Rel: March 19, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1200003

Barry Munza, Larry Lewis, and Debbie Mathis

v.

Kay Ivey, in her official capacity as Governor of the State of Alabama; Scott Harris, in his official capacity as State Health Officer of Alabama; and the Alabama State Board of Health

Appeal from Montgomery Circuit Court
(CV-20-900935)

BOLIN, Justice.

Barry Munza, Larry Lewis, and Debbie Mathis ("the plaintiffs") appeal from the Montgomery Circuit Court's order dismissing their complaint seeking certain injunctive relief and challenging a proclamation issued by Governor Kay Ivey requiring the use of facial coverings in certain circumstances, as outlined in an order issued by Dr. Scott Harris, the State Health officer, to slow the spread of COVID-19.

Facts and Procedural History

In December 2019, a new human coronavirus emerged. The virus, which causes the disease known as COVID-19, quickly spread around the world. On March 6, 2020, the State Board of Health designated COVID-19 as a disease with the potential to cause an epidemic, as a threat to the health and welfare of the public, or as otherwise having public-health importance, and it added COVID-19 to the list of diseases classified as immediate or extremely urgent that required the notification of a county health department or the State Department of Public Health within four hours of a presumptive diagnosis. The virus causing COVID-19 was first detected in Alabama on March 13, 2020. On that day, Governor Ivey issued a proclamation declaring a state of emergency for

the State of Alabama because of the COVID-19 global pandemic. The state of emergency has been extended several times as the State continues to respond to the pandemic.

According to the United States Centers for Disease Control and Prevention ("the CDC"), the virus causing COVID-19 is thought to spread mainly between people who are in close contact with one another or through respiratory droplets produced when an infected person coughs or sneezes. Notably, a person without symptoms of the virus can unknowingly still be infected and capable of spreading the virus to others. According to the CDC, using a mask or facial covering to cover one's mouth and nose can help reduce the spread of the virus; wearing a mask or facial covering serves two purposes: personal protection against inhalation of harmful pathogens and source control to prevent exposing others to infectious microbes that may be expelled during respiration. Again according to the CDC, wearing a mask or facial covering is particularly important in settings where social distancing -- physical separation from others by at least six feet -- cannot consistently be maintained.

On March 20, 2020, Dr. Harris, in his capacity as the State Health officer, issued an order, commonly referred to as "the Safer at Home order," "suspending certain public gatherings due to risk of infection by COVID-19." That order was issued as an emergency rule pursuant to §§ 41-22-5(b), 41-22-6(c)(3), 22-2-8, and 22-11A-1, Ala. Code 1975. Dr. Harris issued amended versions of the order on March 27, 2020, April 3, 2020, April 28, 2020, May 8, 2020, and May 21, 2020. The State Committee of Public Health, which has the authority to act on behalf of the State Board of Health, see § 22-2-6, Ala. Code 1975, was not in session when Dr. Harris issued the original order and the amendments thereto as emergency rules, but it later ratified the original order and the amendments thereto at its next meeting.

On June 30, 2020, Governor Ivey issued a proclamation that incorporated Dr. Harris's order, as most recently amended. As the proclamation explained, under the Alabama Administrative Procedure Act ("the AAPA"), § 41-22-1 et seq., Ala. Code 1975, "[t]he State Health Officer's authority to adopt a COVID-19 related health order will arguably

expire on July 15, 2020, which is 120 days after" Dr. Harris issued his original order as an emergency rule. The proclamation further stated:

> "[T]he uncertainties of the COVID-19 pandemic will require COVID-19-related rulemaking to be done on an emergency, ad hoc basis for longer than the 120-day emergency period contemplated by the Administrative Procedure Act. The Governor's powers under the Emergency Management Act allows the flexibility to undertake such rulemaking for as long as a declared state public health emergency is in effect."

Accordingly, Governor Ivey attached Dr. Harris's order, as most recently amended, to her proclamation and "promulgate[d] that order as an order, rule, or regulation under the applicable provisions of the Emergency Management Act. See, e.g., Ala. Code [1975,] §§ 31-9-6(1) & 31-9-13." The proclamation stated that the "law-enforcing authorities of the state shall enforce that order as any other order, rule, or regulation promulgated by the Governor under [the Emergency Management] Act, and the penalty for violating it shall be a fine of not more than $500 or imprisonment in the county jail as set forth in [that] Act, see, e.g., [Ala. Code 1975,] § 31-9-22." Each subsequent amended order issued by Dr. Harris has been adopted and promulgated by Governor Ivey in a

proclamation issued under the Alabama Emergency Management Act of 1955, § 31-9-1 et seq., Ala. Code 1975.

