

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 23-0046

STAND UP MONTANA, a Montana non-profit Corporation; CLINTON DECKER; MORGEN HUNT; GABRIEL EARLE; ERIC PRATHER; BRADFORD CAMPBELL; MEAGAN CAMPBELL; AMY ORR and JARED ORR,

Plaintiffs/Appellants,

v.

MISSOULA COUNTY PUBLIC SCHOOLS, ELEMENTARY DISTRICT NO. 1, HIGH SCHOOL DISTRICT NO. 1, MISSOULA COUNTY, STATE OF MONTANA; TARGET RANGE SCHOOL DISTRICT NO. 23; and HELLGATE ELEMENTARY SCHOOL DISTRICT NO. 4,

Defendants/Appellees.

APPELLEES' RESPONSE BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County, Cause No. DV-21-1031
Before Hon. Jason Marks

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF ISSUES 1

II. STATEMENT OF THE CASE 1

III. STATEMENT OF FACTS..... 5

IV. STANDARDS OF REVIEW 9

V. SUMMARY OF ARGUMENT 10

VI. ARGUMENT 12

 A. The District Court Properly Granted Summary Judgment on the Substantive Due Process Claim Under the Deferential Standard Set Forth in *Jacobson v. Massachusetts*. 12

 B. The Mask Policies Did Not Implicate Any Fundamental Rights. Therefore, the Rational Basis Test is Appropriate. 19

 1. The Mask Requirements Do Not Infringe Upon Any Recognized Fundamental Rights of Parents..... 19

 2. The School Districts’ Mask Requirements Did Not Infringe upon Any Fundamental Privacy or Bodily Integrity Rights. ... 23

 C. The District Court Properly Granted the District Court’s Motion in Limine on Two of SUM’s experts..... 25

VII. CONCLUSION 27

CERTIFICATE OF COMPLIANCE 28

TABLE OF AUTHORITIES

Cases

<i>Alan v. Ige</i> , 557 F. Supp. 3d 1083 (D. Haw. 2021).....	22
<i>Armstrong v. State</i> , 1999 MT 261, 296 Mont. 361, 989 P.2d 364	24
<i>Arnold v. Yellowstone Mt. Club, LLC</i> , 2004 MT 284, 323 Mont. 295, 100 P.3d 137	9
<i>Bailey v. State Farm Mut. Auto. Ins. Co.</i> , 2013 MT 119, 370 Mont. 73, 300 P.3d 1149	10
<i>Bentonville Sch. Dist. v. Sitton</i> , 643 S.W. 3d 763 (Ark. 2022)	20
<i>Corporate Air v. Edwards Jet Ctr. Mont Inc.</i> , 2008 MT 283, 345 Mont. 336, 190 P.3d 1111	9, 10
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993)	26
<i>Doe v. Dall. Indep. Sch. Dist.</i> , 194 F. Supp. 3d 551 (N.D. Tex. 2016)	20
<i>Doe v. Franklin Square Union Free Sch. Dist.</i> , 568 F. Supp. 3d 270 (E.D.N.Y. 2021)	20, 21
<i>Driscoll v. Stapleton</i> , 2020 MT 247, 401 Mont. 405, 473 P.3d 386.....	19
<i>Exxon Pipeline Co. v. Zwahr</i> , 88 S.W.3d 623 (Tex. 2002).....	25
<i>Family Freedom Endeavor v. Riley</i> , Nos. 147563, 2179CV00494, 2021 Mass. Super. LEXIS 505 (Nov. 16, 2021)	17
<i>Fields v. Palmdale Sch. Dist.</i> 427 F.3d 1197 (9th Cir. 2005)	21

<i>Forbes v. Cnty. of San Diego</i> , No. 20-cv-00998-BAS-JLB, 2021 U.S. Dist. LEXIS 41687 (S.D. Cal. Mar. 4, 2021)	17
<i>Fortuna v. Town of Winslow</i> , 607 F. Supp. 3d 29 (D. Me. 2022)	15, 16, 20
<i>Grover v. Cornerstone Constr. N.W., Inc.</i> , 2004 MT 148, 321 Mont. 477, 91 P.3d 1278	10
<i>Gryczan v. State</i> (1997), 283 Mont. 433, 942 P.2d 112	24
<i>Gunter v. N. Wasco Cnty. Sch. Dist. Bd. of Educ.</i> , 577 F. Supp 3d 1141 (D. Or. 2021)	21
<i>Harris v. Univ. of Mass.</i> , 557 F. Supp. 3d 304 (D. Mass. 2021)	14
<i>Hopkins Hawley LLC v. Cuomo</i> , 518 F. Supp. 3d 705 (S.D.N.Y. 2021).....	17
<i>Hughes v. Lynch</i> , 2007 MT 177, 338 Mont. 214, 164 P.3d 913	10
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905)	1, 8, 11, 12, 13, 14, 15, 16, 18
<i>L.T. v. Zucker</i> , No. 1:21-CV-1034 (LEK/DJS), 2021 U.S. Dist. LEXIS 196906 (N.D.N.Y. Oct. 13, 2021).....	16, 17
<i>Lloyd v. Sch. Bd. of Palm Beach Cnty.</i> , 570 F. Supp. 3d 1165 (S.D. Fla. 2021).....	22
<i>McDermott v. State Dep't of Corr.</i> , 2001 MT 134, 305 Mont. 462, 29 P.3d 992	23
<i>Miranda ex rel. M.M. v. Alexander</i> , No. 21-535-JWD-EWD, 2021 U.S. Dist. LEXIS 183649 (M.D. La. Sep. 24, 2021)	22

