

**IN THE COURT OF COMMON PLEAS
WOOD COUNTY, OHIO**

Andrea Hoerig)	CASE NO.
370 East Township Rd 152)	
Tiffin, Ohio 44883,)	
)	JUDGE
Carolyn Dailey)	
121 Conklin Hall)	
1301 E. Wooster St.)	
Bowling Green, Ohio 43403-4003,)	
)	
Gabrielle Downard)	
19107 Kellogg Rd.)	
Bowling Green, Ohio 43402)	COMPLAINT FOR
)	DECLARATORY and INJUNCTIVE
and)	RELIEF
)	
Amy Vorst)	
11022 Road R)	
Columbus Grove, Ohio 45830)	
)	
Plaintiffs,)	
)	
vs.)	
)	
Bowling Green State University)	
Bowling Green, Ohio 43403-0001)	
)	
and)	
)	
David O'Brien, Marilyn Eisele,)	
Willa Ebersole, Drew Forhan,)	
Russell Martin, Richard Ross,)	
Amy Shore, Howard Traul II,)	
Linda Forte, Ava Harter,)	
George Miller, Geoffrey Radbill)	
in their official capacity as members)	
of the Board of Trustees of Bowling)	
Green State University)	
Bowling Green State University)	
Bowling Green, Ohio 43403-0001)	
)	
Defendants.)	

For their complaint against defendants Bowling Green State University and its Board of Trustees (collectively “Bowling Green State University” or the “University”), plaintiffs Andrea Hoerig, Carolyn Dailey, Gabrielle Downard, and Amy Vorst state as follows:

Introduction

1. This is a civil action for declaratory and injunctive relief arising under R.C. 3709.212, R.C. 3792.04, Article I, Section I of the Ohio Constitution and R.C. 2905.12.

2. This action involves the statutory and constitutional validity of a vaccination and health measures mandate (“Mandate”) issued on September 2, 2021 by defendants. A copy of the Mandate is attached as Exhibits A, B, C, D, E and F.

3. The Mandate requires faculty, employees and students, including plaintiffs, who are not exempted, to provide proof of a Covid-19 vaccination dose by November 29, 2021. It further requires that exempted unvaccinated individuals wear masks and be subject to testing and limitation of activities. The Mandate provides that faculty and employees who do not meet these requirements may face disciplinary action. The Mandate also provides that students who do not meet these requirements will be barred from face-to-face classes.

4. Defendants lack authority, by reason of R.C. 3709.212 and Ohio case law, to order those who are not diagnosed with a disease or have not come into direct contact with someone who has been diagnosed with a disease, to wear masks, undergo weekly testing, or to limit their activities.

5. The Mandate violates R.C. 3792.04 to the extent that defendants as a state institution of higher education are requiring plaintiffs to receive a vaccine for which the U.S. Food and Drug Administration (the “FDA”) has not granted full approval and is discriminating

by requiring plaintiffs to engage in or refrain from engaging in activities or precautions that differ from the activities or precautions of an individual who has received such a vaccine.

6. The Mandate violates the liberty interests protected by Article I Section 1, of the Ohio Constitution, which encompasses rights of personal security, bodily integrity and autonomy, in that it violates plaintiffs' right to refuse medical treatment, including vaccination and masking.

7. The Mandate violates R.C. 2905.12 to the extent that it coerces plaintiffs by means of taking or withholding official action or threatening same regarding actions for which plaintiffs have a legal freedom of choice.

Parties

8. Plaintiff Andrea Hoerig is, and at all times mentioned was, residing at 370 East Township Rd. 152, Tiffin, Ohio 44883 and is a member of the faculty of Bowling Green State University.

9. Plaintiff Carolyn Dailey is, and at all times mentioned was, residing at 121 Conklin Hall, 1301 E. Wooster St., Bowling Green, Ohio 43403-4003, and is a student and employee of Bowling Green State University.

