

IN THE SUPREME COURT OF THE
STATE OF MONTANA

Case No. DA 23-0046

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

Plaintiffs/Appellants,

vs.

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.

APPELLANTS' OPENING 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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STATEMENT OF THE ISSUES

1. Whether the district court committed prejudicial legal error when it applied the rational basis test rather than strict scrutiny in resolving the due process claims of Stand Up Montana (SUM).
2. Whether the disputed facts of face masking efficacy require a trial to resolve the strict scrutiny test.
3. Whether expert evidence of harm to students is relevant to a parents' fundamental right to control the care and custody of their children and students' fundamental right to personal integrity and a public education, or to resolve SUM's substantive due process claims otherwise.

STATEMENT OF THE CASE

This action arises from one originally filed in Missoula County. The complaint in *Stand-Up Montana et al. v. Missoula County Public Schools et al.*, Cause No. DV-21-1031 was filed on August 23, 2021. The action challenged the implementation of forced masking in Missoula County Public Schools. (AR0001-0029.) The Complaint states six causes of action, including substantive due process (Count I) under which SUM contends that its members' children have a constitutional

right to bodily integrity and that the MCPS mask mandates violate their liberty interest in that right. (AR000019-20.) The Complaint further alleges under Count IV, (AR0023,) that SUM's parent members have a right, under Mont. Code Ann. § 40-6-701, to direct their children's mental health. The Complaint also alleges that MCPS students have a fundamental right to privacy (Count III, AR022) and to human dignity (Count V, AR025).

A motion for preliminary injunction was then filed on August 27, 2021, and was fully briefed on September 16, 2021. An order denying the motion was issued on October 1, 2021. On appeal, the decision was affirmed, and the case was remanded for further proceedings in an opinion issued on August 2, 2022. *See Stand Up Montana v. Missoula Cnty. Pub. Sch.*, 2022 MT 153, 409 Mont. 330, 514 P.3d 1062.

On September 21, 2021, MCPS filed a motion to dismiss all claims for failure to state a claim. (AR053.) The motion was supported by a principal brief the same day. (AR057.) SUM filed an answer brief opposing the motion on October 7, 2021. (AR074.) MCPS's filed a reply brief on October 14, 2021. (AR095.)

On February 23, 2022, MCPS filed a motion in limine (AR108) regarding certain expert witness testimony SUM disclosed for consideration at trial. SUM filed an answer brief opposing the motion on September 8, 2022 (AR181), and Defendants responded on September 21, 2022 (AR189).

MCPS filed a motion to dismiss Count IV of the Complaint on August 8, 2022, along with a supporting brief. (AR163; AR166.) SUM filed an answer brief on the motion on September 8, 2022. (AR175.) MCPS filed its reply brief on September 21, 2022. (AR184.)

On October 31, 2022, the district court granted in part and denied in part MCPS's motion to dismiss for failure to state a claim and granted its motion to dismiss Count IV. (AR194-223.) The district court recognized that it would be inappropriate to dismiss SUM's substantive due process claim on a motion to give the facts asserted by SUM. (Order RE Defs' Mot. to Dismiss at 10 (AR2303). The district court determined that the rational basis test applied to SUM's claims in that regard. (*Id.* at 13-14 (AR206-07.)

On the claim under § 40-6-701, MCA, the district court recognized that parents have a fundamental right to control the care and custody

of students. (*Id.* at 19 (AR212) (citing *In re B.J.J.*, 2019 MT 129, ¶ 28, 396 Mont. 108, 443 P.3d 488).) But it rejected—after taking no evidence—SUM’s factual allegation that mask mandates “actually have a negative impact on a child’s health and education.” (*Id.* at 22 (AR215) (quoting SUM’s factual assertion).) The district court ruled that such harm implicates no fundamental right of either parent or student. (*Id.*) As for privacy, the district court reasoned that mandatory masking does not impair bodily integrity, regardless of the allegation that it impairs student health and education. (*Id.* at 17-23 (AR210-216).) The district court set the case for a bench trial on the “narrow issue under Plaintiff’s substantive due process claim.” (*Id.* at 30 (AR223).)

The next day the court issued an order granting the motion in limine. In so ruling, it rejected SUM’s evidence from a dentist and a speech pathologist describing the risks of physical, psychological, and educational harm masking imposes on students, holding that evidence of such harms is “not relevant.” Order Granting Mot. in Limine at 3-7 (AR226-230.) Upon the district court’s rulings, a sole cause of action—Count I—remained, and the only evidence it deemed admissible were

the opinions of Rodney X. Sturdivant, Ph.D. (See Sturdivant Declar., attached, inter alia, as Ex. A to SUM's complaint. (AR0030-0052.)

On November 10, 2022, the Defendants' filed a motion for summary judgment on substantive due process (Count I), arguing that the school district's masking decisions did not violate the Plaintiffs' right to substantive due process. (AR233-274.) The motion was fully briefed on December 16, 2022, and the court issued an order granting the motion for summary judgment on December 20, 2022. (AR292-304.) The final judgment was entered on December 23, 2022, and a timely appeal was entered on January 19, 2022.

