IN THE COURT OF COMMON PLEAS
ATHENS COUNTY, OHIO

BAILEY MARTIN, ET AL.	:	
	:	Case No.: 21CI0221
Plaintiffs,	:	
	:	JUDGE MCCARTHY
v.	:	
	:	
OHIO UNIVERSITY, ET AL.,	:	
	:	
Defendants.	:	
	:	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

I. INTRODUCTION.

Plaintiffs' opposition brief makes clear that Plaintiffs' claims should be dismissed. Plaintiffs raise a host of irrelevant arguments, fail to identify any statutory or other legal basis for their claims, and fail to identify even a single instance of alleged discrimination based on vaccination status against themselves under the Community Health Directive. Lacking any legal basis for their claims, Plaintiffs now suggest that the Community Health Directive is not "reasonable" and somehow violates "public policy." Yet, it is Defendants – not Plaintiffs – who are statutorily vested with the authority to enact policies designed to protect the health and safety of the 25,000 plus students, faculty and staff at Ohio University. Plaintiffs' claims should be dismissed as a matter of law.

II. PLAINTIFFS LACK STANDING.

Plaintiffs concede that each one of them has received an exemption to the Community Health Directive's vaccine requirements. Accordingly, Plaintiffs have no injury and lack standing. Plaintiffs also concede that they have never bothered applying for an exemption to the Community Health Directive's mask requirements. On this point, Plaintiffs notably fail to discuss the Butler County Court of Common Pleas' decision in *Siliko* – a case brought by the same counsel against Miami University regarding its COVID-19 policies. As the Butler County Court held, a plaintiff who "fails to submit to the procedural requirements of a policy that offers an exemption" cannot show that he or she has been injured by the policy's requirements and thus lacks standing to challenge that policy. *See Siliko* Decision (attached as Ex. A to Motion). Here, Plaintiffs likewise have never applied for a mask exemption. Plaintiffs' assertion that they would not qualify for an exemption is conclusory and speculative at best. Having failed to apply for an exemption, Plaintiffs have not suffered any cognizable injury and lack standing.

In summary, Plaintiffs have failed to identify any actual injury traceable to any alleged conduct of Defendants. "[I]dealistic opposition" to a policy is not enough to establish standing. *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 19. Instead, "for a cause to be justiciable, it must present issues that have a 'direct and immediate' impact on the plaintiffs." *Id.* at ¶ 11. Plaintiffs fail to identify any such direct and immediate impact, and accordingly, Plaintiffs' claims should be dismissed for lack of standing.

III. PLAINTIFFS ARE NOT ENTITLED TO DECLARATORY OR INJUNCTIVE RELIEF.

A. Plaintiffs Have No Claims Under O.R.C. §§ 2905.12 or 3709.212.

Even if Plaintiffs had standing – and they do not – Plaintiffs still have failed to identify any substantive basis for their claims. Plaintiffs, for example, concede that they do not have a direct

cause of action under either O.R.C. § 2905.12 (criminal coercion) or § 3709.212 (local health agencies). Instead, Plaintiffs argue these statutes reflect "public policy" and somehow show that Defendants have exceeded their authority to administer Ohio University. This is not logical. Plaintiffs cannot create a back-door cause of action by relying on statutes that plainly have no application here.

Furthermore, Plaintiffs do not – and cannot – dispute that the Ohio Legislature has granted Defendants full statutory authority to regulate and administer "the use of the grounds, buildings, equipment, and facilities" of the university as well as "the conduct of the students, staff, faculty, and visitors to the campus[.]" O.R.C. §§ 3345.21 and 3345.021. Plaintiffs, however, contend that this authority is subject to a "reasonableness" standard. To the contrary, Ohio courts do not second-guess the professional judgment of university administrators. *See Bleicher v. University of Cincinnati College of Medicine*, 78 Ohio App.3d 302, 308 (10th Dt. 1992). The "standard of review is not merely whether the court would have decided the matter differently," but rather, whether the university action "was arbitrary and capricious." *Id.*

Here, Plaintiffs cannot identify any action that was arbitrary and capricious, let alone unreasonable. Plaintiffs simply disagree with how Defendants have chosen to respond to the unprecedented challenges posed by the COVID-19 pandemic. Plaintiffs, however, are not tasked with protecting the health and safety of the 25,000+ students, faculty and staff at Ohio University. That responsibility – by statute – falls to Defendants. Plaintiffs have failed to present any reason for this Court to substitute its judgment for the considered judgment of Defendants in this matter. Accordingly, Plaintiffs' claims should be dismissed as a matter of law.[1]

[1] Plaintiffs cite the *Peltz* decision for the proposition that a claim for declaratory relief may be brought with respect to criminal statutes like O.R.C. § 2905.12. In *Peltz*, however, the plaintiff sought a declaration that the subject criminal statute was invalid. Not surprisingly, the Ohio

B. O.R.C. § 3792.04 Does Not Apply.

Plaintiffs concede that O.R.C. § 3792.04 only applies with respect to vaccines, which have *not* received full approval from the FDA. Plaintiffs further concede that both Pfizer and Moderna vaccines have received full FDA approval. Faced with these undisputed facts, Plaintiffs make the implausible argument that only the marketing versions of these vaccines – Comirnaty and Spikevax – have been approved. Yet, as the FDA has explained, these are only marketing names, which contain the "same formulations" and are "interchangeable." *See* B-D to Motion. Plaintiffs do not dispute any of these statements from the FDA itself.