<i>Plumb v. Fourth Jud. Dist. Ct.</i> (1996), 279 Mont. 363, 927 P.2d 1011	12
<i>Roman Cath. Diocese v. Cuomo</i> , 141 S. Ct. 63 (2020)	15, 17
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	20
<i>S. Bay United Pentecostal Church v. Newsom</i> , 140 S. Ct. 1613 (2020)	14, 17, 18
<i>Sprunk v. First Bank Sys.</i> (1992), 252 Mont. 463, 830 P.2d 103	10
<i>Stand Up Montana v. Missoula Cnty. Pub. Sch.</i> , 2022 MT 153, 409 Mont. 330, 514 P.3d 1062	2, 24
<i>State v. Jay</i> , 2013 MT 79, 369 Mont. 332, 298 P.3d 396	25
<i>U.S. v. Downing</i> , 753 F.2d 1224 (3d Cir. 1985)	25
<i>W.S. v. Ragsdale</i> , 540 F. Supp. 3d 1215 (N.D. Ga. 2021)	17
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	22
Rules	
Fed. R. Evid. 702	25
Mont. R. App. P. 11(4)(a)	28
Mont. R. Civ. P. 12(b)(6)	3, 4, 6, 7, 10, 12
Mont. R. Civ. P. 56	9
Mont. Unif. Dist. Ct. R. 6	7

Statutes

Mont. Code Ann. § 40-6-701 (2021)..... 3, 19

Constitutional Provisions

Mont. Const. art II 3

Other Authorities

32 C.J.S. *Evidence* § 804 (2008) 25

I. STATEMENT OF ISSUES

1. Whether the District Court properly granted summary judgment to the School Districts on SUM's Substantive Due Process Claim under the deferential standard in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), that gives state authorities broad powers to act during a health emergency.

2. Whether the District Court erred in applying the rational basis test based on the determination that the mask policies do not implicate a fundamental right under Montana's Constitution.

3. Whether the District Court abused its discretion by excluding two of SUM's experts because their opinions were irrelevant.

II. STATEMENT OF THE CASE

This is Stand Up Montana's ("SUM") second appeal related to three Missoula-area School Districts' ("School Districts") decision to require students, staff, and visitors to wear face masks while in school facilities for part of the 2020-2021 and 2021-2022 school years in response to the COVID-19 pandemic.¹ The School Districts adopted the policies after considering recommendations from reputable public health authorities, including the Centers for Disease Control, the American Academy of Pediatrics, the Montana Medical Association, the State and Missoula

¹ The School Districts ended the mask requirements in February 2022, and they are no longer in effect.

City/County health agencies, and various other health care entities and practitioners. In adopting the policies, the School Districts also considered comments and suggestions from students and their parents in each school district.

In August of 2021, SUM and eight parents filed a six-count lawsuit alleging that the face mask policies violated their constitutional rights and the rights of their children. (AR001-AR0052). As part of the lawsuit, SUM filed a motion for a preliminary injunction on the grounds that the face mask rules violated the right to privacy and the right to human dignity under the Montana Constitution. After briefing and oral argument, the District Court denied the motion for a preliminary injunction. (SDR 001-016). In reaching its decision, the District Court analyzed the Constitutional claims under the rational basis test because SUM failed to make a colorable claim that the policies infringed on any fundamental rights. (SDR 017-031). SUM appealed the decision to this Court.

On August 2, 2022, this Court affirmed the denial of the preliminary injunction, finding that SUM did not make a prima facie case of showing a violation of a fundamental right to privacy or individual dignity under Montana's Constitution. *Stand Up Mont. v. Missoula Cnty. Pub. Sch.*, 2022 MT 153, 409 Mont. 330, 514 P.3d 1062. In analyzing the claims, this Court affirmed the District Court's analysis under the rational basis test – whether the policies were reasonably related to a legitimate government interest – because SUM had not made a prima facie case that the mask

policies implicated a fundamental right in Article II of the Montana Constitution. *Stand Up Mont.*, ¶ 19.

The School Districts then filed a motion to dismiss all of SUM's claims under Mont. R. Civ. P. 12(b)(6) on September 21, 2021. (AR053-AR073). SUM filed an opposition brief on October 7, 2021 (AR074-AR094), and the School Districts filed a reply on October 14, 2021. (AR095-AR107). While that motion was pending, the School Districts filed a motion in limine seeking to exclude two of SUM's purported expert witnesses from trial based on the fact that the individual plaintiffs had each testified in their depositions that their children had not been diagnosed with any of the harms SUM experts asserted were caused by wearing face masks at school. (AR189-AR193). The District Court granted the motion on November 1, 2022, and excluded their testimony from trial. (AR224-AR232).