STATEMENT OF FACTS

MCPS filed a motion to dismiss under Mont. R. Civ. P. 12(b)(6). (AR163.) The Rule requires that the facts of the complaint are to be taken as true. The district court's order granting summary judgment on Count I of SUM's complaint relied on the same facts as the order granting the motion to dismiss. As the district court put it: "A full background in this matter was outlined in this Court's Order Re: Motions to Dismiss. That order, issued on October 31, 2022, resulted in the dismissal of all claims

except for the Plaintiffs’ substantive due process claim.” (Order RE Defs’ Mot. for Summary J., at 7 (AR292).)

The balance of the lower court’s factual analysis states:

The Defendants argue that judgment as a matter of law on this issue is appropriate because the competing evidence put forward by the Plaintiffs regarding the efficacy of masking does not create a material question of fact. The Defendants’ argument hinges on their assertion that the mask mandates were adopted in reliance on reputable health authorities. In response, the Plaintiffs argue that judgment as a matter of law is not appropriate because they have put forward evidence that the mask mandates did not prevent the spread of the virus and had a negative effect on students’ well-being and education. In their Complaint, the Plaintiffs relied on the declaration of Rodney X. Sturdivant, Ph.D., for this assertion. However, in their response brief, they cite studies that overwhelmingly focus on the effects of masking on learning and mental health—not efficacy. These studies, even when coupled with the other studies Plaintiffs put on the record, cannot withstand summary judgment under the *Jacobson v. Massachusetts* standard.

(Order RE Defs’ Mot. for Summary J., at 7 (AR0243).)

Those facts SUM “put on the record” are as follows:

1. U.S. Centers for Disease Control (CDC) statistics show that Covid-19 is not much of a threat to schoolchildren. Its numbers show that more people under the age of 18 died of influenza during the 2018–19¹ flu season—a season of it labeled of “moderate severity” that lasted eight months—than have died of Covid-19 across more than 18 months.² (Complaint, ¶ 17, AR004.)

¹ <https://www.cdc.gov/flu/about/burden/2018-2019.html> (last visited 24 AUG 21)

² https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm (last visited 24 AUG 2021)

2. Both data and science suggest such a mandate for widespread and universal use is not justified or effective. (Complaint, ¶ 18, AR004, citing Declaration of Rodney X. Sturdivant, PhD., ¶¶ 42-65 (Aug. 11, 2021) (Sturdivant Declar.), attached to the Complaint as Ex. A (see, AR30-AR52).)

3. When the United States Centers for Disease Control (CDC) and public health officials suddenly shifted from the well-established scientific positions about the marginal effectiveness of masks, there was little to no new evidence of effectiveness. At that time, the entire justification for the CDC guidelines rested on asymptomatic spread concerns. In the time since, new studies have even cast doubt on how much impact asymptomatic people play in transmission. A recent study involving contact tracing of over 3400 close contacts of 391 confirmed cases found only 0.3% attack rate among asymptomatic cases compared to 3.3% for those with mild symptoms (or 10 times less). The rate increases further as symptoms become severe to 5.6% and 6.2% for those with moderate or severe symptoms. A remarkably large study, testing over 10 million people, in Wuhan China found “there was no evidence of transmission from asymptomatic positive persons”. They found 303 cases, all asymptomatic, and traced 1,174 close contacts. (Sturdivant Declar. ¶ 43 AR040.) (Complaint, ¶ 19, AR006.)

4. The ineffectiveness of masks was well known prior to 2020 as stated in a New England Journal of Medicine perspective from May 2020: “We know that wearing a mask outside health care facilities offers little, if any, protection from infection... In many cases, the desire for widespread masking is a reflexive reaction to anxiety over the pandemic.” (Sturdivant Declar. ¶ 44, AR039.; Complaint, ¶ 20, AR007.)

5. The evidence prior to 2020 is captured in a review by the World Health Organization (WHO). In 2019 they completed a systematic review of the scientific literature for all NPIs. The thorough study found 10 studies, all randomized control trials (RCTs), of sufficient scientific quality for meta-analysis. They

concluded that “there was no evidence that face masks are effective in reducing transmission of laboratory-confirmed influenza.” They rated the quality of the evidence as “moderate” – this highest rating of available evidence for any of the 16 NPIs analyzed. Additional studies, particularly in the community settings, were suggested to increase the quality. Two such studies: The Marine Corps study mentioned previously (*id.*, ¶ 40) and the “Danish Mask Study” significantly add to the quality of the literature, specifically in the community setting. (Sturdivant Declar. ¶ 45, AR041.; Complaint, ¶ 21, AR007.)

