

IN THE COURT OF COMMON PLEAS
ATHENS COUNTY, OHIO

Bailey Martin

CONFIDENTIAL
Athens, OH 45703

CASE NO.:

Tyce Patt

CONFIDENTIAL
Athens, OH 45703

JUDGE:

Jack Noble

CONFIDENTIAL
Athens, OH 45703

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Isabel Thomas

CONFIDENTIAL
Athens, OH 45703

John Thomas

CONFIDENTIAL
Athens, OH 45703

Sebastian Laike Beal

CONFIDENTIAL
Athens, OH 45703

Cameron May

CONFIDENTIAL
Athens, OH 45703

Brandon Michael Sand

CONFIDENTIAL
Athens, OH 45703

Zane Maier

CONFIDENTIAL
Athens, OH 45703

**Fitzgerald JohnPatrick
Dwyer**

CONFIDENTIAL
Athens, OH 45703

Francesca Cerutti

CONFIDENTIAL

Sydney Jones

CONFIDENTIAL Drive, Apt. 202
Streetboro, OH 4241

Nikolas Dibiasio

CONFIDENTIAL ne
Hudson, OH 4230

Emanuel John Seyboldt

CONFIDENTIAL Street
Lima, OH 4300

Kyle Utt

CONFIDENTIAL Drive
7825 Tenth Field

and

Mary Thomas

CONFIDENTIAL

Plaintiffs,

-vs.-

The Ohio University

ATTN: Office of Legal Affairs
160 W. Union Street, Ste. 150
Athens, OH 45701

and

**Cary Cooper, Lorrie Platt, Scott Borgemenke,
Misty Crosby, Janelle Coleman, Steve Casciani,
Diane Smullen, Peggy Viehweger, and
Matthew Evans, in their official capacity as
members of the Board of Trustees of The
Ohio University**

ATTN: Office of Legal Affairs
160 W. Union Street, Ste. 150
Athens, OH 45701

Defendants.

For their Complaint against defendants The Ohio University and its Board of Trustees (collectively “Defendants” or “Ohio University” or “University”), Plaintiffs¹ state as follows:

INTRODUCTION

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

2. This action involves the statutory and constitutional validity of Defendants’ vaccination and health measure mandate (the “Mandate”) effective on August 31, 2021. A copy of the Mandate is attached as **Exhibit 1**.

3. The Mandate requires Defendants’ students, faculty, and staff, who are not exempted, to be fully vaccinated by November 15, 2021. Ex. 1, p. 6.

4. Students, faculty, and staff who are granted an exemption from vaccination, must be tested for COVID-19 each week regardless of whether they are symptomatic or have come into direct contact with someone infected by COVID-19. Ex. 1, pp. 5-6.

5. The Mandate states that “Failure to comply with [the Mandate] by faculty or staff will be addressed through the appropriate University disciplinary processes based on an employee’s classification. Disciplinary action may vary, up to and including termination of employment.” Ex. 1, p. 7. The Mandate further states that student violations of the Mandate will incur “disciplinary action up to and including suspension or expulsion”. Ex. 1, p. 7.

¹ Plaintiffs include Bailey Martin, Tyce Patt, Jack Noble, Isabel Thomas, John Thomas, Mary Thomas, Sebastian Laike Beal, Cameron May, Brandon Sand, Zane Maier, Fitzgerald Dwyer, Francesca Cerutti, Sydney Jones, Nikolas Dibiasio, Emanuel Seyboldt, and Kyle Utt.

6. 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.

7. The Mandate violates R. C. 3792.04 to the extent that Defendants are a state institution of higher education and are 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 a vaccine that has not been fully approved by the U.S. Food and Drug Administration (“FDA”).

8. The Mandate violates Article I, Section 1 of the Ohio Constitution in that it violates Plaintiffs’ right to refuse medical treatment.

9. The Mandate violates R.C. 2905.12 to the extent that it coerces Plaintiffs from taking or refraining from actions concerning which they have a legal freedom of choice, by taking, withholding or threatening to take or withhold official action.

PARTIES

10. Plaintiffs Bailey Martin, Tyce Patt, Jack Noble, Isabel Thomas, John Thomas, Sebastian Beal, Cameron May, Brandon Sand, Zane Maier, Fitzgerald Dwyer, Francesca Cerutti, Sydney Jones, Nikolas Dibiasio, Emanuel Seyboldt, and Kyle Utt are, and at all times relevant herein, were students at defendant Ohio University.

