IN THE UNITED STATES DISTRICT
COURT WESTERN DIVISION FOR THE
NORTHERN DISTRICT OF OHIO

Ohio Stands Up! and Kristen Beckman, Plaintiffs, Attorneys: Thomas Renz (Bar ID 98645) 1907 W State St. #162 Fremont, OH 43420 & Robert Gargasz (Bar ID 7136) 1670 Cooper Foster Park Rd. Lorain, OH 44053 & N. Ana Garner (NM Bar ID#921) 1000 Cordova Pl., #644 Santa Fe, NM 87505 (pending *pro hac vice* approval) -vs- The United States Department of Health & Human Services, Center for Disease Control (CDC), Secretary Norris Cochran, Director Rochelle Walensky, The National Center for Health Statistics (NCHS), Director Brian C. Moyer, and John and/or Jane Doe[s] 1-20, Defendants.	CASE NO.: 3:20-cv-02814-JRK JUDGE: James R. Knepp II MOTION FOR TRO AND PRELIMINARY INJUNCTION AND REQUEST FOR AN ORDER TO SHOW CAUSE

1. Pursuant to Rules 65(a) and (b) of the Federal Rules of Civil Procedure, Plaintiffs hereby move this Court for an Order granting a Temporary Restraining Order ("TRO") and a Preliminary Injunction against the Defendants prohibiting:
    a. the use of the March 24, 2020 rule[1] changing the death reporting procedures as applied only to one disease: COVID-19. The impact of this injunctive relief would be to maintain the status quo during the course of this proceeding by requiring death reporting for COVID-19 be done in the way that every other known disease is reported until such time as this case progresses further; and
    b. the use of "Case Reporting" based on unreliable testing procedures such as PCR testing without the proper creation of a national standard for PCR tests and a uniform definition of what a "case" is.
2. Plaintiffs also request that the Court issue an Order to Show Cause, requiring the Defendants to appear and demonstrate the following:
    a. that PCR testing is, by itself, an accurate means of diagnosing the COVID-19 disease; and
    b. that the number of COVID-19 deaths reported from DHHS agencies accurately represents the number of people that have died as a direct result of COVID-19 disease; and
    c. that the number of COVID-19 deaths reported from DHHS agencies is not statistically higher as reported under the existing rule than they would be had

[1] COVID-19 Alert No. 2 https://www.cdc.gov/nchs/data/nvss/coronavirus/Alert-2-New-ICD-code-introduced-for-COVID-19-deaths.pdf

those deaths been accounted for under the rules laid out in the 2003 Coroners Handbook.

Legal Test for a Temporary Restraining Order

3. Under traditional criteria, Plaintiffs must show that (1) they are likely to succeed on the merits of their claim, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor and (4) an injunction is in the public interest. Enchantment Christmas Light Maze& Mkt. Ltd. v. Glowco, LLC, 958 F.3d 532, 535-36 (6th Cir. 2020).
4. Alternatively, "a court may grant the injunction if the plaintiff demonstrates *either* a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 677 (9th Cir. 2008) (quoting Freecycle Network, Inc. v. Oey, 505 F.3d 898, 902 (9th Cir.2007); *see also* Earth Island II, 442 F.3d 1147, 1158.

Likelihood of Success on the Merits

5. The Sixth Circuit has amplified the "likelihood of success on the merits" prong of the test in several decisions:
    a. The court has held that in order to establish success on the merits of a claim, Plaintiffs must show more than a mere possibility of success. Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp., 511 F.3d 535, 543 (6th Cir. 2007).

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b. Plaintiffs do not need to definitively convince the court that they will prevail, nor would they need to present an overwhelming flood of favorable evidence such that the court cannot help but conclude that they will win on the merits. Corporate Express Office Prods. v. Warren, 2002 U.S. Dist. LEXIS 27653, at *21 (W.D. Tenn. May 24, 2002).

AND

c. It is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation, and thus for more deliberate investigation. Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp., 511 F.3d 535, 543 (6th Cir. 2007).

