



IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

BARRY MUNZA,
LARRY LEWIS,
DEBBIE MATHIS

Plaintiffs,

v.

Civil Action No. CV-2020-_____

GOVERNOR KAY IVEY
in her official capacity as Governor
of the State of Alabama, and
SCOTT HARRIS
in his official capacity as State Health
Officer of Alabama,
ALABAMA STATE BOARD OF
HEALTH,

Defendants.

**COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY
INJUNCTION, AND INJUNCTIVE RELIEF**

COME NOW the Plaintiffs and request this Court issue a Temporary Restraining Order and other Injunctive Relief against the Defendants for their continuing and persistent unlawful conduct. As grounds for such, the Plaintiffs state the following:

PARTIES

1. Plaintiff Barry Munza is over the age of 19 years and a resident citizen of Jackson County, Alabama.
2. Plaintiff Larry Lewis is over the age of 19 years and a resident citizen of Jackson County, Alabama.
3. Plaintiff Debbie Mathis is over the age of 19 years and a resident citizen of Jackson County, Alabama.
4. Defendant Kay Ivey is the Governor of Alabama, whose official residence is Montgomery County, Alabama.
5. Defendant Scott Harris is the Alabama State Health Officer, whose official residence is Montgomery County, Alabama.

6. The Alabama State Board of Health is an agency established by the legislature which promulgates rules and regulations within its granted duties. As such its official residence is Montgomery County, Alabama.

JURISDICTION AND VENUE

7. Jurisdiction and venue are proper in Montgomery County, Alabama Circuit Court due to all the defendants having an official residence in Montgomery County, Alabama and pursuant to Section 41-22-10, Code of Alabama.

FACTS

8. The Governor and the Health Officer, throughout the past four months, have issued various Proclamations and Orders restricting the freedoms of the citizens of Alabama in response to what is known as COVID-19.
9. On July 15, 2020, the Governor issued a Proclamation, incorporating an Order, also issued on July 15, 2020, of the State Health Officer which mandated, among other things, that each person “wear a mask or other facial covering” at all times when within six feet of a person from another household, with some exceptions. Said Proclamation and Order are attached as Exhibit A and Exhibit B.
10. Said Proclamation provided threat of fine and incarceration for violation of the Proclamation.
11. The Plaintiffs are directly affected by the Proclamation and Order, as they are located within the boundaries of the State of Alabama and, during times, interface with the public at distances of less than six feet.
12. Plaintiff Munza is a retired sheriff’s deputy and interfaces with the general public in his normal daily life, oftentimes within six feet of another individual.
13. Plaintiff Lewis is a retired sheriff’s deputy interfaces with the general public in his normal daily life, oftentimes within six feet of another individual.
14. Plaintiff Mathis is a real estate agent who interfaces with the general public in her personal and professional life, oftentimes within six feet of another individual.
15. All other individuals currently located in Alabama are similarly situated and affected by said Proclamation and Order.
16. Said Proclamation and Order are illegal.

17. Said Proclamation and Order have been illegally adopted, against well recognized procedure for adopting and promulgating health rules and regulations.
18. Said Proclamation and Order are unenforceable and are nothing more than an expression emanating from the Governor and the Health Officer.