On August 8, 2022, the School Districts filed a separate motion to dismiss Count IV of the Complaint that alleged the mask policies violated the newly enacted Mont. Code Ann. § 40-6-701 (2021), which states in pertinent part;

A governmental entity may not interfere with the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children unless the governmental entity demonstrates that the interference:

- (a) furthers a compelling governmental interest; and
- (b) is narrowly tailored and is the least restrictive means available for the furthering of the compelling governmental interest.

The School Districts filed the motion to dismiss on the grounds that requiring students to wear a face mask during a pandemic did not violate any of SUM's fundamental rights, and therefore, the strict scrutiny test set forth in that statute was inapplicable. (AR163-AR175).

On October 31, 2022, the District Court granted the School Districts' motion to dismiss five of the six counts in the lawsuit for failure to state a claim, leaving only SUM's substantive due process claim viable for trial. (AR194-AR223). As to that Count, the District Court determined that the policies were reasonably related to the School Districts' legitimate concern of stemming the spread of COVID-19. The Court, however, determined that it could not dismiss the entire claim on a Rule 12(b)(6) motion and left for trial "the narrow issue of whether Defendants' mask mandates are unreasonable or arbitrary when balanced against the purpose of slowing the spread of COVID-19." (AR203).

As COVID-19 jurisprudence evolved prior to the scheduled trial, numerous courts around the country rejected substantive due process claims where government agencies (and school districts) based masking policies on the recommendations of reputable healthcare organizations such as the CDC. Those cases held that school districts were entitled to deference in adopting face mask policies even though some commentators disputed mask effectiveness in stopping the spread of COVID-19. Given this line of cases, the School Districts filed a motion for summary judgment

on the remaining substantive due process claim. (AR233-AR275). After the filing of the briefs, SUM filed a motion to stay the trial and re-open discovery so that it could explore “dark money funding” of the CDC. (SDR 017-031).

On December 20, 2022, the District Court granted the School Districts’ motion for summary judgment on the due process claim and denied SUM’s Motion to Vacate Trial and Reopen Discovery. (AR292-AR304). Having now dismissed all claims in the Complaint, the District Court issued its final judgment on December 23, 2022, (AR305-AR306) and SUM filed this appeal on January 19, 2023.

III. STATEMENT OF FACTS

SUM has appealed the District Court’s decision granting the School Districts’ motion for summary judgment on the substantive due process claim and the School Districts’ motion in limine to exclude two of SUM’s experts.

In their summary judgment briefing, the School Districts listed the following as uncontested issues of material facts that supported summary judgment (AR239-AR241):

1. For portions of the 2020-2021 and 2021-2022 school years, each of the three School Districts adopted COVID-19 mitigation plans that included requirements that students, staff, and visitors wear cloth face coverings while in School District facilities.

2. When deciding to adopt their COVID-19 mitigation plans, each of the districts considered, among other things, masking recommendations from the Centers for Disease Control, the American Academy of Pediatrics, the Montana Medical Association, and the Missoula City/County Health Departments – all of which recommended universal masking of students, staff, teachers, and visitors to K-12 schools regardless of vaccination status.

3. Plaintiffs filed a six-count Complaint against all three school districts on Aug. 24, 2021, alleging the COVID-19 plans, and specifically the masking requirements, violated their constitutional rights and violated Mont. Code Ann. § 40-6-701 (formerly SB 400). Plaintiffs also sought a preliminary injunction.

4. Attached to the Complaint was the Declaration of Rodney X. Sturdivant, a Texas statistician whose opinion, in a nutshell, is that studies have shown that cloth face masks are not effective in stemming the spread of COVID-19.

5. The School Districts filed an Opposition to the Motion for Preliminary Injunction on August 31, 2021, and filed a Motion to Dismiss the Complaint pursuant to Mont. Rule Civ. P. 12(b)(6) the Complaint on September 14, 2021.

6. The Court denied the Plaintiffs' Motion for a Preliminary Injunction on October 1, 2021, and Plaintiffs filed an appeal with the Montana Supreme Court on October 28, 2021.

7. While the appeal was pending, the School Districts filed with the Court expert reports from former Montana epidemiologist Dr. Ed Septimus and Missoula pediatric physician Dr. Lauren Wilson. In their reports, they opine that masking is an effective tool in stemming the spread of COVID-19 and cited numerous studies supporting those opinions.²

8. On August 2, 2022, the Montana Supreme Court affirmed [the District] Court's order denying the preliminary injunction.

9. On October 31, 2022, the [District] Court granted in part the Defendant School Districts' Motion to Dismiss pursuant to Rule 12(b)(6) (Doc. 72). The [District] Court dismissed all the Counts in Plaintiffs' Complaint except for the Plaintiffs' substantive due process claim.

10. Trial is set for January 18, 2023, on the "narrow issue of whether Defendants' mask mandates are unreasonable or arbitrary when balanced against the purpose of slowing the spread of COVID-19.

² Defendants filed their reports with the Court pursuant to Mont. Unif. Dist. Ct. R. 6 which states, in part, that "expert reports will be **filed** within three months of the court's Scheduling Order."