6. Support for mask effectiveness is largely based on laboratory studies. The evidence even in that setting, however, is at best inconclusive. The problem is that cloth and surgical masks allow particles the size of Covid-19 through. A 2009 study of small particles involving 5 different surgical masks concludes for “included particles in the same size range of viruses confirms that surgical masks should not be used for respiratory protection.” A more recent study considered small particles and used human volunteers to test masks. The very best-case mask filtered 70% of particles with others filtering less than 50%. Another study, done even before Covid, measured the filtering efficacy and the size of mask pores particularly, concluding very poor filtering made worse with wear time and washing of the masks. The airborne nature of Covid-19 means that this performance is not effective when exposure is more than brief to the virus. The studies cited here involve surgical masks, likely better than most cloth masks worn by people. Further, the time of wear and proper use is also likely better in the studies than when people wear masks for many hours. (Sturdivant Declar. ¶ 46, AR041.; Complaint, ¶ 22, AR008.)

7. Translating results from a lab setting to conclude similar rates of spread reduction requires evidence. A significant ability of masks to reduce spread in the entire population is not supported by data and science. Attempts to find data supporting this hypothesis have been particularly lacking in scientific rigor. A study of 1083 counties in the US which showed a decrease in

hospitalizations after mask mandates had to be withdrawn as rates actually increased shortly after publication. (Sturdivant Declar. ¶ 47, AR041.; Complaint, ¶ 23, AR 009.)

8. Even if masks filter some percentage of particles, the number of such particles is far greater than needed to cause a serious infection. An infectious dose of COVID-19 is approximately 300 particles. The number of particles emitted in a single minute of speaking is greater than 700,000. Even a 50% reduction would have no impact on transmissibility. (Sturdivant Declar. ¶ 48, AR042.; Complaint, ¶ 24, AR009.)

9. The WHO, in 2020, changed recommendations about mask use quite suddenly in June or July. They published an “interim guidance” document on December 1, 2020, to discuss their new guidelines. The first key point of this document states “a mask alone, even when it is used correctly, is insufficient to provide adequate protection or source control.” Later they reiterate this point and add a mask “is insufficient to provide an adequate level of protection for an uninfected individual or prevent onward transmission from an infected individual (source control).” They remarkably then continue on to recommend use “despite the limited evidence of protective efficacy of mask wearing in community settings.” (Sturdivant Declar. ¶ 49, AR042.; Complaint, ¶ 25, AR009.)

10. The WHO interim guidance suffers from some additional shortcomings. For example, they mention studies that “use country or region-level data” to support mask effectiveness but fail to point out that most of those reports have since been invalidated by surges in cases and that there are other studies such as those discussed subsequently that show no effect. (Sturdivant Declar. ¶ 50, AR042.; Complaint, ¶ 26, AR010.)

11. The CDC “scientific” support for mask use has been particularly troubling. Guidance prior to 2020 in pandemic planning documents was consistent with that of the WHO. Without any additional evidence the CDC recommended masks

and have since attempted to produce support for this change in policy. None of their work would pass rigorous scientific peer review. A study involving counties in Kansas suffers numerous flaws, most notably use of large counties for the mask group and small counties for the non-mask, thus inflating the amount of change in virus spread due to lower denominators. Further, the study authors' carefully select the time frame; examining the same counties over a longer time frame removes the effect. A more extensive study was performed of mask mandates and their relationship to hospitalizations, using the time period March 1 – October 17, 2020 in very similar fashion to the retracted study mentioned previously. Despite the clear and dramatic increase in hospitalizations almost immediately after the study time period, which completely invalidates the study conclusions, the CDC did not retract the study and, in fact, published it in early February 2021. (Sturdivant Declar. ¶ 51, AR042.; Complaint, ¶ 27, AR010.)

12. Additional evidence from the CDC includes primarily laboratory studies with flaws as noted previously. In one such study the authors note major “leakage jets” for cloth and surgical masks. A second notes an issue of the mask actually breaking the larger droplets into smaller particles that they were unable to measure, which would essentially aerosolize the virus. (Sturdivant Declar. ¶ 52, AR043.; Complaint, ¶ 28, AR011.)

13. Additional evidence in the CDC scientific brief is based on simulations or models rather than actual data or flawed observational studies some of which are basically anecdotal. None would rise to the WHO 2019 standard for evidence. Examples include a study in New York which begins at a time well after the incidence of cases had already begun to fall. There is no discernable change to the case trend after mask use began. Another considers Arizona from January to August 2020. The study is another that should be retracted – not long after the study timeframe the incidence rates increased in both counties with and without mask use. The “hairdresser” study is included as evidence despite a host of flaws: all reports are purely anecdotal, there is no control group, and less than 50% of clients

actually responded. Further, some reported getting sick just not testing for Covid. (Sturdivant Declar. ¶ 53, AR043.; Complaint, ¶ 29, AR011.)