On July 15, 2020, Governor Ivey issued a proclamation ("the July 15 proclamation") adopting Dr. Harris's order, as amended effective July 15, 2020 ("the amended health order"), that, among other things, required a mask or facial covering to be worn in certain circumstances. The amended health order stated the following:

> "2. Facial coverings for individuals: Effective July 16, 2020 at 5:00 P.M., each person shall wear a mask or other facial covering that covers his or [her] nostrils and mouth at all times when within six feet of a person from another household in any of the following places: an indoor space open to the general public, a vehicle operated by a transportation service, or an outdoor public space where ten or more people are gathered. But this facial-covering requirement is subject to the following exceptions[:]
>
> > "a. Exceptions for practical necessity. The facial-covering requirement does not apply to:
> >
> > > "i. Any person six years of age or younger;
> > >
> > > "ii. Any person with a medical condition or disability that prevents him or her from wearing a facial covering;

"iii. Any person while consuming food or drink, or seated at a restaurant to eat or drink;

"iv. Any person who is obtaining a service (for example, a medical or dental procedure) that requires removal of the facial covering in order to perform the service; or

"v. Any person who is required to remove the facial covering to confirm his or her identity, such as for security of screening purposes.

"b. Exceptions for exercise. The facial-covering requirement does not apply to:

"i. Any person who is actively engaged in exercise in a gym or other athletic facility if he or she maintains six feet of separation from persons of another household;

"ii. Any person who is directly participating in athletic activities in compliance with paragraph 11 of this order; or

"iii. Any person who is in a swimming pool, lake, water attraction, or similar body of water, though wearing a facial covering or social distancing is strongly encouraged if safe and practicable.

"c. Exceptions for effective communication. The facial-covering requirement does not apply to:

"i. Any person who is seeking to communicate with another person where the ability to see the person's mouth is essential for communication (such as when the other person has a hearing impairment); or

"ii. Any person speaking for broadcast or to an audience if the person maintains six feet of separation from persons from another household.

"d. Exceptions to facilitate constitutionally protected activity. The facial-covering requirement does not apply to:

"i. Any person who is voting, though wearing a face covering is strongly encouraged; or

"ii. Any person who cannot wear a facial covering because he or she is actively providing or obtaining access to religious worship, though wearing a face covering is strongly encouraged.

"e. Exceptions for essential job functions. The facial-covering requirement does not apply to:

"i. Any first responder (including law enforcement officers, firefighters, or emergency medical personnel) if

> necessary to perform a public-safety function; or
>
> "ii. Any person performing a job function if wearing a face covering is inconsistent with industry safety standards or a business's established safety protocols."

Governor Ivey has extended the facial-covering requirement several times since issuing the July 15 proclamation adopting the amended health order.

On July 24, 2020, the plaintiffs sued Governor Ivey and Dr. Harris, in their official capacities, and the Alabama State Board of Health ("the defendants"), seeking a temporary restraining order and injunctive relief regarding the July 15 proclamation adopting the amended health order mandating the use of facial coverings.

On July 26, 2020, the trial court entered an order denying the plaintiffs' request for a temporary restraining order, stating that the plaintiffs had failed to demonstrate that they would be "irreparably harmed" without the issuance of a temporary restraining order. On July 27, 2020, the defendants moved the trial court to dismiss the plaintiffs'

action seeking injunctive relief on the basis that the trial court lacked subject-matter jurisdiction, see Rule 12(b)(1), Ala. R. Civ. P., and on the basis that the plaintiffs had failed state a claim upon which relief can be granted, see Rule 12(b)(6), Ala. R. Civ. P. In the alternative, the defendants moved for a summary judgment. The defendants specifically argued, among other things, that the plaintiffs lack standing because they failed to plead any particular injury caused by the facial-covering requirement and that the plaintiffs' claims for injunctive relief against the defendants are barred by the doctrine of sovereign immunity. On August 7, 2020, the plaintiffs filed a response in opposition to the motion to dismiss or, in the alternative, for a summary judgment.