6. As noted in the Complaint, the March 24, 2020 rule and reports generated thereunder violate the plain language of both the Paperwork Reduction Act ("PRA") and Information Quality Act ("IQA"), as they contain data that is intentionally misleading (the death counts) and factually incorrect (cases based on PCR testing). It simply strains credulity to argue that recording and reporting the deaths of individuals purportedly infected with COVID-19 in this unique, singular way, that deviates from the standard way in which the deaths of individuals infected with all other diseases known to man continue to be recorded and reported, is done with "integrity, quality and utility." It is equally absurd to suggest that there is any "integrity, quality, and utility" involved in reporting cases based solely on a test that is required to bear the following disclaimer:

> *The detection result of this product is only for clinical reference, and it should not be used as the only evidence for clinical diagnosis and treatment.*

7. The March 24, 2020 rule also violates the Administrative Procedures Act ("APA"). The APA makes it clear that an agency action constitutes a rule and requires a rulemaking

process when it constitutes a de facto rule or binding norm that could not properly be promulgated absent the notice-and-comment rulemaking required by the APA.

8. A rule is then defined under the APA to mean: "(4) rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." This statement has been interpreted broadly to include nearly any statement an agency can make. Chaney v. Heckler, 718 F.2d 1174, 231 U.S. App. D.C. 136, 1983 U.S. App. LEXIS 16070 (D.C. Cir. 1983), reh'g denied, 724 F.2d 1030, 233 U.S. App. D.C. 146, 1984 U.S. App. LEXIS 26347 (D.C. Cir. 1984), rev'd, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714, 15 Envtl. L. Rep. 20335, 1985 U.S. LEXIS 78 (1985).

9. The rule issued on March 24, 2020 is not just a rule but also a "substantive rule" given that it provides guidelines that have a dramatic future effect by both changing eligibility for reimbursement under the CARES Act[2] and also altering the methods by which the cause of death is recorded – which is literally a change in process for the individuals responsible for recording deaths. If this process were not followed and an individual were to sue for damages based on not being reimbursed under the CARES Act the Court would be bound by this regulation thus demonstrating it is substantive. Energy Consumers & Producers Asso. v. Department of Energy, 632 F.2d 129, 1980 U.S. App. LEXIS 18952

[2] See Complaint, para. 55-56.

(Temp. Emer. Ct. App.), cert. denied, 449 U.S. 832, 101 S. Ct. 102, 66 L. Ed. 2d 38, 1980 U.S. LEXIS 2772 (1980).

10. The CDC did not comply with the APA notice and comment procedures when it instituted the March 24, 2020 rule change, thereby depriving the public of an opportunity for consultation and hard questioning. The rule and resulting reports are unlawful, violate the APA, PRA and IQA, and have had all of the negative consequences set forth in the Complaint and in the analysis of the other prongs of the test set forth below. The admissions and statements of the Defendants themselves and of the World Health Organization,[3] support the claims.
11. There can hardly be any question that Plaintiffs are likely to succeed on the merits of their case.

Possibility of Irreparable Injury

12. As a result of the false and misleading data and illegal rule promulgated by the Defendants. numerous of the Plaintiffs' Constitutional and statutory rights have been violated. The data has terrified the public, and has been used by Ohio and its municipalities, including those in which the Plaintiffs reside, in order justify the declaration of a state of emergency, the continual extension of the emergency, the consolidation and exercise of power in the hands of one branch of government, the executive, and a profusion of COVID-19 mandates that have encroached on civil liberties in an unprecedented way. Without the data, none of this could have happened. Further, the corporate operators that control access to the virtual public square, rely on the data

[3] See WHO Information Notice for IVD Users 2020/05, https://www.who.int/news/item/20-01-2021-who-information-notice-for-ivd-users-2020-05 (last visited February 2, 2020).

and cite to it as gospel, and on that basis have censored Plaintiffs and countless others who have sought to present the information and arguments set forth in the Complaint and herein to the broader public.