10. Plaintiff Gabrielle Downard and Amy Vorst, are, and at all times mentioned, were, residing at 19107 Kellogg Rd., Bowling Green, Ohio 43402 and 11022 Road R, Columbus Grove, Ohio 45830, respectively, and are students at Bowling Green State University.

11. Defendant Bowling Green State University, is, and at all times mentioned was, a state university, a public institution of higher education and a body politic and corporate under R.C. 3341.01 and R.C. 3345.011, with its principal office in Bowling Green, Ohio.

12. Defendants David O'Brien, Marilyn Eisele, Willa Ebersole, Drew Forhan, Russell Martin, Richard Ross, Amy Shore, Howard Traul II, Linda Forte, Ava Harter, George Miller and Geoffrey Radbill are members of the Board of Trustees of Bowling Green State University with the authority to administer the University pursuant to R.C. 3341.02 and R.C. 3345.021.

Count One-Declaratory Relief

13. Plaintiffs incorporate the allegations set forth above as though fully restated herein.

14. An actual controversy has arisen and now exists between plaintiffs and defendants concerning their respective rights and duties, in that plaintiffs contend that the Mandate violates applicable Ohio statutory and constitutional law as set forth below. Defendants dispute these contentions and contend that the Mandate is lawful.

15. Plaintiffs desire a judicial determination of plaintiffs' rights and duties, and a declaration as to whether the Mandate is in violation of applicable Ohio statutory and constitutional law.

16. A judicial declaration pursuant to R.C. 2721.03, is necessary and appropriate at this time under the circumstances in order that plaintiffs may ascertain their rights and duties.

A. Lack of Authority

17. Defendants lack authority to order public health or preventative health measures, such as vaccination, masking, testing or limitation of activities for persons who are not diagnosed with a disease or have not come into direct contact with someone who has been diagnosed with a disease.

18. Pursuant to R.C. 3341.02 and R.C. 3345.021, defendants have general authority to administer Bowling Green State University. However, Ohio case law limits that general authority by requiring that the exercise of such authority be reasonable. *See State ex rel. Barno v Crestwood Bd. Of Edn.*, 134 Ohio App 3d 494, 503 (11th Dist. 1998). Reasonableness must be evaluated by the standards of “common sense ... guided by considerations of public policy manifested in relevant statutory, administrative, and decisional law.” *Id.* at 304.

19. The Ohio Legislature recently set relevant public policy limiting local boards of health regarding issuing orders or regulations for the public health or prevention or restriction of disease by enacting R.C. 3709.212. This statute limits the application of health orders and regulations to persons medically diagnosed with a disease or in direct contact with such persons. The Mandate far exceeds the limits of the Ohio Legislature’s explicit statement of public policy. Defendants are using their general authority relating to administration of the University, to assume powers to issue health regulations that the Ohio Legislature has expressly prohibited local boards of health from issuing. This is manifestly unreasonable and is beyond defendants’ authority under Ohio case law.

20. Plaintiffs are not currently diagnosed with Covid-19 and have not currently come into direct contact with someone medically diagnosed with Covid-19.

21. The Mandate requirements regarding vaccination and masking and testing are regulations for the prevention or restriction of disease, which are applied to those, including plaintiffs, who have not been diagnosed with a disease or have not come into direct contact with someone who has been medically diagnosed with a disease, and which therefore exceed defendants’ general authority to administer the University.

22. The Mandate exclusion of unvaccinated persons from face-to-face classes or other limitations of activities in certain circumstances are regulations for the prevention or restriction of disease, which are applied to those, including plaintiffs, who have not been diagnosed with a disease or have not come into direct contact with someone who has been medically diagnosed with a disease, and which therefore exceeds defendants' general authority to administer the University.

23. The Mandate requirement that every unvaccinated person within the University submit to regular COVID-19 testing is a regulation for the public health, which is applied to those, including plaintiffs, who have not been diagnosed with a disease or have not come into direct contact with someone who has been medically diagnosed with a disease, and which therefore exceeds defendants' general authority to administer the University.