Following a hearing, the trial court, on August 11, 2020, entered an order denying the plaintiffs' request for a preliminary injunction and granting the defendants' motion to dismiss. On September 9, 2020, the plaintiffs moved the trial court to alter, amend, or vacate the trial court's order and for leave to supplement their pleadings. On October 1, 2020, the trial court entered an order denying the plaintiffs' postjudgment motion. This appeal followed.

Standard of Review

This Court has stated the applicable standard of review as follows:

> " 'A ruling on a motion to dismiss is reviewed without a presumption of correctness. This Court must accept the allegations of the complaint as true. Furthermore, in reviewing a ruling on a motion to dismiss we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail.'
>
> "Newman v. Savas, 878 So. 2d 1147, 1148-49 (Ala. 2003) (citations omitted). 'Matters of subject-matter jurisdiction are subject to de novo review.' DuBose v. Weaver, 68 So. 3d 814, 821 (Ala. 2011). ' " 'When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction.' " ' Blevins v. Hillwood Office Ctr. Owners' Ass'n, 51 So. 3d 317, 321 (Ala. 2010) (quoting Riley v. Pate, 3 So. 3d 835, 838 (Ala. 2008), quoting in turn State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999))."

Poiroux v. Rich, 150 So. 3d 1027, 1033 (Ala. 2014). Further,

> " '[a] court ruling on a Rule 12(b)(1) motion to dismiss "may consider documents outside the pleadings to assure itself that it has jurisdiction." Al-Owhali [v. Ashcroft], 279 F. Supp. 2d [13,] 21 [(D.D.C. 2003)]; see also Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987) ("In 12(b)(1) proceedings, it has been long accepted that the judiciary may make appropriate inquiry beyond the pleadings to satisfy itself on [its] authority to entertain the case." (internal citations and quotation marks omitted)). The level of scrutiny

with which the Court examines the allegations in the complaint that support a finding of jurisdiction, however, depends upon whether the motion to dismiss asserts a facial or factual challenge to the court's jurisdiction. See I.T. Consultants v. Pakistan, 351 F.3d 1184, 1188 (D.C. Cir. 2003).

"'Facial challenges, such as motions to dismiss for lack of standing at the pleading stage, "attack[] the factual allegations of the complaint that are contained on the face of the complaint." Al-Owhali, 279 F. Supp. 2d at 20 (internal quotation marks and citation omitted). "If a defendant mounts a 'facial' challenge to the legal sufficiency of the plaintiff's jurisdictional allegations, the court must accept as true the allegations in the complaint and consider the factual allegations of the complaint in the light most favorable to the non-moving party." Erby [v. United States,] 424 F. Supp. 2d [180,] 181 [(D.D.C. 2006)]; see also I.T. Consultants, 351 F.3d at 1188. The court may look beyond the allegations contained in the complaint to decide a facial challenge, "as long as it still accepts the factual allegations in the complaint as true." Abu Ali [v. Gonzales,] 387 F. Supp. 2d [16,] 18 [(D.D.C. 2005)]; see also Jerome Stevens Pharm., Inc. v. Food & Drug Admin., 402 F. 3d 1249, 1253-54 (D.C. Cir. 2005) ("At the pleading stage .... [w]hile the district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction, the court must still accept all of the factual allegations in the complaint as true." (internal citations and quotation marks omitted))."

Ex parte Safeway Ins. Co. of Alabama, 990 So. 2d 344, 349 (Ala. 2008)(quoting Lindsey v. United States, 448 F. Supp. 2d 37, 43 (D.D.C. 2006)).

Discussion

The defendants have asserted that the plaintiffs lack standing to challenge Governor Ivey's July 15 proclamation adopting the amended health order that required masks or facial coverings to be worn in certain circumstances.

Public-law actions involve "constitutional or other challenges to the actions of officials or administrative agencies." Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 34 (Ala. 2013). A party establishes standing to bring a challenge in a public-law case "'"when it demonstrates the existence of (1) an actual, concrete and particularized 'injury in fact' -- 'an invasion of a legally protected interest'; (2) a 'causal connection between the injury and the conduct complained of'; and (3) a likelihood that the injury will be 'redressed by a favorable decision.'"'" Poiroux, 150 So. 3d at 1039 (quoting Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, LLC, 890 So. 2d 70, 74 (Ala. 2003), quoting in

turn other cases). This Court has explained the following with regard to the "injury" element of standing:

> "'"Injury will not be presumed; it must be shown."' A party's injury must be "tangible," and a party must have "a concrete stake in the outcome of the court's decision."' The plaintiffs 'must allege "specific concrete facts demonstrating that the challenged practices harm [them], and that [they] personally would benefit in a tangible way from the court's intervention."' At a minimum, they must show that they personally have suffered some actual or threatened injury as a result of the purportedly illegal conduct."