14. Perhaps the greatest evidence that mask use in the community is ineffective is provided by two guidance documents published by the CDC during the pandemic. The first was a notice about the use of masks for protection against wildfire smoke that is titled “Cloth masks will not protect you from wildfire smoke” and continues the masks “do not catch small, harmful particles in smoke that can harm your health.” Covid particles are significantly smaller than smoke particles. The second was a recent study in support of wearing two masks. The study itself is scientifically flawed; a laboratory study using mannequins. The authors note the significant limitations and suggest the findings should not be interpreted as “being representative of the effectiveness of these masks when worn in real world settings.” The study is at least a tacit admission that mask use has not been effective in reducing transmission of the virus. (Sturdivant Declar. ¶ 54, AR043.; Complaint, ¶ 30, AR012.)

15. A basic principle of scientific hypothesis testing of the effectiveness of interventions is that they should demonstrate clear and convincing evidence that they “work.” Finding examples of success should not be difficult for an effective medical intervention. The opposite is clearly the case with community use of face masks – studies of effectiveness are extremely limited and reduced increasingly to a very small group that are the exceptions rather than the rule. Proving that something “doesn’t work” is statistically and scientifically difficult. However, the preponderance of evidence from the pandemic indicates no effect. (Sturdivant Declar. ¶ 55, AR044.; Complaint, ¶ 31, AR013.)

16. A growing body of data and literature published in 2020 supports what was available prior to Covid. A meta-analysis of 10 different studies since 1946 concludes “We did not find evidence that surgical-type face masks are effective in reducing laboratory-confirmed influenza transmission, either when worn by

infected persons (source control) or by persons in the general community to reduce their susceptibility.” Another examining 15 randomized trials concludes “Compared to no masks, there was no reduction of influenza-like illness cases or influenza for masks in the general population, nor in healthcare workers.” A third meta-analysis included both randomized trials and observational studies, a total of 31, and concluded “evidence is not sufficiently strong to support widespread use of facemasks as a protective measure against COVID-19.” (Sturdivant Declar. ¶ 56, AR044.; Complaint, ¶ 32, AR013.)

17. The European CDC, in similar fashion to the WHO December 2020 update, conducted an extensive review of evidence regarding mask wear. As with the WHO review they found “limited evidence on the effectiveness...in the community” and yet continued to recommend use. (Sturdivant Declar. ¶ 57, AR045.; Complaint, ¶ 33, AR 014.)

18. In 2020 two more randomized trials including a control group added to the quality of available evidence documented by the WHO. The first, by C. Raina MacIntyre, *et al.*, involved hospital workers with the group wearing cloth masks actually having a significantly higher rate of lab confirmed influenza-like illness than a group wearing no masks. The study also examined the penetration rates finding over 97% of particle penetration in cloth masks and 44% in medical masks. A more recent study involves Covid-19 spread in Denmark. The study found a non-significant difference in the control and mask groups (2.1% compared to 1.8% positive) when high quality surgical masks were worn. The difference was even smaller when they considered participants who reported the highest compliance with mask use. (Sturdivant Declar. ¶ 57, AR045.; Complaint, ¶ 34, AR014.)

19. Numerous studies of data during the Covid pandemic confirm the known science prior to 2020. An extremely extensive Cochrane review of over 60 studies found that face mask use did not reduce case either in the general population or among healthcare workers. A quasi-experimental study of European data

similarly concludes “requiring facemasks or coverings in public was not associated with any independent additional impact.” Despite pressure to retract for fear their article would be used to “support non-mask wearing” researchers from the University of Illinois stood by an article showing that the data does not support mask efficacy. (Sturdivant Declar. ¶ 58, AR045.; Complaint, ¶ 35, AR015.)

20. The evidence of mask use effectiveness is such that there are even studies that show a negative impact. The study by C. Raina MacIntyre et al mentioned previously (*id.*, ¶ 58) was conducted pre-COVID but showed an actual increase in infection with cloth masks in a hospital setting. A more recent review noted a similar conclusion. Physical and chemical attributes of respiration through a mask may scientifically describe reasons for increases in infections. (Sturdivant Declar. ¶¶ 59-60, AR045.; Complaint, ¶ 36, AR015.)

21. Empirical evidence overwhelmingly confirms the scientific literature. While observational, the data should not be ignored. Mask effectiveness should not be hidden in what actually occurs. A comprehensive study of all counties in the U.S. shows that the difference in Covid-19 outcomes in those with mandates is not only not different than those without mandates, but actually worse. As an example, comparing similar large counties in Florida there were 64 cases per 1,000 in mask mandate counties, and in those without only 40 per 1,000. The results are the same in almost every state where there were counties with and without mandates to compare. Similar results were found looking more broadly: for example, at the state level the numbers were 27 per 100,000 with mask mandates and only 17 for no mandates. (Sturdivant Declar. ¶ 61, AR046.; Complaint, ¶ 37, AR015.)

