

FILED
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Candy Russell Clrk
Case Number:21CI0221
Judge:MCCARTHY, GEORGE P

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

Bailey Martin
6816 Allegany Trail
Maineville, OH 45039

CASE NO.:

Tyce Patt
309 Zern Avenue SW
Massillon, Ohio, 44646

JUDGE:

Jack Noble
29760 Waterbury Circle
Perrysburg, OH 43551

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Isabel Thomas
4180 Factory Road
Albany, OH 45710

John Thomas
4180 Factory Road
Albany, OH 45710

Sebastian Laike Beal
112 North Lancaster Street
Athens, OH 45701

Cameron May
20 Kurtz Street
Athens, OH 45701

Brandon Michael Sand
20 Kurtz Street
Athens, OH 45701

Zane Maier
20 Kurtz Street
Athens, OH 45701

**Fitzgerald JohnPatrick
Dwyer**
6874 Clubside Drive
Loveland, OH 45140

Francesca Cerutti
2211 Jesse Drive
Hudson, OH 44236

Sydney Jones
9299 Shady Lake Drive, Apt. 202
Streetsboro, OH 44241

Nikolas Dibiasio
2450 Brunswick Lane
Hudson, OH 44236

Emanuel John Seyboldt
6922 Saint Ninians Street
Lewis Center, Ohio

Kyle Utt
7835 Tartan Fields Drive
Dublin, OH 43017

and

Mary Thomas
4180 Factory Road
Albany, OH 45710

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).

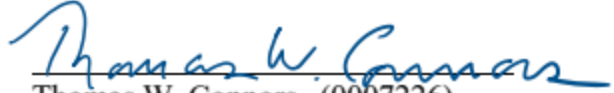
41. “Whether the grant of a preliminary injunction furthers the public interest [is] largely dependent on the likelihood of success on the merits because the protection of constitutional rights is always in the public interest.” *Id.* citing *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d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

Presidential Health Directives for the Ohio University Issued Pursuant to Interim Policy 44.102

Effective: August 31, 2021

Introduction

[Interim Policy 44.102](#) provides Ohio University the ability to take appropriate action to address transmittable disease, epidemics, pandemics, and other threats to the health and safety of persons associated with Ohio University. Pursuant to the policy, the President, or their designee, in consultation with the Chief Medical Affairs Officer (“CMAO”) and Special Assistant to the President for Public Health Operations, has the authority to establish specific health requirements for community members appropriate to current community health risks. All community members at any Ohio University campus or location must comply with all specific health requirements promulgated under this Interim Policy 44.102.

The health requirements promulgated under this policy may be modified or rescinded by the President or his or her designee at any time for any reason. Any changes related to these health requirements will be communicated via electronic mail to Ohio University students, faculty, and staff.

What follows amends the prior Directives issued November 16, 2020.

Community Health Directives

Pursuant to, and in compliance with Interim Policy 44.102, and in consultation with the Ohio University CMAO, I hereby issue the following Community Health Directives to be effective on the date set forth above.

1. Face Coverings

"Face covering" (or "mask") as used herein shall mean a surgical or N95 mask or a cloth face covering that is made of two or more layers of washable fabric; completely covers the wearer's mouth, nose, and chin; and that fits snugly against the side of the wearer's face and doesn't have gaps. A face covering may be commercially made or handmade. Face shields are not acceptable face coverings. Community members may wear both a face shield and a face covering, but not a face shield alone.

- **Outdoors:** Individuals are not required to wear masks outdoors, regardless of vaccination status, except for when entering, exiting, or waiting in line to enter any building on OHIO campuses. The University advises those who are unvaccinated to wear a mask if physical distancing of six feet cannot be maintained in crowded outdoor settings, or during activities that involve sustained close contact with other people. Under certain circumstances outdoors where the likelihood of transmission is increased, including but not limited to large events or activities that include individuals in close proximity, the university may require masking.
- **Indoors:** All individuals are required to wear masks in indoor public spaces on OHIO campuses, and on public transportation.

Masks must cover the nose, mouth and chin as follows:

- a. When entering, exiting, or waiting in line to enter any building on any campus of the Ohio University.
- b. While in any Ohio University building and in areas that are accessible to and are intended for the use of the public or by more than one person, including classrooms.
- c. In any public transportation, such as a bus or other public transit vehicle, a taxi or ride sharing vehicle, any other vehicle for hire, or at a transit stop or waiting area for any public transportation.

Face covering exceptions

- a. Children under 10 years old.
- b. Any person while actively eating or drinking.
- c. Childcare center individuals (including students, administrators, and teachers) to the extent that the regulations and guidelines promulgated by their regulating bodies are in variance to requirements of this interim policy.
- d. In settings where it is not practicable or feasible to wear a face covering such as when receiving dental treatments or while swimming.
- e. Where working with equipment or in a process where wearing face coverings is impractical or dangerous, as determined by instructors or supervisors.
- f. In one's own residence hall room or office, while maintaining appropriate physical distancing.
- g. Individuals who, due to extraordinary circumstances, claim and receive a written exemption from the University's face-covering requirement through the appropriate university process.

Employees, students, and visitors who are unable to wear a face covering due to a disability may request reasonable accommodation (form linked below).

Further Guidance and Resources

- [Face Covering Exemption Request form](#) (opens in a new window)
- [Vaccine Requirement Exemption Request form](#) (opens in new window)

2. Physical Distancing

- **Outdoors:** Individuals do not need to practice physical distancing when outdoors on OHIO campuses, regardless of COVID-19 vaccination status. Unvaccinated individuals are strongly encouraged to maintain at least six feet of physical distance while outside.
- **Indoors:**
 - Classroom* users will adhere to posted seating arrangements as designated by the University. In most cases, seating will be arranged to allow three feet of

physical distance between individuals or a maximum 75 percent of classroom capacity.