SUM submitted its own alleged undisputed issues of facts which were basically a recitation of the significant portions of the declaration of Sturdivant. (AR275-AR284). Though Sturdivant's declaration disputes the expert opinions of Septimus and Wilson, it did not establish a contested issue of material fact regarding the critical issue of whether the Districts could reasonably rely on the prevailing public health opinions regarding the efficacy of face masks in preventing the spread of COVID-19.

The District Court granted the Motion for Summary Judgment on the substantive due process claim, finding that, under the deference given to government agencies pursuant to *Jacobson v. Massachusetts*, the School Districts' decision to adopt mask requirements was not unreasonable or arbitrary. (AR292-AR304). The Court held that SUM's expert declaration merely illustrated that uncertainty existed among some experts about the effectiveness of masks, but that uncertainty was not enough to overcome the School Districts' reliance on reputable authorities in adopting the masking plans. (AR292-AR304).

In addition to the summary judgment ruling, SUM is appealing the District Court's decision granting the School Districts' Motion in Limine to exclude the testimony of dental surgeon Kevin Hahn and speech pathologist Maija Hahn who were prepared to testify that masks caused significant oral health decline and posed risks of speech, language communication, and swallowing deficits. When deposed,

each of the parent plaintiffs denied their children have experienced or had been diagnosed with any of these maladies; as such, the School Districts moved to exclude their irrelevant testimony as there was no connection between the expert's testimony and that of the parents. The Districts also argued that the testimony would not assist the trier of fact in determining the reasonableness of the mask policies. (AR224-AR232).

IV. STANDARDS OF REVIEW

Summary Judgment: The Supreme Court reviews a district court's grant or denial of a motion for summary judgment de novo, using the same criteria applied by the district court under Mont. R. Civ. P. 56. *Corporate Air v. Edwards Jet Ctr. Mont Inc.*, 2008 MT 283, ¶ 24, 345 Mont. 336, 190 P.3d 1111 (citation omitted). Under Rule 56(c), judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Corporate Air*, ¶ 24. “A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact.” *Id.* (quoting *Arnold v. Yellowstone Mt. Club, LLC*, 2004 MT 284, ¶ 15, 323 Mont. 295, 100 P.3d 137). “The party moving for summary judgment has the initial burden of establishing both the absence of genuine issues of material fact and entitlement to

judgment as a matter of law.” *Corporate Air*, ¶ 25 (citing *Hughes v. Lynch*, 2007 MT 177, ¶ 8, 338 Mont. 214, 164 P.3d 913). If the moving party meets this burden, then the “burden . . . shifts to the nonmoving party to establish that a genuine issue of material fact does exist.” *Corporate Air*, ¶ 25 (citing *Hughes*, ¶ 8). Mere disagreement about the interpretation of a fact or facts does not amount to genuine issues of material fact. *Sprunk v. First Bank Sys.* (1992), 252 Mont. 463, 830 P.2d 103. Questions of fact can be determined as a matter of law only when reasonable minds cannot differ. *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 119, 370 Mont. 73, 300 P.3d 1149.

Motions in Limine: The Supreme Court reviews a district court's grant or denial of a motion in limine for an abuse of discretion. *Grover v. Cornerstone Constr. N.W., Inc.*, 2004 MT 148, ¶ 1, 321 Mont. 477, 91 P.3d 1278. A district court abuses its discretion if the district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Id.*

V. SUMMARY OF ARGUMENT

The District Court dismissed all but one of SUM’s claims pursuant to Rule 12(b)(6) because SUM failed to state a claim as to its claims that the mask rules violated any rights under the U.S. and Montana Constitutions. The District Court later granted the School Districts’ motion for summary judgment on SUM’s substantive due process claim, finding that the mask rules were rationally related to

a legitimate concern of addressing the spread of COVID-19 and that the rules were not unreasonable nor arbitrary. As part of its analysis, the District Court correctly found that the School Districts were entitled to deference in adopting the mask rules in the midst of a worldwide pandemic even though there was uncertainty among some authorities about the effectiveness of masks. The District Court found that as long as the School Districts based their policies on the recommendations of reputable health authorities, they were entitled to deference under *Jacobson v. Massachusetts* and its progeny. Given this deference, the District Court properly held that SUM's expert declaration alleging that masks are ineffective simply demonstrated that not all authorities agree about masking and this dispute did not create an issue of fact to present to the jury. As such, the District Court properly granted the School Districts' motion for summary judgment and dismissed the due process claim.

Further, the District Court properly applied the rational basis test because the School District policies did not implicate any fundamental rights of the parents in the upbringing or education of their children and did not violate any recognized rights of privacy or bodily integrity to the students. Given that the strict scrutiny analysis is applicable only when fundamental rights are at issue, the District Court properly analyzed the claims under the rational basis test.

Finally, the District Court properly excluded the testimony of two purported experts who intended to testify that masking harmed students by causing dental

issues and speech problems. Each of the individual plaintiffs testified that their children did not experience or were not diagnosed with problems the experts allege are caused by wearing a mask at school. Given that the testimony was not sufficiently tied to the expert opinion, the District Court properly excluded it as not relevant.