22. The evidence from states, counties and countries worldwide is remarkably consistent. Mask use, which reached very high levels well before the winter virus season, had no discernable impact on the virus outcomes when considering trends – in fact, cases increase dramatically often after or in spite of

increased mask wear. Comparisons of the disease trajectory for like countries/counties consistently depict remarkably similar trajectories despite various level of mask mandates and usage. (Sturdivant Declar. ¶ 62, AR046.; Complaint, ¶ 38, AR016.)

23. The example of mask use is important for several reasons. First, there are potential consequences to extended mask use, both physiological and psychological. Studies are just beginning to emerge of actual physical harms from mask wear. Other studies have found issues with oxygen saturation levels, which impact healthy immune systems. This issue could actually lead to increased susceptibility to Covid and other viruses long term. Other risks include foreign particles causing lung damage and microbial infections. (Sturdivant Declar. ¶ 63, AR046.; Complaint, ¶ 39, AR016.)

24. Harms of mask wear for children is an increasing concern. While children are at very low risk of infection and tend to spread the virus at a much lower rate, masks have also become common for school openings. One is a large study in Germany among over 25,000 children and reports impairments such as headache in over 50%, fatigue (37%), difficulty concentrating (50%), and irritability (60%), among others. A second documents both the risks for children from Covid and a substantial number of harms from mask wear. (Sturdivant Declar. ¶ 64, AR047.; Complaint, ¶ 40, AR017.) A second impact of mask mandates is removing the freedom to choose from individuals and without compelling scientific evidence or data to support such a restriction. Other restrictions are often similarly unsupported. Such mandates are one size fits all, therefore ignoring clear situations where a mask is not needed – for example, for people with immunity. A third issue is that the mask debate itself proves a distraction from other policies and decisions that have had devastating consequences. Finally, mandates that are ineffective done in the name of “science” erode the public trust and potentially contribute to poor response when scientifically justified interventions are recommended by government agencies and health officials, such as a potentially effective and safe vaccine

should one be developed. Public distrust of medical professions and actual science/data increases with potentially detrimental impacts. (Sturdivant Declar. ¶ 65, AR047.; Complaint, ¶ 41, AR017.)

25. Missoula County Public Schools all imposed universal mask mandates requiring all students 0-19 years of age to wear cloth face coverings or masks when indoors on Defendants' campuses. (Complaint, ¶ 42, AR018.)

For its part, in its brief supporting the motion for summary judgment, MCPS also put undisputed facts on the record:

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 requiring students, staff, and visitors to wear cloth face coverings while in School District facilities. (AR239.)

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. (AR239.)

3. 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. (AR240.)

4. 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 cite numerous studies supporting those opinions. (AR240.)

Nowhere in the record does MCPS seriously dispute the evidence proffered by SUM establishing the harm caused to students by mask mandates, stating instead that it knows of no such evidence. (E.g., AR270: “There is limited research on the effects of face masks on children.”) Meanwhile, SUM offered evidence below from a dentist (AR126) and a speech pathologist (AR127-AR128) setting forth long lists of harms caused to children and tending to establish that masking mandates cause all kinds of medical, psychological, and educational damage to students. MCPS never countered this evidence, arguing instead it was simply irrelevant. (Br. in Support of Def.s Mot. in Limine at ¶6 (AR115).) The district court agreed, ruling:

Here, after the Court’s Order Re: Motions to Dismiss, the central issue in this matter is whether Defendants’ mask mandates were reasonably related—or unreasonable and arbitrary—to slowing the spread of COVID-19. Accordingly, whether masking children leads to oral health decline or causes deficits in speech, language communication, or swallowing is not sufficiently tied to the facts. Stated another way, testimony concerning whether masking causes the maladies outlined by the Hahns’ proffered testimony (e.g., tooth decay, halitosis, speech impediments) will not assist the Court in resolving the factual dispute, which is centered around the reasonableness of the mandates as related to the goal of stopping COVID-19. Further, Plaintiffs’ depositions

make clear that none of their children were formally diagnosed with or experienced such maladies.

(Order Granting Defendants' Motion in Limine at 5-6 (AR228-29.)

Thus, the district declined to recognize, or at least consider, the undisputed risk of harm to students imposed by mask mandates and dismissed the case without considering such risks. Doing so constitutes prejudicial error.

STANDARDS OF REVIEW

Summary judgment. The Court reviews a district court summary judgment ruling de novo for conformance to the applicable standards specified in Mont. R. Civ. P. 56. *Dick Anderson Constr., Inc. v. Monroe Prop. Co.*, 2011 MT 138, ¶ 16, 361 Mont. 30, 255 P.3d 1257. Summary judgment is proper only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). A genuine issue of material fact is a fact materially inconsistent with proof of an essential element of a claim or defense at issue. *Mt. W. Bank, N.A. v. Mine & Mill Hydraulics, Inc.*, 2003 MT 35, ¶ 28, 314 Mont. 248, 64 P.3d 1048. The party seeking summary judgment has the initial burden of showing a complete absence of any genuine issue of material fact on the Rule 56 record and that the movant is

accordingly entitled to judgment as a matter of law. *Weber v. Interbel Tel. Coop.*, 2003 MT 320, ¶ 5, 318 Mont. 295, 80 P.3d 88. The Rule 56 factual record includes “the pleadings, the discovery and disclosure materials on file, and any [supporting] affidavits” submitted. Mont. R. Civ. P. 56(c)(3). The burden then shifts to the opposing party to either show the existence of a genuine issue of material fact precluding summary judgment or that the moving party is nonetheless not entitled to judgment as a matter of law. *Osterman v. Sears, Roebuck & Co.*, 2003 MT 327, ¶ 17, 318 Mont. 342, 80 P.3d 435 (citing *Bruner v. Yellowstone Cty.*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)).