13. The Supreme Court has held that "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U. S. 347, 373 (1976). This stance was recently reiterated in *Roman Catholic Diocese of Brooklyn v. Cuomo* 592 U. S. ____ (2020).
14. The 6th Circuit has also ruled that a plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages, and that even a transient violation of constitutional rights cannot be remediated with compensation and is deemed irreparable. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).
15. As noted in the Complaint, both Plaintiff Beckman and numerous members of Ohio Stands Up have had their First Amendment rights violated through the imposition of masks, interference with worship and other events.
16. Plaintiffs Beckman and Ohio Stands Up cannot be made whole from their injuries with mere compensation, and their injuries constitute constitutional violations. Consequently, their injuries are remediable only by injunctive relief.

Balance of Hardships

17. In addressing the balance of hardships for the purposes of a TRO, the court must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Booth v. Flint Police Officers Ass'n, 2020 U.S.

Dist. LEXIS 198042 *6-7 (quoting Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 923-24 (6th Cir. 2020).

18. Reporting death data as required under the rules that pre-existed the agency's illegal rulemaking in this case, data that complied with the requirements of the PRA and IQA, would assist the general public and state and municipal officials to make more informed decisions by ensuring that the data they are relying upon is more accurate and useful.

19. Conversely, there is no benefit at all in continuing to mislead the public regarding the true number of deaths caused by COVID-19. There is no cognizable, legitimate reason for the Defendants to record and present the deaths of individuals purportedly infected with COVID-19 differently than the deaths of individuals infected with other diseases. Finally, there is not even an articulable reason for using a test that does not by itself diagnose a "case" of a disease to determine the number of "cases" – particularly when the number of "cases" is being used as a basis for policy around the country.

20. The Plaintiffs – and much of the rest of the country for that matter – are suffering because of egregious violations of their Constitutional and statutory rights that are being justified by data that is inarguably misleading at best. The 6th Circuit has said the question of whether others will suffer substantial harm absent an injunction is a fact-based inquiry. *Curtis 1000, Inc. v. Martin*, 197 Fed. App'x. 412, 426 (6th Cir. 2006). What possible fact could be presented to the Court that would demonstrate the possibility of harm to anyone that would stem from honesty in data collection and reporting, and the Defendants following the law?

Public Interest

21. Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. S. Bay United Pentecostal Church v. Newsom, 2021 U.S.App. LEXIS 1854 * 47-48. Accordingly, the analysis of this prong of the test should be weighed together with the analysis in the foregoing section.

22. It has been held that the public has an interest in ensuring that shareholders receive "absolute and full disclosure to ensure that a shareholder vote be based upon complete, accurate and comprehensible information," Lewis v. General Employment Enterprises, Inc., 1991 U.S. Dist. LEXIS 950 *12. Obviously, there is much more at stake in this case, than profits, dividends or a shareholder vote.

23. Surely, the public has an interest in not being misled or deceived by inaccurate data reported by government officials and agencies relying on that data to justify their policies, many of which have effected unprecedented invasions of their civil liberties.[4] Members of the general public have an interest in receiving accurate data from public health officials, which they can use to make decisions in their own best interests regarding their health and welfare, quite apart from government policy. Honest information allows people to make risk decisions and determine whether to support or oppose policies related to the disease.

24. The public interest in truth and transparency regarding COVID-19 simply cannot be overstated. This disease and the governmental response to it have dominated the lives of

[4] Even President Biden has recognized this importance as indicated in several of his newly issued executive orders. E.O. 13987 of Jan 20, 2021, FEDERAL REGISTER, https://www.federalregister.gov/documents/2021/01/25/2021-01759/organizing-and-mobilizing-the-united-states-government-to-provide-a-unified-and-effective-response

the Plaintiffs and all Americans for nearly a year and caused incalculable damage. The Plaintiffs are merely asking the Court to enforce the plain language of the law and ensure that the Defendants comply with the mandatory procedures that are meant to protect the public by improving the quality of agency rulemaking, and ensure that agencies provide data with "integrity, quality and utility."