B. R.C. 3792.04 – No Mandate for Non-FDA-Approved Vaccines; No Discrimination between Unvaccinated and those Vaccinated with the Non-FDA-Approved Vaccines

24. Under R.C. 3792.04, a state institution of higher education may not require a vaccine for which the FDA has not granted full approval and may not discriminate against an individual who has not received such vaccine by requiring the individual to engage in or refrain from engaging in activities or precautions that differ from the activities or precautions of an individual who has received such vaccine.

25. The Mandate violates R.C. 3792.04 because it requires plaintiffs to take a vaccine not approved by the FDA. The Covid-19 vaccines that are currently available to be taken, Johnson & Johnson, Moderna and Pfizer, have been authorized for emergency use only (the "EUA vaccines") and have not been fully approved by the FDA. On information and belief,

Comirnaty, the only Covid-19 vaccine that has been fully approved by the FDA, is not currently available.

26. The Mandate also violates R.C. 3792.04 because it treats plaintiffs differently than those who have taken non-FDA-approved vaccines. To date, Comirnaty has not been available in Ohio. Thus, those who have been vaccinated to date, have used non-FDA-approved vaccines. The Mandate requires unvaccinated individuals, including plaintiffs, to engage in activities and precautions different from those of individuals who have received non-FDA-approved vaccines and therefore discriminates within the meaning of R.C. 3792.04.

27. Defendants' religious exemption form requires all those who apply for exemption, including plaintiffs, to agree to comply with testing and preventative measures, including masking. To the extent that the Mandate's provision for testing and preventative measures treats plaintiffs differently than those vaccinated with vaccines that are not FDA-approved, it discriminates in violation of R.C. 3792.04.

28. On or about October 4, 2021, defendants announced an incentive program available only to their employees and students who have taken Covid-19 vaccines. This treats plaintiffs differently than employees of defendants who have taken vaccines that are not FDA-approved, and therefore the incentive program violates R.C. 3792.04.

C. Ohio Constitution, Article 1 Section 1 - Right To Refuse Medical Treatment

29. Plaintiffs have a fundamental right under Article I, Section 1, of the Ohio Constitution to refuse medical treatment to protect the liberties of personal security, bodily integrity and autonomy. *Steele v. Hamilton Cty. Community Mental Health Bd.*, 90 Ohio St. 3d 176, 180-181 (2000).

30. “The liberty interests infringed upon when a person is [medically treated] against his or her wishes is significant... This type of intrusion clearly compromises one’s liberty interests in personal security, bodily integrity and autonomy.” *Id.* at 182.

31. “The right to refuse [medical treatment] is not absolute and it must yield when outweighed by a compelling government interest.” *Id.* at 181.

32. “Whether the potential benefits of [medical treatment] are worth the risks is a personal decision that, in the absence of a compelling state interest, should be free from government intrusion.” *Id.* at 183.

33. A state may have a compelling interest to override an individual’s decision to refuse [medical treatment] to prevent harm to that individual or others. *Id.* at 183.

34. The state’s right to invoke its police power to override an individual’s decision to refuse [medical treatment] arises only when there is an imminent danger of harm. *Id.* at 184.

35. Any such forced [medical treatment] must be medically appropriate for the individual and it must be the least intrusive means of accomplishing the state’s interest of preventing harm. *Id.* at 184.

36. The state must establish its compelling interest to override the individual decision to refuse [medical treatment] by clear and convincing evidence. *Id.* at 180.

37. The Mandate’s requirement to wear masks is a form of medical treatment. The Mandate requires the use of face coverings such as cloth face masks, surgical masks, or N95 masks (the “masks”). The masks are currently authorized by the FDA as medical devices intended for a medical purpose. As such, their use is a form of medical treatment which plaintiffs have a right to refuse under Article I, Section I of the Ohio Constitution. Further, the emergency use authorization of the masks is conditioned on plaintiffs’ right to refuse their use.