STATUTES, CASE LAW, AND PROCEDURAL REQUIREMENTS

A. The Alabama State Board of Health

19. The Alabama State Board of Health ("Board") is an administrative board and creature of statute, created by the state legislature. See Ala. Code § 22-2-1 (1975).
20. The Board has authority and jurisdiction, among other things, to "adopt and promulgate rules and regulations providing proper methods and details for administering the health and quarantine laws of the state, ... and a quorum... shall be competent to act." Ala. Code § 22-2-2 (1975).
21. The legislature created the State Committee of Public Health ("committee"), comprised of 12 members of the board of censors of the Medical Association of the State of Alabama and the chairman of each of the four councils created in Section 22-2-9 (1975). Ala. Code § 22-2-4 (1975).
22. The term "State Board of Health" is used interchangeably with the term "State Committee of Public Health" except when the State Board of Health is in actual session assembled. Ala. Code § 22-2-5 (1975).
23. Meetings of the State Committee of Public Health shall be held monthly. A majority of the members shall constitute a quorum. Ala. Code § 22-2-6 (1975).
24. When rules and regulations are not adopted by the Board according to law, including having less than a quorum of the body, they are "nothing more than an expression emanating from individual members of the boards." Wheeler v. River Falls Power Co., 111 So. 907, 909 (Ala. 1926).
25. The legislature created a position known as the State Health Officer to discharge the duties of the committee during the times in which the committee is not in session. Ala. Code § 22-2-8 (1975).
26. The State Health Officer has no superior ability to promulgate rules than does the State Board of Health.

B. The Alabama Administrative Procedure Act

27. The legislature created the Alabama Administrative Procedure Act ("AAPA") in 1981. Ala. Code § 41-22-1 (1975).
28. The AAPA governs all state agencies having express statutory authority to adopt rules and regulations. Ala. Code § 41-22-2 (1975).
29. "The Administrative Procedure Act, enacted in 1981, was intended to provide minimal due process procedural requirements for all state agencies when taking actions affecting the rights and duties of the public. Code 1975, § 41-22-2(a)." Benton v. Ala. Bd. of Med. Exam'rs, 467 So. 2d 234, 236 (Ala. 1985).
30. "Nothing in the act, however, relieves agencies of the duty to comply with additional procedural requirements otherwise established by law." Id.
31. The Alabama State Board of Health is governed by the AAPA. See Ala. Code §§ 41-22-2 and 41-22-3.
32. "The Alabama Administrative Procedure Act provides that no agency rule, order, or decision shall be valid or effective against any person or party until it has been made available for public inspection and indexed as required by the Act. See § 41-22-4(b)." Ex parte Vizzina, 533 So. 2d 658, 660 (Ala. 1988).
33. Where an amendment resembles legislation, it is a "rule" within the meaning of the AAPA. Ex parte Traylor Nursing Home, Inc., 543 So. 2d 1179, 1988 (Ala. 1988).
34. "The provisions of the Administrative Procedure Act impose upon administrative agencies the duty -- preliminary to the "adoption, amendment, or repeal," § 41-22-5(a)(1), of "rules of practice," § 41-22-4(a)(2) -- to publish the "terms or substance" of such rules, § 41-22-5(a)(1), and, among other things, to "afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing." Section 41-22-5(a)(2). Noncompliance with these provisions voids every "agency rule, order, or decision" taken in any case in which the provisions are applicable." Brunson Constr. & Envtl. Servs. v. City of Prichard, 664 So. 2d 885, 893 (Ala. 1995).
35. The AAPA requires the Board to give certain notice prior to the implementation of any rule.
36. The Board must provide at least 35 days' notice of its intended action, prior to adopting any rule. Ala. Code § 41-22-5 (1975).
37. If the Board finds that there is an emergency, it may adopt a rule upon fewer than 35 days' notice only if it states in writing its reasons for that finding to the Alabama Joint Committee on Administrative Rule Review. Ala. Code § 41-22-5 (1975).

38. The Alabama Joint Committee on Administrative Rule Review must also review all agency rules prior to their adoption. Ala. Code § 41-22-22 (1975); Ala. Code § 41-22-23 (1975). There has been no such review in the case at bar.

C. Alabama Emergency Management Act of 1955

39. The legislature has conferred upon the Governor certain powers contained within what is known as the Alabama Emergency Management Act of 1955 (“AEMA”). Ala. Code § 31-9-2 (1975).
40. The Governor is authorized and empowered to make rules and regulations within the very narrow authority granted to the Governor to carry out the duties in the AEMA. Ala. Code § 31-9-6 (1975).
41. All orders, rules and regulations promulgated by the Governor under the Governor’s emergency powers have the full force and effect of law and law enforcement authorities shall enforce the orders. Ala. Code §§ 31-9-13 and 31-9-14.
42. Violators of the Governor’s orders may be arrested, charged with a misdemeanor, and, upon conviction, be fined \$500 and jailed for six months. Ala. Code §§ 31-9-15 and 31-9-22.
43. However, there is no statutory authority that can be construed to empower the Governor to mandate the wearing of a mask under any circumstances.