11. Plaintiff Mary Thomas is, and at all times relevant herein, was an employee of defendant Ohio University.

12. Defendant Ohio University is, and at all times relevant herein, was a state university, a public institution of higher education, and a body politic and corporate, under R.C. 3337.01, within the meaning of R.C. 3345.011, with its principal office in Athens, Ohio.

13. Defendants Cary Cooper, Lorrie Platt, Scott Borgemenke, Misty Crosby, Janelle Coleman, Steve Casciani, Diane Smullen, Peggy Viehweger, and Matthew Evans are members of the Board of Trustees of Ohio University with the authority to adopt rules applicable to Plaintiffs and students, faculty, and staff of Ohio University.

COUNT ONE – DECLARATORY RELIEF

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

15. An actual controversy has arisen and now exists between Plaintiffs and Defendants concerning their respective rights and duties, in that Plaintiffs assert that the Mandate is void to the extent that it violates Ohio statutory and constitutional law as described below. Defendants dispute these contentions and contend that the Mandate is lawful.

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

17. A judicial declaration is necessary and appropriate at this time under the circumstances in order that Plaintiffs may ascertain their rights and duties.

LACK OF AUTHORITY

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

19. Pursuant to R.C. 3337.01 and 3345.021, Defendants have general authority to administer Ohio 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.

20. 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 to administer a 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.

21. The Mandate requirement that all persons within the University wear masks while indoors is a regulation for the prevention or restriction of disease, which is applied to those 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.

22. The Mandate requirement that every unvaccinated person within the University provide a negative COVID-19 test result before attending events / student activities is a regulation for the prevention or restriction of disease, which is applied to those 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 weekly COVID-19 testing is a regulation for the public health, which is applied to those 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.

VIOLATION OF R.C. 3792.04

24. Under R.C. 3792.04, a state institution of higher education may not discriminate between an unvaccinated individual and one who has received a Covid-19 vaccine that is not fully approved by the FDA by requiring the unvaccinated individual to engage in or refrain from engaging in activities or precautions that differ from the activities or precautions of an individual who have received vaccines that are not fully approved by the FDA.

25. 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 requires students, faculty, and staff (including Plaintiffs) who are unvaccinated to submit to weekly testing but does not require persons vaccinated only with EUA vaccines to submit to such testing, and therefore is discriminatory within the meaning of R.C. 3792.04.

27. The Mandate also requires unvaccinated persons to submit a negative COVID-19 test prior to attending school sponsored functions, such as events at the Athena Theater, a theater

operated by the University, but does not require persons vaccinated only with EUA vaccines, to submit a negative COVID-19 test prior to the same functions, and therefore is discriminatory within the meaning of R.C. 3792.04.

**VIOLATION OF OHIO CONSTITUTION, ARTICLE I, SECTION 1
RIGHT TO REFUSE MEDICAL TREATMENT**

28. 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):

29. “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.

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

31. 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. However, 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.

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

33. The Mandate's requirement to wear masks is a form of medical treatment. The Mandate requires the use of 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 1 of the Ohio Constitution. Further, the emergency use authorization of the masks is conditioned on Plaintiffs' right to refuse their use.

VIOLATION OF R.C. 2905.12 – COERCION

34. 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.

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

COUNT TWO – INJUNCTIVE RELIEF

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

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

38. By reason of Defendants' violation of Plaintiffs' constitutional and statutory rights as described above, Plaintiffs are presumed to have suffered irreparable harm.

39. 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 terminated or expelled.

40. 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).

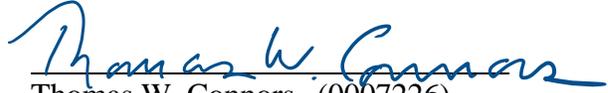
41. “Whether the grant of a preliminary injunction furthers the public interest [is] largely dependent on the likelihood of success on the merits because the protection of constitutional rights is always in the public interest.” *Id.* citing *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d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

WHEREFORE, Plaintiffs request judgment for:

1. A declaration that the Mandate is void to the extent that 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 fees and costs incurred in this action;
4. Such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

MENDENHALL LAW GROUP



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JURY DEMAND

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



Thomas W. Connors

INSTRUCTIONS FOR SERVICE

Plaintiffs request the Clerk of Courts to serve summons and a copy of this Complaint on Defendants at the addresses listed in the caption of the Complaint.



Thomas W. Connors