Motions in limine. A district court's ruling on a motion in limine is an evidentiary ruling that is reviewed for an abuse of discretion. *Alexander v. Bozeman Motors, Inc.*, 2012 MT 301, ¶ 22, 367 Mont. 401, 291 P.3d 1120.

SUMMARY OF THE ARGUMENT

The district court granted Defendant’s motion to dismiss as to all counts but one. Later, the district court dismissed SUM’s remaining substantive due process claim on summary judgment.

The district court’s dismissal rejected SUM’s allegations that masks cause physical, psychological, and educational harm to students—even though the standard required the district court to accept SUM’s facts as pleaded. The district court then granted MCPS’s motion for summary judgment on substantive due process by applying the wrong test—rational basis—leading it to erroneously conclude that there were disputed material facts and judgment therefore appropriate as a matter of law.

In short, the court ruled that since MCPS relied on “reputable authorities,” it enjoyed discretion in imposing mask mandates regardless of the allegations of harm to students. But this was the wrong test. MCPS’s infringement on the fundamental rights of parents and students requires the application of strict scrutiny. Applying strict scrutiny and given the factual dispute (which the district court recognized but rejected), entry of summary judgment under a rational basis test was legally erroneous.

Strict scrutiny applies because MCPS’s mask mandates infringe upon the fundamental individual rights of SUM’s members, parents, and students, requiring the highest level of constitutional review.

MCPS mask mandates infringe upon the fundamental parental rights to control the care and custody of their children. The mandates infringe upon fundamental student privacy rights and their right to human dignity. And because of the trinity of harms it causes to students—physical, psychological and educational—forced masking infringes on students’ fundamental right to bodily integrity and a public education.

Because MCPS’s infringement on these fundamental rights requires strict scrutiny, the district court erred in applying the rational basis test when considering MCPS’s motion for summary judgment. Instead, a trial must be held on whether MCPS can show that mask mandates satisfy the elements of strict scrutiny: narrowly tailored to serve a compelling government interest by the least restrictive means. The factual issue of whether masks are efficacious will control. If not, then forced masking does not serve a compelling government interest, is not narrowly tailored, and is not the least restrictive means of pursuing the goal of stemming the spread of COVID-19. A fact finder must weigh the competing evidence of masking efficacy before a final conclusion can be drawn.

As a final issue, the district court's rejection of SUM's allegations of the triad of harm to students led it to bar expert evidence of those harms. Applying the proper test, however, evidence of student risk created by forced masking is relevant in that it tends to establish a violation of fundamental rights. As a result, the district court's order in limine barring evidence of the risk is reversible error.

Accordingly, SUM requests the Court to reverse the district court orders dismissing SUM/s claims grounded in substantive due process and to remand the case with instructions for the district court to hold a trial to consider the evidence for SUM's allegations of physical, psychological and educational harm to students, and the alleged efficacy of forced masking. In doing so, the Court should further clarify, that the burden of sustaining strict scrutiny must fall upon MCSP.

ARGUMENT

- 1. The district court based its allowance of MCPS's summary judgment motion on the wrong test—rationale basis—leading it to erroneously conclude that there are no disputed material facts and, as a matter of law, MCPS had the discretion to impose mask mandates.**

Count I of the complaint states a cause of action for violating substantive due process. MCPS first filed a motion to dismiss the

claim. (See, Defendants’ Motion to Dismiss and Defendants’ Brief in Support of Motion to Dismiss, (AR163-174).) In addressing the requested dismissal of the substantive due process claim, the court did not consider strict scrutiny—although both parties raised and argued it. (E.g., Brief in Support of Def.’s Mot. to Dismiss at 4-7 (AR169-172); Plfs’ Answer B. In Opp. to Defs’ Mot. to Dismiss at 4-5 (AR178-179).) Instead, the district court ruled the rational basis test should be applied to resolve the substantive due process issue. (Order RE Mot. to Dis., at 7-10 (AR200-203).) Still, it denied the motion to dismiss as to SUM’s substantive due process claim, concluding that the matter was sufficiently well-pleaded to proceed on the merits under the Rule 12(b)(6) standard. (AR205.)

