end, are likewise inapposite. *Fabick v. Evers*, 956 N.W.2d 856 (Wis. 2021), involved a challenge to the governor's executive order proclaiming a public health emergency under Wisconsin law. The Wisconsin statute at issue places a 60-day limit on a state of emergency declared by the governor, unless it "is extended by joint resolution of the legislature." *Fabick*, 956 N.W.2d at 864 (quoting Wis. Stat. § 323.10). While the legislature had not extended the state of emergency, the governor argued that he should be permitted to make serial 60-day emergency declarations, because "the ups and downs of COVID-19 have created independent enabling conditions thereby renewing his power to declare a new state of emergency . . ." *Id*. at 868. The Wisconsin Supreme Court did not uphold the governor's position, but its rationale supports the City's position here. The City's ordinance, like Wisconsin's statute, sets a time limit for a mayor's unilateral declaration of a public health emergency. But unlike the Wisconsin legislature, here the Minneapolis City Council ratified and extended Mayor Frey's emergency declaration. *Fabick* provides no authority for this Court to countermand the decision of the City Council by holding that the emergency declaration is now null and void as a basis for adoption of ER 2022-5.

Grisham v. Romero, 483 P.3d 545 (N.M. 2021), likewise does not bolster Plaintiffs' position. In *Grisham*, a New Mexico trial court issued a TRO to enjoin enforcement of a statewide pandemic-related restriction on indoor dining in restaurants and breweries. The New Mexico Supreme Court granted a stay of the TRO and ultimately vacated it, rejecting the restaurants' and breweries' argument that the restriction was *ultra vires* and therefore void. The New Mexico Supreme Court found that the "delegation of substantial discretion and authority to the executive branch (including state or local health boards) to respond to health emergencies has a long history in the United States." 483 P.3d at 557 (citing cases). The majority opinion concluded that the state's executive branch was empowered to issue an indoor dining ban in a pandemic, and that its order imposing such a ban was neither arbitrary nor capricious. *Id.* at 559, 563.

Plaintiffs rely on a concurring opinion in *Grisham* that cites to the United Supreme Court's *Youngstown* decision, in which Justice Jackson stated, "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." 343 U.S. 579, 637 (1952) (Jackson, J. concurring). The *Grisham* concurrence cautions that "[t]here may reach a point at which the state of emergency is no longer an immediate crisis but a managed and regulated one, because either the circumstances have changed, and the crisis has ended, or life has settled into a *new normal*, and what was once a crisis is now an everyday reality of life." *Id.* at 564 (emphasis in original). The concurrence speculates that when a "new normal" is reached, "the exercise of state executive power during a crisis or emergency may likewise fall within a zone of twilight, where the power to act is not the sole province of one

branch of government." 483 P.3d at 564. Notwithstanding this speculation about a new normal in which it may be appropriate for the judiciary to take on certain functions traditionally reserved to the executive, the concurrence concludes that with the evidence currently before it, the pandemic still present a state of emergency that justifies the challenged executive actions. The situation here is similar. The record before this court does not show a new normal, but an ongoing emergency. Moreover here, unlike the Wisconsin and New Mexico cases, the ongoing emergency has been declared by both the City's executive (mayor) and legislative (city council) branches. For this Court to declare the emergency is over would place the judiciary above both the executive and legislative branches, and none of these cases support such an abrogation of authority by the judiciary.

Without law defining when a public health emergency must be found to end, and without evidence challenging the legitimate public health purpose of ER 2022-5, the Court finds that Plaintiffs have not shown they are likely to succeed on the merits of their claim that enforcement of ER 2022-5 should be immediately suspended as an *ultra vires* action by Mayor Frey. Their argument that Mayor Frey has acted by mayoral fiat, leaving the City Council out of the process, is belied by the City Council's immediate actions to review and decide whether to ratify each step Mayor Frey has taken. Their argument that the City should not be allowed to single out bars and restaurants as part of its goal to increase the vaccination rate does not provide legal authority for the Court to suspend enforcement of the regulation on that basis. It is within the City's discretion to decide how best to promote public health during a pandemic. Plaintiffs' argument that the pandemic is winding down, in contrast to Defendants' evidence that case numbers are at all-time highs and that ICU beds are almost all filled, requires a policy analysis that the City's governance structure

should address. Indeed, these types of policy questions are particularly ill-suited for courts to decide. Deciding the wisest way deal with a public health emergency and deciding when the emergency begins and ends are appropriately left to the Mayor and City Council, as elected by the citizenry, and politically accountable to those whom they serve.

Notwithstanding their occasional references to due process and equal protection, Plaintiffs did not assert any constitutional challenges in their written submissions or at the hearing. The Court expresses no opinion on any constitutional issues, as they are not part of the merits argument made by Plaintiffs in support of their TRO motion.

In sum, the Court does not find that likelihood of success on the merits favors granting the TRO sought by Plaintiffs.

D. Public Policy

Plaintiffs argue that public policy supports open and vigorous debate over ordinances, and disfavors government by proclamation. Defendants respond that Plaintiffs have not shown that the public interest requires enjoining the enforcement of ER 2022-5. Instead, according to Plaintiffs, ER 2022-5 is nothing more than one of a series of emergency regulations adopted by the City in its ongoing efforts to curb the pandemic. The regulation does not single out Plaintiffs' businesses to be at the forefront of a new policy; it merely requires their patrons to show proof of vaccination or a negative test in order to eat or drink inside their establishments. In light of the City Council's unanimous extension of the public health emergency declaration on January 10, 2022, and Defendants' evidence to support the public health purpose motivating the promulgation of ER 2022-5, Plaintiffs argue that public policy weighs against granting a TRO to enjoin the enforcement of ER 2022-5.

The Court finds that this factor does not favor issuance of a TRO. The City Council and Mayor Frey were up for election in November 2021, and the voters placed them in office, with power to decide matters of public policy. How long to extend the declaration of public health emergency and how to respond to the pandemic are all matters of public policy that are better left to these elected officials.

E. The Administrative Burden

Neither party identified any administrative burden that the Court would face in either granting or denying the requested TRO. Accordingly, the Court finds that this factor is neutral.

III. Conclusion

In conclusion, the Court finds that, with four of the five *Dahlberg* factors weighing against granting the requested injunctive relief, Plaintiffs have failed to carry their burden. Accordingly, Plaintiffs' motion for a TRO enjoining the enforcement of ER 2022-5 is denied. The Court recognizes that Plaintiffs face challenges in implementing a screening process at their establishments. The Court asked Defendants' counsel at the hearing what support the City planned to offer to establishments such as Plaintiffs, in training their employees how to distinguish real from fake vaccine cards or to identify authentic test results. He expressed confidence that the City would work with Plaintiffs in meeting that challenge, and the Court expects nothing less of the City.

L.J.M.