While Plaintiffs argue there is a "legal" distinction, they never identify any distinction relevant for purposes of O.R.C. § 3792.04. The statute is intended to prohibit mandatory vaccination with vaccines that have not received full FDA approval. The FDA, however, has now fully approved two vaccines. In short, Plaintiffs' argument is the equivalent of insisting that Advil is not the same as ibuprofen. Perhaps there is some "legal" distinction that might be relevant in a marketing lawsuit. There is no relevant distinction here.

And, in any event, Plaintiffs have failed to identify any *discrimination* based on vaccination status. Plaintiffs admit that they have received exemptions from the Community Health Directive's vaccine requirements. Plaintiffs likewise do not dispute that the mask requirements apply *regardless of vaccination status*. Plaintiffs do not dispute that testing is required for several categories of students *regardless of vaccination status*. Plaintiffs do not dispute that quarantine provisions apply to COVID-19 positive individuals *regardless of vaccination status*. Plaintiffs also notably fail to identify even a single instance of discrimination against themselves despite the

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Supreme Court held that the validity of a criminal statute can be challenged through a declaratory judgment action. *Peltz.v City of South Euclid*, 11 Ohio St.2d 128, 131, 228 N.E.2d 320 (1967). Here, of course, Plaintiffs are *not* challenging the validity of § 2905.12.

fact that the Community Health Directive was first issued on August 31, 2021 – more than five months ago. Having failed to identify any actual discrimination, Plaintiffs' claims fail as a matter of law.

C. The Community Health Directive Does Not Violate Article 1, Section 1 Of The Ohio Constitution.

Plaintiffs fail to cite any legal authority for the proposition that the temporary wearing of a mask somehow constitutes a form of medical treatment, let alone medical treatment that would implicate a constitutional right. It does not. Unable to identify any relevant legal authority, Plaintiffs instead argue that N95 masks have received emergency use authorization from the FDA. This is irrelevant. The Community Health Directive does not require the use of N95 masks. Instead, it suggests several different types of masks (including but not limited to N95s) and simply states that "[c]loth and handmade face coverages are discouraged." The Directive does *not* prohibit cloth or handmade face masks, but instead "recommends" double-masking in that circumstance. *See* Ex. 2 to Am. Complaint at p.2. And, regardless, Plaintiffs fail to explain how temporary mask wearing constitutes forced medical "treatment." Plaintiffs have not been forced to undergo any form of treatment whatsoever. There certainly is no treatment of the type which would implicate a constitutional right as in the *Steele* case cited in Plaintiffs' Amended Complaint. Plaintiffs' claims should be dismissed as a matter of law.

D. Plaintiffs' Remaining Arguments Have No Merit.

Plaintiffs' brief contains a hodge-podge of other arguments that are irrelevant and have no merit. Plaintiffs, for example, argue that Defendants have a statutory obligation to follow the orders of local health agencies. Whether this is accurate or not is irrelevant. This case does not involve health orders issued by any local health agencies.

Plaintiffs also argue that Defendants somehow should be "judicially estopped" because the Ohio Attorney General argued against federal vaccine mandates. Again, this is irrelevant. Whether the federal government has the authority to issue a vaccine mandate has nothing to do with the question whether Defendants here had the authority to issue the Community Health Directive. Plaintiffs' reliance on irrelevant arguments such as these highlights the fact that their substantive claims have no merit.

IV. CONCLUSION.

Plaintiffs have failed to allege any injury traceable to Defendants' alleged conduct, and accordingly, Plaintiffs' claims should be dismissed for lack of standing. But even if standing exists, Plaintiffs' claims still fail on the merits for the reasons discussed above. Accordingly, Defendants respectfully request that the Court grant this Motion and dismiss Plaintiffs' Amended Complaint in its entirety, with prejudice.

Respectfully submitted,

/s/ Michael N. Beekhuizen
Michael H. Carpenter (0015733)
Michael N. Beekhuizen (0065722)
Gregory R. Dick (0097816)
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Facsimile: (614) 365-9145
carpenter@carpenterlipps.com
beekhuizen@carpenterlipps.com
dick@carpenterlipps.com

Attorneys for Defendants Ohio University, Cary Cooper, Lorrie Platt, Scott Borgemenke, Misty Crosby, Janelle Coleman, Steve Casciani, Diane Smullen, Peggy Viehweger, and Matthew Evans.

CERTIFICATE OF SERVICE

I certify that, pursuant to Civ.R. 5(B)(2)(f), a copy of the foregoing DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT were served on February 11, 2022 by e-mail on:

Thomas W. Connors (007226)
Warner Mendenhall (0070165)
John Pfleiderer (0100195)
Mendenhall Law Group
190 North Union St. Ste. 201
Akron, Ohio 44304
tconnors@warnermendenhall.com
warner@warnermendenhall.com
john@warnermendenhall.com

Counsel for Plaintiffs

/s/ Michael N. Beekhuizen
One of the Attorneys for Defendants Ohio University, Cary Cooper, Lorrie Platt, Scott Borgemenke, Misty Crosby, Janelle Coleman, Steve Casciani, Diane Smullen, Peggy Viehweger, and Matthew Evans.