- In all other indoor public spaces on OHIO campuses, unvaccinated individuals are required to maintain a distance of at least six feet from others who are not members of their household.
- Fully vaccinated individuals do not have to maintain physical distance from others in non-classroom indoor public spaces on campus.
- Some academic programs may require that all participants keep physical distance of at least six feet from others who are not members of their household.
- Academic programs or University departments may approve physical distancing of less than three feet in certain environments where physical distancing of at least three feet is not possible.

**For the purposes of physical distancing, classrooms are defined as any indoor campus spaces that are assigned for learning activities (lectures, labs, studios, etc.).*

3. COVID-19 Positive, Symptomatic, or COVID-19 Exposed

All students, faculty and staff members should measure their body temperature and complete a [Daily COVID Symptom Assessment](#) daily before leaving their residence hall and/or leaving home to come to campus. Any student, faculty, or staff member who lives on or off campus and experiences any of the following should isolate and must follow ALL the steps in the relevant section of the [OHIO COVID-19 Protocol: Positive, Symptomatic, or Exposed](#):

- Is in close contact with someone who has tested positive for COVID-19 and is not vaccinated (exposed).
- Develops symptoms that are consistent with COVID-19, regardless of vaccination status (symptomatic).
- Tests positive for COVID-19, regardless of vaccination status (positive).

4. Adherence to Quarantine and Isolation Orders


All Ohio University students, faculty, and staff are required to fully comply with all health directives and guidelines issued by the local health department, Ohio University, their medical provider, and University-sanctioned health resources, as applicable, related to quarantine and/or isolation. If these directives are in conflict, Ohio University students, faculty, and staff are expected to adhere to orders from their local health department as the final authority. Any individual under isolation or quarantine orders will not participate in on-campus activities or enter campus buildings, other than an individual's assigned residential housing.

5. Participation in Contact Tracing Efforts

All Ohio University students, faculty, and staff are required to fully participate in contact tracing efforts by Ohio University and by the local health department regardless of vaccination status. Fully participating includes answering phone calls and emails from COVID Operations.

6. COVID-19 Testing and Testing Pathway Program

- All OHIO students, faculty, and staff are required to choose a pathway as part of the [COVID-19 Testing Pathway Program](#).
 - Those individuals who are fully vaccinated are not required to participate in weekly asymptomatic testing if they select the Vaccination Pathway and provide proof of COVID-19 vaccination, unless testing is warranted due to changing public health conditions.
 - Those individuals who select the Weekly Testing Pathway or who have not yet selected a Pathway must test weekly unless a different testing cadence is determined based on campus epidemiology or guidance from the local health department, Ohio Department of Health, or the CDC.
- Any individual, vaccinated or unvaccinated, may be required to participate in COVID-19 testing in the event of a potential outbreak or when participating in internships, clinicals, field experiences, or other experiential learning activities.

- Individuals who fail to schedule or take a test when notified may be prohibited from attending face-to-face classes, accessing in-person campus services, or entering campus buildings until a COVID-19 test is completed. Students living in residence halls who fail to comply with required testing shall be subject to the terms of their University Housing and Culinary Services Contract. Ohio University COVID Operations will share important information regarding testing requirements from the following addresses: COVIDoperations@ohio.edu and notifications@maxient.com, and via phone call. All students, faculty, and staff are expected to read these emails and answer phone calls. Nonreceipt of emails due to opting out or messages being delivered to junk folders will not be accepted as an excuse for not being aware of asymptomatic testing requirements. Those who have opted out of receiving emails from COVID Operations in the past are expected to opt back in by [following these instructions](#) .
- When taken in accordance with University instructions, tests will be provided at no cost to students, faculty, and staff.

7. COVID-19 Vaccine Requirement

Ohio University requires all students, faculty, and staff to be vaccinated against COVID-19 by November 15, 2021 or have an approved exemption. For vaccines that require two doses, both doses must be complete by November 15. This applies to all employees, including those working remotely, and all students except those enrolled exclusively in fully online programs and coursework who will not access University facilities on any campus in person. Students, faculty and staff can apply for an exemption from the vaccine requirement for medical reasons *or for reasons of conscience, including ethical and moral belief or sincerely held religious beliefs*. Any exemption request must be approved and confirmed in writing prior to November 1, 2021.

Further Guidance and Resources

- [Face Covering Exemption Request form](#) (opens in a new window)
 - [Vaccine Requirement Exemption Request form](#) (opens in new window)
-

Student violations of Interim Policy 44.102 will be adjudicated through the Student Code of Conduct, thereby incurring disciplinary action up to and including suspension or expulsion.

Student organizations will be held to the same standards as individual students, faculty, and staff. Student organizations may be found in violation of Interim Policy 44.102 if there is a preponderance of the evidence that suggests that an organization, formally or informally, facilitated violations of the health directives issued by the State of Ohio, the local health department, or Ohio University. If found in violation of Interim Policy 44.102 the organization will face discipline up to and including suspension or expulsion from Ohio University.

Failure to comply with Interim Policy 44.102 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.

A handwritten signature in black ink, appearing to read "Hugh Sherman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Hugh Sherman
President, Ohio University

Relevant Health Resources

[ATHENS, OH HEALTH DEPARTMENT >](#)

[LOCAL AND COUNTY HEALTH DEPARTMENTS FOR REGIONAL CAMPUSES >](#)

[OHIO DEPARTMENT OF HEALTH CORONAVIRUS WEBSITE >](#)

[INTERIM POLICY 44.102 > OHIO UNIVERSITY COVID-19 INCIDENT REPORT >](#)

[STUDENT CODE OF CONDUCT >](#)