VI. ARGUMENT

A. **The District Court Properly Granted Summary Judgment on the Substantive Due Process Claim Under the Deferential Standard Set Forth in *Jacobson v. Massachusetts*.**

In analyzing SUM's substantive due process claim, the District Court considered two inquiries: first, were the mask requirements related to a legitimate governmental concern; and second, whether the means chosen by School Districts were reasonably related – or unreasonable or arbitrary -- to slowing the spread of COVID-19 (AR194-AR223) (citing *Plumb v. Fourth Jud. Dist. Ct.* (1996), 279 Mont. 363, 372, 927 P.2d 1011, 1016). The District Court found, as a matter of law, that the School Districts' policies met the first standard, i.e., that the policies were related to the School Districts' attempts to “reduce the COVID exposure for students and others who enter Missoula schools.” (AR199-AR200).

The Court, however, held that it could not dismiss the entire due process claim under the Rule 12(b)(6) standard and set a trial limited to the second prong of the substantive due process claim on “whether Defendants' mask mandates are unreasonable or arbitrary when balanced against the purpose of slowing the spread

of COVID-19.” (AR203). Prior to the scheduled trial, the School Districts moved for summary judgment on this narrow issue, arguing that even though some uncertainty about the effectiveness of masks exists among commentators, the School Districts were entitled to rely upon reputable healthcare authorities when enacting the policies under the deferential standard provided to the government in the face of a national health emergency as set forth in *Jacobson*. The District Court agreed and found as a matter of law that the policies satisfied the second prong of the due process analysis and held that they were not arbitrary or unreasonable, thereby dismissing the substantive due process claim. (AR302-AR303).

SUM asked the District Court to invade the province of scientists and public health specialists by weighing the persuasiveness of medical and scientific testimony. While SUM focused on this largely irrelevant scientific dispute between the majority of the medical and scientific community and SUM’s dissenting experts pertaining to disease prevention efficacy, the District Court properly focused on the key inquiry: whether the School Districts exercised reason in adopting the making requirements and, if so, whether the rationale was entitled to deference under the holding of *Jacobson v. Massachusetts*. In *Jacobson*, plaintiffs challenged a mandatory smallpox vaccine for healthcare workers alleging that the vaccine requirement violated their substantive due process rights. In rejecting that claim, the Supreme Court held that laws protecting the public health in the midst of an epidemic

fall well within the state’s broad powers to stem the spread of disease and announced that the government was entitled to deference in addressing a public health crisis. *Jacobson*, 197 U.S. at 26-31. The Court held that mandatory vaccine law satisfied the Constitution because it had a substantial relation to the protection of public health. Under this deference, state officials have especially broad authority when they “undertake to act in areas fraught with medical and scientific uncertainties.” *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). Courts have held that *Jacobson* “commands a deferential standard for analyzing [substantive due process] challenges to generally applicable public health measures.” *Harris v. Univ. of Mass.*, 557 F. Supp. 3d 304 (D. Mass. 2021). Applying this standard, the District Court here found that the School Districts’ mask policies were not unreasonable or arbitrary because the undisputed facts demonstrated that the School Districts adopted the mask policies by following recommendations of the CDC, the American Academy of Pediatrics, the Montana Medical Association, the Missoula City/County Health Department and other state and local health care providers and agencies, all of which had recommended universal masking of students, staff, teachers and visitors to school facilities at the time:

Therefore, the mask mandates at issue were generally applicable and adopted in reliance on the recommendation provided by objectively reputable authorities.

(AR 300).

Most school board trustees are not scientists or medical doctors, though they are vested with the responsibility of school governance, as well as the right to consult known experts to develop appropriate policies and procedures. Given that the School Districts were entitled to deference in addressing the public health efforts to curb the spread of COVID-19, the District Court found that even though SUM's expert declaration and the studies it cited offered "an alternate view on the efficacy of masking, that view does not render the Defendants' decisions arbitrary." (AR 301). Therefore, the competing views about mask effectiveness did not constitute an issue of fact that precluded summary judgment.

This decision is in accord with courts across the country that have applied the *Jacobson* deferential standard when reviewing substantive due process claims aimed at COVID-19 restrictions. For example, in *Fortuna v. Town of Winslow*, the plaintiff argued his substantive due process rights were violated by a mask requirement and relied upon certain studies and journal articles that concluded that masks are not effective against COVID-19. *Fortuna v. Town of Winslow*, 607 F. Supp. 3d 29 (D. Me. 2022). He argued that based on those authorities, the rules lacked a substantial relationship to public health and violated his due process rights as described by *Jacobson*. The Court rejected that claim, first finding (as the District Court here has) that stemming the spread of COVID-19 is unquestionably a compelling interest. *Id.* at 41 (citing *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020)). Further, the

Fortuna court found that despite the disagreement among experts and studies about mask efficacy, the school districts were entitled to deference about how best to balance competing policy considerations when adopting health-related policies, and the Court dismissed the due process claim:

In light of the School Defendants' duty to protect their students during this unprecedented multi-year pandemic... the Court will not second guess the School Defendants' assessment that a mask requirement would help keep their school community safe, especially as the CDC has explicitly stated that it believes masking to be an effective means of preventing the spread of COVID-19. Ultimately, the masking requirement is neither arbitrary nor oppressive and is rationally related to public health efforts to curb the spread of COVID-19 in schools.