COUNT I TEMPORARY RESTRAINING ORDER

44. The Plaintiffs incorporate by reference all preceding paragraphs of this Complaint as if fully set forth herein.
45. “Injunctive action may be maintained against a state official, if the official is acting beyond the scope of his authority or acting illegally, in bad faith, or fraudulently.” Wallace v. Bd. of Educ., 197 So. 2d 428, 431 (1967).
46. “A state’s immunity from suit does not apply when officers under a mistaken interpretation of the law acting in the name of the State commit acts not within their authority which are injurious to the rights of others.” Id.
47. The Supreme Court has stated that “[i]t is well settled that the purpose of granting a temporary restraining order or preliminary injunction is to maintain the status quo until the merits of the case can be determined.” Aliant Bank v. Carter, 197 So. 3d 981, 987 (Ala. 2015) (quoting Ex parte Health Care Mgmt. Grp. of Camden, Inc., 522 So. 2d 280, 282 (Ala. 1988)).

48. Here, the Governor and the Health Officer are under the mistaken belief that they have the authority to issue the complained of Proclamation and Order.
49. In this case, the status quo is no mandate for individuals to wear a mask when within six feet of another person.
50. There has been no official action by the Board, or, or if there has been, then the official action is procedurally deficient; therefore, the Plaintiffs' only remedy is to seek injunctive relief with this Court to suspend enforcement of the Governor's illegal Proclamation and the Health Officer's illegal Order.
51. The Health Officer has promulgated a rule without adhering to the procedures proscribed by the legislature specifically for the Board and has not adhered to the procedures proscribed in the AAPA.
52. There is no regulation contained in the Alabama State Board of Health Administrative Code that would put anyone in this State on notice that a mask or facial covering is required while in the general public, under any circumstances, much less when within six feet of another person.
53. Neither the Board nor the committee met with a quorum to promulgate any rule or regulation contained within the Order of the State Health Officer dated July 15, 2020.
54. Furthermore, the Health Officer's order is woefully deficient of procedural requirements mandated by the legislature under the AAPA. There has been no public notice; there has been no publication in the Alabama Administrative Monthly, giving notice of any intended action or rule; there has been no public inspection; there has been no emergency notice in writing sent to the Alabama Joint Committee on Administrative Rule Review; and there has been no review by the Alabama Joint Committee on Administrative Rule Review.
55. Moreover, the State Health Officer cannot promulgate rules without the same due process procedural requirements as the whole Board itself. The law is devoid of any authorization giving the State Health Officer absolute and unchecked discretion on rule making and promulgation.
56. Put succinctly, the Health Officer's order, in this case, is nothing more than an expression, and does not carry the weight of law and it cannot be valid or effective against any person or party until the proper procedures are met.
57. The Proclamation and Order poses a threat of criminal prosecution without the due process safeguards and procedures that the legislature intended to protect.
58. Since the State Health Officer's Order is illegal and unenforceable, likewise, the Governor's Proclamation, as it relates to the State Health Officer's Order is illegal and unenforceable.
59. The Plaintiffs have been deprived of their due process rights.

60. The Plaintiffs are at risk of immediate and irreparable injury at every moment that the Plaintiffs are within six feet of another individual. Such irreparable injury consists of a deprivation of liberty by means of incarceration and a fine every time they interact with members of the public while they are within six feet of another individual.
61. It is of paramount importance to an orderly society that, in times of crisis, law and procedure be upheld to ensure due process of law without usurping the separation of powers.
62. The Plaintiffs request this Court issue a Temporary Restraining Order, enjoining the Defendants from taking any act in enforcing the Proclamation and Order.