25. With that in mind, Plaintiffs ask what possible basis could there be for presenting data in this way? Why would the CDC change the way it collects and reports data where there is a positive test purportedly indicating an infection for only a single disease? Even the rules related to the IQA discuss, extensively, the importance of integrity in this data so that the public trust is not shaken.[5]

26. Further, an injunction "serves the interests of the general public" if it "ensur[es] that the Government's procedures comply with the Constitution. Generally, public interest concerns are implicated when a constitutional right has been violated because all citizens have a stake in upholding the constitution." Id. (quoting Hernandez v. Sessions, 872 F.3d 976, 996 (9th Cir. 2017). The Sixth Circuit has consistently held that it is always in the public interest to prevent the violation of a party's constitutional rights. Boyd Cty. High Sch. Gay Straight All. v. Bd. of Educ., 258 F. Supp. 2d 667, 692 (E.D. Ky. 2003).

27. The COVID-19 mandates that have harmed the Plaintiffs in this case and Americans all across this country, have been promulgated by officials who insist on the importance of "following the science." The only science they have to follow, are the inflated COVID-19 death counts flowing from Defendants' illegal rulemaking and use of unreliable tests. But for that misleading data, public officials would not be able to justify to the people

[5] 67 FR 8451-8460, Federal Register :: Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication.

their COVID-19 mandates, especially those that implicate civil liberties, on the basis that they are necessary for their protection. But for that data, public officials would not be able to survive judicial review of their actions.

28. The reporting under the March 24, 2020 rule has artificially inflated the numbers of COVID-19 cases and deaths, instilled fear in the public, and served as the predicate and engine for unprecedented exercises of executive power that have been found to infringe civil liberties, and have themselves caused human suffering and economic destruction. The Defense cannot, in good faith, demonstrate any legitimate public interest in presenting false or misleading data, and further, it is against the plain language of the law.

Motion for a Show Cause Order

29. While Plaintiffs request the TRO be granted immediately, we also request that the Court issue an immediate Order to Show Cause. Such an order would force the Defendants to produce certain targeted information promptly, where that information will be useful in facilitating an expeditious resolution of this matter. Plaintiffs request that the Defense prove:

    a. That a PCR test alone can accurately determine whether a person has the COVID-19 disease;
    b. That death reporting for COVID-19 is being done in the same way as any other cause of death thus ensuring the data is useful and being presented with integrity;
    c. That the number of deaths being reported and publicized by the CDC accurately reflects the number of deaths caused directly by COVID-19 (from not with) and, further, would not vary if the reporting rules were the same for COVID-19 as for all other diseases (which are treated the same way); and

d. That the new rule for reporting COVID-19 deaths is not substantive.

30. Plaintiffs contend that if the Defense cannot clearly show evidence of the points above then they are in clear violation of the plain language of the APA, PRA and IQA.

31. Given the importance of presenting honest data in a situation such as that which we are facing in the United States, we also ask the Court to order cause be shown for:

    a. Scientific peer-reviewed proof of asymptomatic spread;

    b. Scientific proof that COVID-19 is spread by asymptomatic school-aged children;

    c. Scientific proof of the effectiveness of cloth and paper masks at preventing the spread of the SARS-COV2 virus;

    d. Scientific proof that facemasks do not reduce pulse-ox levels or create other negative consequences for those that wear them;

    e. That the outcomes of the response to COVID-19 – including masking, business closures, stay-at-home orders, travel restrictions, and other such policies – have resulted in fewer COVID-19 deaths (when counted using traditional guidelines) than increases in domestic violence, drug overdoses/deaths, and suicides; and

    f. The rate of death per confirmed case of COVID-19 in individuals under 60 years of age is statistically higher than the rate of death in individuals under 60 years of age for influenza based on the dominant flu strains from the past 5 years.

Given the preceding, we humbly ask the Court to grant our motions for preliminary injunctive relief on all grounds discussed above.

Respectfully submitted,

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