MCPS then filed a motion for summary judgment on the issue (AR233-274), which the district court granted. (AR292-304.) In its summary judgment order, the district court ruled that masking may harm children, as SUM plead and as the testimony of Dr. Sturdivant states, and as the other authorities relied upon by SUM supports. (*See e.g.* AR298 (“Plaintiffs argue ... they have put forward evidence that the

mask mandates did not prevent the spread of the virus and had a negative effect on students' wellbeing and education.).)

But misapprehending the standard, the district court then held that the fact that MCPS relied on reputable authorities for imposing the mask mandates meant that MCPS did not violate substantive due process. At the crux of its ruling, the district court held:

L.T. v. Zucker presents similarities to the facts here. ***The parties have competing experts and competing studies.*** The Defendants argue that masking is an effective way to slow the spread of COVID-19, while the Plaintiffs argue that it is not. ***As in L.T. v. Zucker, this simply establishes uncertainty among experts.*** Under the deferential Jacobson standard, uncertainty is not enough to overcome the Defendants' imposition of the mask mandates and their reliance on reputable authorities in making that decision. In other words, while Mr. Sturdivant's declaration and the studies cited therein offers an alternate view on the efficacy of masking, that view does not render the Defendants' decisions arbitrary. Therefore, under the second prong of the substantive due process analysis, the mask mandates at issue were reasonably related to slowing the spread of COVID-19.

(AR301 (emphasis added).)

Thus, the district court concluded that the uncertainty among experts required it to defer to the choices of the school officials. (Order RE Defs' Mot. for Summary J., at 9-10 (AR300-301).) "This is true even though the Plaintiffs submitted contradictory materials." (*Id.* at 9.)

The fact disputes were not material in the district court’s analysis because, under the rational basis test, “the expert’s testimony simply established that scientific uncertainty and a debate between experts existed in the face of an ongoing public health crisis and that under such circumstances substantial deference must be given to state and local authorities.” *Id.* Because the district court did not regard the factual dispute as material under the rational basis test, it entered summary judgment in favor of MCPS. (*Id.* at 12 (AR303).)

The district court, however, applied the wrong test. As demonstrated below, the rational basis test does not apply. The court should have applied strict scrutiny. Under strict scrutiny, the competing expert witness testimony on the efficacy of masks and the risk of harm mask mandates cause for students creates a material fact dispute that must be resolved with a trial.

- 2. MCPS’s infringement on the fundamental rights of parents and students requires the application of strict scrutiny, and given the factual dispute, entry of summary judgment was legally erroneous.**
 - A. MCPS mask mandates infringe upon the fundamental individual rights of SUM’s members, parents, and students, requiring the application of strict scrutiny.**

(i) *MCPS mask mandates infringe upon the fundamental parental rights to control the care and custody of their children and fundamental student rights to bodily integrity.*

SUM's members—parents—have a fundamental constitutional right to make decisions concerning government care and custody that puts their children at medical, psychological, and educational risk. *See Polasek v. Omura*, 2006 MT 103, ¶¶ 14, 332 Mont. 157, 136 P.3d 519 (citing *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060 (2000)). Moreover, the “the fundamental right of a parent to make decisions regarding the care of their children, including, among other things, the ‘upbringing, *education, health care, and mental health* of their children’ referenced in § 40-6-701, MCA, is likewise protected under both the federal and Montana constitutions.” *SUM Montana v. Missoula Cnty. Pub. Sch.*, 2022 MT 153, ¶ 28, 409 Mont. 330, 345, 514 P.3d 1062 (holding that the district court did not abuse its discretion in denying SUM's request for a preliminary injunction, emphasis added).

Similarly, the Due Process Clause of the United States Constitution protects individual liberty interests, not the least of which is “bodily integrity.” *Washington v. Glucksberg*, 521 U.S. 702, 719-20, 117 S. Ct. 2258, 2265 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390, 43

S. Ct. 1110 (1942); *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952)); *see also Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977) (“Among the historic liberties [protected by the Due Process Clause] was a right to be free from ... unjustified intrusions on personal security.”); *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957) (“right of an individual that his person be held inviolable”).

Montana law is the same. “Montana's constitutional right to privacy ‘broadly guarantees each individual the right to make medical judgments affecting her or his *bodily integrity and health* in partnership with a chosen health care provider free from government interference[,]’” *Planned Parenthood of Montana v. State by & through Knudsen*, 2022 MT 157, ¶ 20, 409 Mont. 378, 515 P.3d 301 (citing *Armstrong v. State*, 1999 MT 261, ¶ 39-40, 296 Mont. 361, 989 P.2d 364) (emphasis added); *see, Gryczan v. State*, 283 Mont. 433, 451, 942 P.2d 112, 122 (1997). As this Court noted in SUM’s earlier appeal of the preliminary injunction issues, the Montana Constitution's right of privacy “guarantees each individual the right to make medical judgments affecting her or his *bodily integrity and health* in

partnership with a chosen healthcare provider free from the interference of the government.” *SUM Montana*, at ¶ 12 (citing *Armstrong*, ¶ 75, emphasis added). No exception exists, so far as SUM’s research has disclosed, that excludes primary and secondary students from the right to bodily integrity.