38. The Mandate's requirement to show proof of Covid-19 vaccination, unless exempted, requires a medical treatment, which plaintiffs have a right to refuse under Article I, Section 1 of the Ohio Constitution. Further, the emergency use authorization of the vaccines, as discussed above, is conditioned on plaintiffs' right to refuse such medical treatment.

39. Not only are defendants precluded from violating plaintiffs' right to refuse medical treatment without a compelling interest, "the unconstitutional-conditions doctrine bars a State from achieving the same goal indirectly". *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 914 (6th Cir. 2019). This "principle 'forbids burdening [constitutional] rights by coercively withholding benefits from those who exercise them.'" *Id.* at 911.

40. The Mandate's exemption conditions i.e. masking, testing and limitation of activities are not only statutory violations, they unduly burden plaintiffs' constitutional rights by "denying [educational] benefits if [plaintiffs] exercise[] those rights". *Id.* at 912. Moreover, the exemption condition of masking is itself a violation of the right to refuse medical treatment.

41. Plaintiff Andrea Hoerig is not vaccinated and has not received an exemption because she is not willing to agree to the conditions required by defendants to receive an exemption. These conditions include masking, testing, and limitations on activity which are unlawful as described above, and further, the condition regarding masking is a medical treatment which she has a right to refuse. As such these conditions constitute an impermissible burden and unconstitutional condition on the exercise of her constitutional right to refuse medical treatment.

42. Plaintiffs Carolyn Dailey, Amy Vorst and Gabrielle Downard have received exemptions, but remain subject to the exemption conditions which are unlawful, and which constitute unconstitutional conditions on their right to refuse medical treatment as described above.

43. Defendants are unable to show the elements necessary to establish a compelling interest overriding plaintiffs' right to refuse medical treatment as described above.

44. Plaintiffs are not an imminent danger to harm themselves or others because asymptomatic Covid-19 spread from individuals is negligible, and the Covid-19 infection survivability rate for people ages 0-19 and 20-49 are estimated by the CDC as 99.9998% and 99.95% respectively, and have been shown by a study published in *The Lancet*, one of the world's oldest and best-known general medicine journals, to be 99.99968% and 99.9991% respectively.

45. Plaintiff Andrea Hoerig is 44 years old. Carolyn Dailey is 22 years old. Amy Vorst is 20 years old. Gabrielle Downard is 19 years old. As a result, plaintiffs have the risk profile for their age cohorts as described above.

46. The Covid-19 vaccines are not medically appropriate for plaintiffs because the risks outweigh the benefits. The Covid-19 vaccine has a limited period of efficacy of about 4 to 6 months either because of the waning effects of the vaccine or the nature of Covid-19 variants. Extended protection would require the use of booster shots, with uncertain attendant risks of adverse effects. The adverse events reported to the federal Vaccine Adverse Event Reporting System ("VAERS") through July 16, 2021, show at least a 39-fold increase in annualized vaccine deaths reported to VAERS. Those who have recovered from Covid-19 have natural immunity which provides equivalent or greater protection than that generated by the Covid-19 mRNA vaccines which is likely to be long lasting. There is also evidence that those who've recovered from Covid-19 and are then vaccinated have a heightened risk of adverse effects.

47. Andrea Hoerig and Carolyn Dailey have recovered from Covid-19 and have natural immunity. As a result, they are protected from Covid-19 and the risks of Covid-19 vaccines outweigh the benefits as described above.

48. The Covid-19 vaccines are not the least intrusive means of preventing harm because the treatment of the Covid-19 infection has improved tremendously, and those particularly vulnerable to Covid-19 have other means available to protect themselves.

D. R.C. 2905.12 – Coercion

49. Under R.C. 2905.12, no person may coerce another from taking or refraining from action concerning which the other person has a legal freedom of choice, by taking, withholding or threatening to take or withhold official action.

50. The Mandate involves taking or withholding official action to coerce plaintiffs to accept medical treatment which plaintiffs have the legal freedom to refuse under Article I, Section 1, of the Ohio Constitution and therefore violates R.C. 2905.12.