Ex parte Merrill, 264 So. 3d 855, 863 (Ala. 2018)(internal citations omitted).

The plaintiffs alleged the following in their complaint:

> "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.
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> "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 provided threat of fine and incarceration for violation of the Proclamation.

> "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.
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> "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.
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> "Plaintiff Lewis is a retired sheriff's deputy and interfaces with the general public in his normal daily life, oftentimes within six feet of another individual.
>
> "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.
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> "All other individuals currently located in Alabama are similarly situated and affected by said Proclamation and Order.
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> "Said Proclamation and Order are illegal.
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> "Said Proclamation and Order have been illegally adopted, against well recognized procedure for adopting and promulgating health rules and regulations.
>
> "Said Proclamation and Order are unenforceable and are nothing more than an expression emanating from the Governor and the Health Officer."

(Paragraph numbers omitted.)

The plaintiffs have failed to allege any "'"specific concrete facts"'" demonstrating that they have suffered an "actual" injury as the result of the July 15 proclamation adopting the amended health order that required masks or facial coverings to be worn when within six feet of a person from another household. Ex parte Merrill, 264 So. 3d at 863. Rather, the plaintiffs broadly asserted that they were "directly affected" by the facial-covering requirement because they live in Alabama and that, during certain times, they "interface with the public at distances of less than six feet." Absent from the plaintiffs' allegations is any description of "'"an actual, concrete and particularized 'injury in fact'"'" proximately caused by the facial-covering requirement. Poiroux, 150 So. 3d at 1039. The plaintiffs further alleged that the July 15 proclamation adopting the amended health order requiring the use of masks or facial coverings was "illegal" and "unenforceable." Those assertions are wholly conclusory in nature and fail to demonstrate an injury in fact, because an individual's belief that a law is invalid or unenforceable is not the kind of "'"actual, concrete and particularized 'injury in fact'"'" that supports an individual's standing to sue. Poiroux, 150 So. 3d at 1039; see also

Muhammad v. Ford, 986 So. 2d 1158, 1165 (Ala. 2007) (holding, in a case in which the plaintiffs claimed that the defendants' " 'actions denied them the opportunity to live in a county in which a valid law ... exists,' " that "[s]uch a violation of a purported right does not establish an 'actual, concrete and particularized injury in fact' ").

Relying upon Parker v. Judicial Inquiry Commission of Alabama, Case No. 2:16-CV-442-WKW, Aug. 31, 2017 (M.D. Ala. 2017), not reported in the Federal Supplement), the plaintiffs argue that they have satisfied the "injury in fact" requirement for standing because, they say, they are threatened with imminent injury in the form of a fine and/or incarceration for those instances when they "interface" within six feet of persons outside their households without wearing a mask or facial covering. In Parker, then Justice Parker brought a pre-enforcement action challenging the constitutionality of several Alabama Canons of Judicial Ethics ("the challenged Judicial Canons"), as well as § 159 of the Alabama Constitution of 1901, alleging that the challenged Judicial Canons violated his First Amendment right to freedom of speech by restricting the ability of judges to speak out on certain issues and that §

159 violated his Fourteenth Amendment right to due process by providing for the suspension of judges who have complaints filed by the Alabama Judicial Inquiry Commission ("the JIC") pending against them. The federal district court determined that Justice Parker had standing to bring the action, stating that " 'a [preenforcement] plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." ' " Parker, (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 160, 134 S. Ct. 2334, 2342 (2014), quoting in turn Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)). The federal district court explained that Justice Parker satisfied those requirements because he (1) "had alleged that he intend[ed] to engage in political speech that is arguably proscribed by the Judicial Canons at issue and might result in his automatic suspension under § 159" and (2) there existed a credible threat of prosecution because "Justice Parker ha[d] already once been subjected to investigation based on the alleged violation of the Judicial

Canons he now challenges." Parker. The federal district court concluded that

> " 'the "pre-enforcement nature" of the suit [is] not "troub[ling]" because the plaintiff[] ha[s] "alleged an actual and well-founded fear that the law will be enforced against [him]." ' Susan B. Anthony List [v. Driehaus], [573 U.S. 149, 160,] 134 S. Ct. [2334,] 2343 [(2014)] (quoting [Virginia] v. Am. Booksellers[, Ass'n], 484 U.S. [383,] 393 [(1988)]. Justice Parker has standing to bring this preenforcement First Amendment challenge because [the] JIC already has proven the threat of prosecution credible and, at any moment, may start another investigation against him."