COUNT II PRELIMINARY INJUNCTION

63. The Plaintiffs incorporate by reference all preceding paragraphs of this Complaint as if fully set forth herein.
64. A preliminary injunction should be issued when the party seeking an injunction demonstrates: “(1) that without the injunction the [party] would suffer irreparable injury; (2) that the [party] has no adequate remedy at law; (3) that the [party] has at least a reasonable chance of success on the ultimate merits of his case; and (4) that the hardship imposed on the [party opposing the preliminary injunction] by the injunction would not unreasonably outweigh the benefit accruing to the [party seeking the injunction].” Colbert Cty. Bd. of Educ. v. James, 83 So. 3d 473, 478 (Ala. 2011) (quoting Ormco Corp. v. Johns, 869 So. 2d 1109, 1113 (Ala. 2003)).
65. While the Proclamation and Order remain cloaked in the appearance of enforceability, the Plaintiffs are at risk of incarceration and fine every time they interact with members of the public while they are within six feet of another person.
66. The Plaintiffs have no other adequate remedy at law.
67. The Plaintiffs have a reasonable chance of success on the merits of this case, as set forth in the preceding paragraphs of this complaint.
68. The Governor and the Health Officer will suffer no hardship should this Court grant the Plaintiff’s request for preliminary injunction. The Governor and Health Officer, at any time, may promulgate rules properly, in accordance with the applicable statutes.
69. The Plaintiffs’ rights have been injured, and will continue to be injured, until this Court issues a preliminary injunction enjoining the Defendants from taking any act in enforcing the Proclamation and Order.

COUNT III
PERMANENT INJUNCTIVE RELIEF

70. The Plaintiffs incorporate by reference all preceding paragraphs of this Complaint as if fully set forth herein.
71. The harm and threat of liberty deprivation to the Plaintiffs is an ongoing harm as long as the Proclamation and Order are in effect.
72. The Plaintiffs' rights have been injured, and will continue to be injured, until this Court issues an order permanently enjoining the Defendants from taking any act in enforcing the Proclamation and Order.


PRAYER FOR RELIEF


WHEREFORE, the Plaintiffs request this Court to:

- a) Issue a Temporary Restraining Order enjoining the Defendants from enforcing the Proclamation and Order from July 15, 2020;
- b) Issue a Preliminary Injunction enjoining the Defendants from enforcing the Proclamation and Order from July 15, 2020;
- c) After a full hearing on this matter, permanently enjoin the Defendants from enforcing the Proclamation and Order from July 15, 2020.
- d) Tax the costs against the Defendants;
- e) Award expenses and attorneys' fees allowed by law; and
- f) Award any and all other relief for which the Plaintiffs may be entitled to.

DATED THIS 23rd DAY OF July, 2020.


BARRY MUNZA

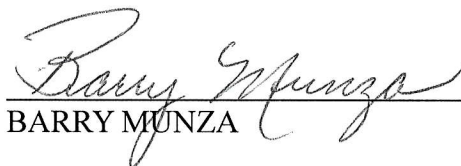

LARRY LEWIS

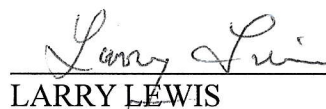

DEBBIE MATHIS

VERIFICATION

Before me, the undersigned notary public in and for the State of Alabama at large, personally appeared **BARRY MUNZA, LARRY LEWIS, and DEBBIE MATHIS**, who are known to me, and who by me first being duly sworn did depose and say under oath that the facts contained in the said complaint are true to the best of their knowledge, information, and belief.

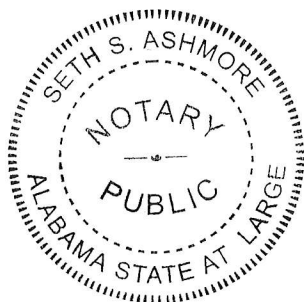
DATED this 23rd day of July, 2020.



BARRY MUNZA


LARRY LEWIS


DEBBIE MATHIS

Sworn to and Subscribed before me this 23rd day of July, 2020.




NOTARY PUBLIC
My Commission Expires: 03-15-22

Respectfully submitted


/s/ Seth S. Ashmore

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SETH S. ASHMORE