Id. at 49.

Other courts have also quickly disposed of substantive due process claims attacking mask requirements. In *L.T. v. Zucker*, the court dismissed such a claim even though the plaintiff presented an industrial hygienist expert's testimony that masks are not effective in stemming COVID-19. *L.T. v. Zucker*, No. 1:21-CV-1034 (LEK/DJS), 2021 U.S. Dist. LEXIS 196906 (N.D.N.Y. Oct. 13, 2021). There, the Court found that this testimony simply established that scientific uncertainty and that a debate between experts exists in the face of an ongoing public health crisis. Further, the court restated *Jacobson's* admonition that courts must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic:

Given the many reliable sources that establish masks as an effective means to stop the spread of COVID-19, the expert testimony provided by Plaintiffs at most establishes scientific uncertainty and a debate between experts in the face of an ongoing public health crisis. The Constitution “principally entrusts the safety and the health of the people to the politically accountable officials of the States.” *S. Bay*, 140 S. Ct. at 1613. In such a situation, courts “must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic.” *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 74 (2020).

L.T., 2021 U.S. Dist. LEXIS 196906, at *27-28.

State authorities must be able to “rely on recommendations given by reputable public health authorities such as the CDC and WHO in the face of an ongoing pandemic.” *Id.* at *28 (citing *W.S. v. Ragsdale*, 540 F. Supp. 3d 1215 (N.D. Ga. 2021)); *see also Family Freedom Endeavor v. Riley*, Nos. 147563, 2179CV00494, 2021 Mass. Super. LEXIS 505 (Nov. 16, 2021) (finding mask requirements in schools bear a substantial relation to the protection of public health even though plaintiffs provided an expert declaration from an epidemiologist who opined masks were not effective); *Forbes v. Cnty. of San Diego*, No. 20-cv-00998-BAS-JLB, 2021 U.S. Dist. LEXIS 41687 (S.D. Cal. Mar. 4, 2021) at *13 (plaintiff’s contentions disputing the scientific basis for the mask rules are simply not enough to state a plausible claim that the rules are not rationally related to a legitimate government interest); *Hopkins Hawley LLC v. Cuomo*, 518 F. Supp. 3d 705, 715 (S.D.N.Y. 2021) (plaintiff’s assertion that a COVID-19 policy went against the grain of scientific proof did not satisfy the due process claim requirements).

It is undisputed in this case that the School Districts considered the recommendations of the CDC and numerous other reputable healthcare agencies when adopting the face mask requirements. Under the cases cited herein, the fact that SUM has found an expert to testify that masks are not effective in stemming the spread of COVID-19 is not enough to create an issue of fact that defeats the summary judgment entered by the District Court. The School Districts were entitled to deference in deciding how best to combat the spread of COVID-19 in their school facilities. On this topic, Chief Justice John Roberts cautioned earlier this year in *S. Bay United Pentecostal Church*, when “officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad,” and “they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.” *S. Bay*, 140 S. Ct. at 1613-1614 (addressing temporary numerical restrictions on public gatherings to combat COVID-19).

Given the *Jacobson* deference afforded to the School Districts in attempting to stem the spread of COVID-19, SUM’s proffered expert testimony is insufficient to undermine the rational basis supporting the School Districts’ adopted policies. The District Court did not err in granting the School Districts’ motion for summary judgment simply because SUM was able to point to a minority of competing studies about the efficacy of masks in combatting COVID-19.

B. The Mask Policies Did Not Implicate Any Fundamental Rights. Therefore, the Rational Basis Test is Appropriate.

In evaluating the mask policies, the District Court found that the mask policies bore a rational relationship with the School Districts’ legitimate interest in containing the spread of COVID-19 and the policies were neither unreasonable nor arbitrary. The District Court used this rational basis test finding that the policies did not implicate or infringe on any fundamental constitutional right. *Driscoll v. Stapleton*, 2020 MT 247, 401 Mont. 405, 473 P.3d 386 (strict scrutiny applies only if a fundamental right is affected). SUM assigns error to this analysis by arguing that the mask policies infringe on their parental rights and the students’ privacy and bodily integrity rights – two arguments that the District Court properly rejected.

1. The Mask Requirements Do Not Infringe Upon Any Recognized Fundamental Rights of Parents.

The District Court, this Court, and the parties have agreed that parents have certain fundamental rights when it comes to their children and their education. The District Court, however, rejected SUM’s assertion that the mask requirements interfere with the parents’ “fundamental rights to direct the upbringing, education, health care, and mental health of their children” because sending a child to school without a mask in violation of a school policy designed to stem the spread of a communicable disease was not such a fundamental right. *See* Mont. Code Ann. § 40-6-701 (2021). In reaching that decision, the District Court partially relied on this

Court’s decision affirming the denial of the preliminary injunction motion wherein the Court cited several cases that rejected the argument that school mask mandates infringed on a fundamental right of parents:

[Plaintiffs] . . . do not . . . present an argument regarding how Parents’ rights to control their children’s health and upbringing are violated in the context of Parents exercising that right by enrolling their children in the public schools, a legal issue commonly at center in challenges to masking policies. *See generally Fortuna v. Town of Winslow*, No. 1:21-cv-00248-JAW, 2022 U.S. Dist. LEXIS 104678, at *37–38 (D. Me. June 13, 2022) (“Once his child is in school, Mr. Fortuna’s parental rights must be measured against the equal rights of other parents to control their children and the duty of the school to provide a safe environment for all children, not just Mr. Fortuna’s child, and for others who work or volunteer in the school.”)(citations omitted); *Doe v. Dall. Indep. Sch. Dist.*, 194 F. Supp. 3d 551, 562 (N.D. Tex. 2016) (“[T]he right to choose what sort of school a child will attend and the right to have input on [discrete school policies] . . . are cut from different cloth. The former is almost self-evidently a fundamental decision about the child’s education, while the latter is, at best, a ‘component of the educational process’ that Doe is attempting to ‘mask . . . with the trappings of a fundamental right and then elevate . . . to the status of a fundamental right.”)(citations omitted); *Bentonville Sch. Dist. v. Sitton*, 643 S.W. 3d 763, 771 (Ark. 2022) (“Parents do have a liberty interest in shaping their child’s education . . . [But] the District’s [masking] policy is not, ‘beyond all question, a plain, palpable’ violation of the parents’ constitutional rights to care for their children.” (citations omitted); *see also Doe v. Franklin Square Union Free Sch. Dist.*, 568 F. Supp. 3d 270 (E.D.N.Y. 2021).

Stand Up Mont., ¶ 29.

These cases are supported by other courts that have rejected the same arguments SUM makes here. There are limits to what parents can demand of their public schools. *Runyon v. McCrary*, 427 U.S. 160 (1976) (“parents may not replace

state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society but ... the state may posit (educational) standards”). Other courts reiterated that parents do not get to control all aspects of a child’s public education:

[O]nce parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished and they do not have a fundamental right generally to direct how a public school teaches their child.

Fields v. Palmdale Sch. Dist. 427 F.3d 1197, 1206-07 (9th Cir. 2005) (citations omitted). Applying these precepts, other courts in the age of COVID have rejected the precise claim Plaintiffs make here: that parents have a Constitutional right to demand that their children be allowed to violate a face-covering mandate as part of their parental rights. See *Gunter v. N. Wasco Cnty. Sch. Dist. Bd. of Educ.*, 577 F. Supp. 3d 1141 (D. Or. 2021). In *Gunter*, the court held:

Plaintiffs’ general right to direct their children’s education is an insufficient basis to show that their right to preclude their children from wearing masks during a pandemic is a fundamental right.

Id. at 1156. Parents simply do not have a fundamental right to refuse to abide by a face-covering mandate. *Doe v. Franklin Square Union Free Sch. Dist.*, 568 F. Supp. 3d 270, 291 (E.D.N.Y. 2021) (“[L]ike a physician with a patient, a parent may justifiably be expected to act in the child’s best interest. But it is that very motivation—laudable in itself—that might lead the parent to misjudge what is best

for the health of the community as a whole. That is precisely why we, as a society, have entrusted public institutions to make such decisions”). *See also Miranda ex rel. M.M. v. Alexander*, No. 21-535-JWD-EWD, 2021 U.S. Dist. LEXIS 183649 (M.D. La. Sep. 24, 2021) (noting that “there is no fundamental constitutional right to not wear a mask”); *Alan v. Ige*, 557 F. Supp. 3d 1083 (D. Haw. 2021) (dismissing challenge to a statewide face covering-mandate with prejudice because such mandates “do not infringe on fundamental rights”); *Lloyd v. Sch. Bd. of Palm Beach Cnty.*, 570 F. Supp. 3d 1165 (S.D. Fla. 2021) (school board’s mask requirement did not implicate any of the parents’ fundamental rights).

These cases demonstrate that although parents have some fundamental rights to direct the upbringing, education, health care, and mental health of their children, the mask requirements in schools did not infringe on any fundamental parental right. In addition, the U.S. Supreme Court has cautioned against recognizing new fundamental rights under the Due Process Clause. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended”). Given this admonition from the Supreme Court, finding that parents had a fundamental right to send their children to school without a mask during a pandemic would be an inappropriate expansion of fundamental rights under the Due Process Clause. Given that no fundamental rights

are at stake, the strict scrutiny test SUM advances as District Court error simply does not apply.

2. The School Districts' Mask Requirements Did Not Infringe upon Any Fundamental Privacy or Bodily Integrity Rights.³

As it did in the appeal of the preliminary injunction denial, SUM argues that the mask requirements violated students' fundamental privacy and bodily integrity rights and that it should have been allowed to present studies and testimony that masks are not useful in stopping the spread of COVID-19 at trial to show the policies did not satisfy the strict scrutiny requirement that the policies served a compelling state interest and were narrowly tailored⁴. The argument was flawed when this Court reviewed the first appeal, and it remains flawed today because SUM is attempting to apply principles and Montana case law governing private medical decisions to public health regulations.