Parker.

The plaintiffs' allegations of an imminent threat of enforcement of the July 15 proclamation adopting the amended health order against them differ substantially from those in Parker. The plaintiffs have failed to allege any credible risk of enforcement that would give rise to standing that would support a pre-enforcement action. The plaintiffs rely upon Babbitt, supra, for the proposition that a plaintiff "should not be required to await and undergo criminal prosecution as the sole means of seeking relief." Although that is true, Babbitt also requires that a plaintiff allege that "either (1) he was threatened with prosecution; (2) prosecution is

likely; or (3) there is a credible threat of prosecution." American Civil Liberties Union v. The Florida Bar, 999 F.2d 1486, 1492 (11th Cir. 1993). The plaintiffs have alleged no facts that would satisfy those requirements. The plaintiffs' complaint does not contain a single allegation that any of the plaintiffs have been specifically threatened with enforcement of the fine and incarceration penalties in the July 15 proclamation. Instead, all the plaintiffs alleged was that the July 15 proclamation "provided threat of fine and incarceration" and that 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." Although the plaintiffs now argue that they "are at risk of incarceration at times when they are in public and when within six feet of another person without wearing a 'mask' or 'other facial covering,' " their complaint fails to even state that they have refused to wear masks or facial coverings in public such that they could be subject to an enforcement action. Further, the plaintiffs' complaint contains no allegations about how the facial-covering requirement is being enforced, to the extent that the requirement is being enforced at all.

Based on the foregoing, we conclude that the plaintiffs have failed to allege " ' "specific concrete facts," ' " Ex parte Merrill, 264 So. 3d at 863, demonstrating an " ' "actual ... particularized 'injury in fact,' " ' " Poiroux, 150 So. 3d at 1039, and that they, therefore, lack standing to proceed with this action.

The plaintiffs argue alternatively that the AAPA affirmatively grants them standing to bring this action. Specifically, the plaintiffs contend they have standing to bring this action under § 41-22-10, Ala. Code 1975, which provides:

> "The validity or applicability of a rule may be determined in an action for a declaratory judgment or its enforcement stayed by injunctive relief in the circuit court of Montgomery County, unless otherwise specifically provided by statute, if the court finds that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. In passing on such rules the court shall declare the rule invalid only if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in [the AAPA]."

The plaintiffs' reliance upon the AAPA to establish standing is likewise unavailing. This Court has noted:

> "'[T]he Alabama Administrative Procedure Act, Ala. Code 1975, § 41-22-1 et seq., incorporates the requirement of standing by providing that
>
> > "'"[t]he validity or applicability of a rule may be determined in an action for a declaratory judgment or its enforcement stayed by injunctive relief in the circuit court of Montgomery County, unless otherwise specifically provided by statute, if the court finds that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiffs ...."'"

Ex parte LeFleur, [Ms. 1190191, Nov. 6, 2020] ___ So. 3d ___, ___ (Ala. 2020)(quoting Smith v. LeFleur, [Ms. 2180375, Oct. 11, 2019] ___ So. 3d ___, ___ (Ala. Civ. App. 2019), quoting in turn § 41-22-10) (emphasis omitted). In other words, the AAPA incorporates all the normal standing requirements discussed in Poiroux and does not grant the plaintiffs a separate avenue to assert standing to bring an action. Even under the AAPA, the plaintiffs must still allege facts showing that they suffered an injury in fact, and, as discussed above, they have failed to do so.

Conclusion

We conclude that the plaintiffs lacked standing to bring their complaint seeking injunctive relief regarding the July 15 proclamation adopting the amended health order that, among other things, requires masks or facial coverings to be worn in certain circumstances. Because we have determined that the plaintiffs lacked standing, we pretermit discussion of the remaining issues presented by the parties.

AFFIRMED.

Parker, C.J., and Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Shaw, J., concurs in the result.