Count Two - Injunctive Relief

51. Plaintiffs incorporate the allegations set forth above, as if fully restated herein.

52. Plaintiffs have a substantial likelihood of success on the merits for the reasons described above.

53. By reason of defendants' violation of plaintiffs' constitutional and statutory rights as described above, plaintiffs are presumed to have suffered irreparable harm.

54. Plaintiffs have no adequate or speedy remedy at law. Defendants' violations are ongoing and will continue so long as there is no injunction in place. Defendants have not

indicated that the Mandate, or any related policy, will be lifted. If plaintiffs refuse to comply, they may be disciplined, including by termination of employment or expulsion as a student..

55. The balancing of equities consideration merges into the consideration of the public interest. “In the preliminary injunction analysis, the public-interest factor merge[s] with the substantial-harm [to third parties] factor when the government is the defendant.” *Daunt v. Benson*, 956 F 3d 396,422 (6th Cir. 2020).

56. “Whether the grant of a preliminary injunction furthers the public interest [is] largely dependent on the likelihood of success on the merits because the protection of constitutional rights is always in the public interest.” *Id.* citing *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 752 (8th Cir. 2008).

WHEREFORE, plaintiffs request judgment for:

1. A declaration that the Mandate is void to the extent it violates Ohio constitutional and statutory law;
2. Preliminary and permanent injunctive relief prohibiting defendants, their officers, agents, employees, successors and attorneys and all those in active concert or participation with them, from enforcing the Mandate and from discriminating against plaintiffs in violation of plaintiffs’ statutory and constitutional rights.
3. Attorney’s fees and costs incurred;
4. Such other and further relief as the court may deem just and proper.

Respectfully Submitted,



Thomas W. Connors (0007226)
Warner Mendenhall (0070165)
Mendenhall Law Group
190 North Union St. Ste 201
Akron, Ohio 44304
Counsel for Plaintiffs

JURY DEMAND

A trial by jury is demanded for all issues so triable in this case.



Thomas W. Connors

INSTRUCTIONS FOR SERVICE

Plaintiff requests the clerk of courts to serve the first amended complaint on defendants at the addresses listed in the caption of the complaint.



Thomas W. Connors

VERIFICATION OF COMPLAINT

I, Andrea Hoerig, plaintiff herein, state that the statements and allegations pertaining to me contained in the foregoing Complaint are true and accurate to the best of my knowledge and belief.

FURTHER AFFIANT SAYETH NAUGHT


Andrea Hoerig

State of Ohio)
) ss
County of Wood)

This document was acknowledged before me on 12-20, 2021.


Signature of Notary

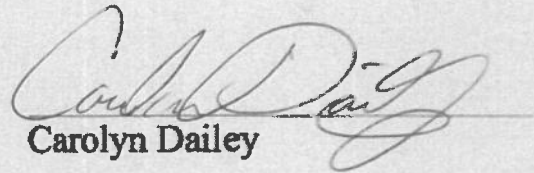
My commission expires: 5.14.2024



VERIFICATION OF COMPLAINT

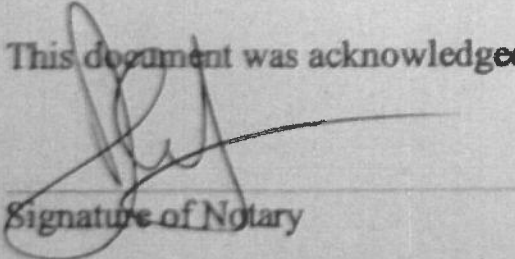
I, Carolyn Dailey, plaintiff herein, state that the statements and allegations pertaining to me contained in the foregoing Complaint are true and accurate to the best of my knowledge and belief.

FURTHER AFFIANT SAYETH NAUGHT


Carolyn Dailey

State of Ohio)
) ss
County of ~~Franklin~~) Franklin

This document was acknowledged before me on December 21, 2021.



Signature of Notary

My commission expires: 09/14/2025