At the crux of SUM's claims is the argument that face masks constitute medical treatment and requiring masks interferes with students' ability to obtain or reject medical treatment. This Court has already found as unpersuasive SUM's arguments (which are based on the same expert declaration advanced on this appeal)

³ This Court fully explored and found unpersuasive the claim that mask mandates implicate Montana's right to privacy or dignity in its previous opinion. *Stand Up Mont.*, ¶¶ 11-23. The analysis is equally applicable to the current appeal.

⁴ Under this standard, the challenged law must be narrowly tailored to further a compelling state interest. *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 31, 305 Mont. 462, 29 P.3d 992.

that requiring face masks constitutes a regulation of private medical decisions as described in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 and *Gryczan v. State* (1997), 283 Mont. 433, 942 P.2d 112 and their progeny. *Stand Up Mont.*, ¶ 15. This Court succinctly rejected that argument:

Beyond the simple assertion that refusing to wear a mask is akin to rejecting medical treatment, Appellants have not yet demonstrated that schools requiring face masks to ensure the safety and health of students, visitors, and staff voluntarily on public property during a recognized pandemic implicates the same private decisions addressed in our precedent.

Stand Up Mont., ¶¶ 15-16. That holding is still applicable. SUM's argument that it should have been allowed to present its experts at trial to testify that masking is ineffective or harmful is predicated on the incorrect assertion that refusing to wear a mask at schools during a pandemic is a student's fundamental right. As this Court and the District Court have held, Supreme Court precedent does not support this assertion that the mask policies violate the student's fundamental right of privacy or bodily autonomy. The fact that SUM's expert does not believe masks are effective is simply irrelevant to whether a fundamental right is implicated here.⁵ And if no fundamental right is at stake, the strict scrutiny test SUM suggests is not applicable.

⁵ SUM's opening brief purports to cite additional mask effectiveness studies it claims supports its argument that summary judgment was inappropriate. Appellant's Opening Brief at 42-46. These studies simply affirm that there is scientific debate about masking efficacy, which is not enough to create a question of fact for a trial.

C. The District Court Properly Granted the District Court’s Motion in Limine on Two of SUM’s experts.

As part of their argument that the use of face masks in schools harmed students’ health, SUM submitted affidavits from dental surgeon Kevin Hahn and speech pathologist Maija Hahn who were prepared to testify that masks caused significant oral health decline and posed risks of speech, language communication, and swallowing deficits. In preparation for trial, the School Districts deposed each of the Plaintiff parents about the experiences their children had wearing masks while at school. Under oath, the parents all denied that the children had experienced or were diagnosed with any of the maladies the Hahns ascribe to mask use. As such, the School Districts moved to exclude the Hahns from testifying because their testimony was not relevant. The District Court agreed, noting that:

Even if a proffered expert is deemed qualified and their field reliable, not all expert testimony will “assist” the trier of fact. *State v. Jay*, 2013 MT 79, ¶ 29, 369 Mont. 332, 298 P.3d 396....[L]ike all evidence, expert testimony must still be relevant. Accordingly, the Montana Supreme Court has noted that “in order for expert testimony to be relevant there must be a connection between the expert’s [testimony] and fact testimony.” *Id.* at ¶ 29 (quoting 32 C.J.S. Evidence § 804, at 465 (West 2008) (emphasis added); *accord U.S. v. Downing*, 753 F.2d 1224, 1242 (3rd Cir. 1985) (stating “[a]n additional consideration under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the [finder of fact] in resolving a factual dispute.”) (emphasis added); *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex.2002) (same).

(AR228).

SUM's only argument on appeal is that the District Court erred because the Hahns' testimony would be relevant if the District Court had used the strict scrutiny analysis. This is incorrect. First, no matter what level of constitutional scrutiny is applied in this case, the fact remains that the parents who are suing the School Districts for requiring their children to wear masks at school testified that their children have not experienced or have not been diagnosed with the harms the Hahns ascribe to mask use. The Hahns' testimony is simply irrelevant because their claims that masks cause all these dental and respiratory issues it is not sufficiently tied to the facts of the case. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (“An additional consideration under [the rules]—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute”).

Second, SUM's argument fails because, as the courts have held, policies requiring the use of masks in schools do not implicate a fundamental right that would trigger the strict scrutiny analysis SUM suggests rendering the Hahns' testimony irrelevant and unlikely to assist the trier of fact in deliberations. Given these reasons, the District Court did not abuse its discretion in excluding the Hahns' testimony, and this Court should affirm the District Court's motion in limine ruling.

VII. CONCLUSION

Given the deference afforded to the School Districts to develop health and safety policies to stem the spread of COVID-19 in their schools, the Supreme Court should affirm the District Court's order granting them summary judgment on the substantive due process claim. As the mask policies do not infringe on any recognized fundamental right, the strict scrutiny standard SUM advances is inapplicable. Finally, the District Court properly excluded irrelevant expert testimony in this case. The School Districts request that this Court affirm the decisions of the District Court.

DATED this 29th day of June, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(a), I hereby certify that this Appellee's Response Brief is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and the word count excluding tables and certificates is 6570 as calculated by Microsoft Word.

DATED this 29th day of June, 2023.

By: /s/ Kevin A. Twidwell
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CERTIFICATE OF SERVICE

I, Kevin A. Twidwell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-29-2023:

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