On this record, substantial evidence indicates that students who are forced to wear masks all day at school face a variety of risks that would not exist but for the mask mandates. (Sturdivant Declar., ¶¶ 63-64 (AR0046-47).) According to SUM’s expert dental surgeon, risks of physical harm include increased tooth decay, gingivitis, halitosis, peri-oral conditions, xerostomia, orthognathic deformities, malocclusion of teeth, jaw development issues, jaw joint dysfunction, speech, and swallowing disorders. (Aff. of Dr. Kevin Scott Hahn, D.D.S. (AR126).) Masks also impair proper hydration in students. (*Id.*) Educational risks include delayed speech and language development caused by the students’ inability to properly see and hear their educators that can persist for years; mouth breathing; increased risk of speech and articulation disorders; and special risks of harm for autistic students and others with special needs and developmental delays like sensory

processing disorder or neurological deficits. (Aff. of Maija C. Hahn, M.S., CCC-SLP, (AR0127-AR128).) Because it jeopardizes the well-being of students, mask mandates in schools infringe upon parental rights to control the care of their children and student rights to personal integrity. These are fundamental rights. (See discussion of caselaw above.)

(ii) The MCPS mask mandates infringe upon fundamental student privacy rights.

“The right to individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” Mont. Const. Art. II, Sec. 10. The Montana Constitution affords citizens broader protection of their right to privacy than does the federal constitution. *Gryczan v. State*, 283 Mont. 433, 448, 942 P.2d 112, 121 (1997). Montana’s right to privacy was intended by the delegates to the 1972 Montana Constitutional Convention to protect citizens from illegal private action and from legislation and governmental practices that interfere with the autonomy of everyone to make decisions in matters generally considered private. *Armstrong v. State*, 1999 MT 261, ¶ 35, 296 Mont. 361, 989 P.2d 364.

The Court first addressed the personal autonomy aspect of the right to privacy in *Gryczan*, in which it held that the right encompasses the right of consenting adults to engage in same-gender sexual conduct. *Gryczan*, 283 Mont. at 455-56, 942 P.2d at 126. Two years later, in *Armstrong*, the Court noted that no final boundaries can be drawn around the personal autonomy component of the right to individual privacy. *Armstrong*, ¶ 38. The delegates decided not to define the right by design, reasoning that doing so would constrain the right and eliminate future areas of protection to be developed by the courts. *Id.*, ¶ 36 (citing Montana Constitutional Convention, Verbatim Transcript, March 9, 1972, p. 1851). As described by the Court:

[T]hat the delegates deliberately drafted a broad and undefined right of ‘individual’ privacy was more a testament to and culmination of Montanans’ continuous and zealous protection of a core sphere of personal autonomy and dignity than it was an attempt to create a greater right than that which already existed by historical precedent. [The right to privacy] is, at one and the same time, as narrow as necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy by the government—as in *Gryczan*—and as broad as are the State’s ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular.

Id., ¶¶ 36, 38.

The parents and the students have a right to privacy in deciding what physical, psychological, and educational risks they choose to take. Masks may not constitute medical devices, and whether to mask may not be a decision about medical treatment—but forced masking has a heavy impact on students' best interests and physical, psychological, and educational well-being. The principles upon which the *Grykzan* and *Armstrong* decisions rest equally apply here.

(iii) MCPS's infringement on fundamental rights requires strict scrutiny.

Given that the fundamental rights of both the parents and students are at stake, the test of “strict scrutiny” applies in this case. *See Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 154, 104 P.3d 445. “Upon satisfaction of the challenging party's initial burden to show substantial interference with a fundamental constitutional right, the burden shifts to the government or other defending party to demonstrate that the challenged statute survives strict scrutiny.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 39, 401 Mont. 405, 473 P.3d 386.

Strict scrutiny, moreover, is an exacting standard for a government entity to meet. As this Court held in *Malcomson*,

“legislation that infringes the right of privacy must be reviewed under a strict scrutiny analysis. The subject statute must be justified by a compelling state interest and be narrowly tailored to effectuate that purpose.” *Robinson v. State Comp. Mut. Ins. Fund*, 2018 MT 259, ¶ 19, 393 Mont. 178, 430 P.3d 69 (*Malcomson v. Liberty Northwest*, 2014 MT 242, ¶ 23, 376 Mont. 306, 339 P.3d 1235). *See also, e.g., Hamlin Constr. & Dev. Co. Inc. v. Montana Dep't of Transportation*, 2022 MT 190, ¶ 36, 410 Mont. 187, 521 P.3d 9; *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 16, 366 Mont. 224, 286 P.3d 1161; *State v. Nelson*, 283 Mont. 231, 941 P.2d 441 (1997).

B. The district court erred in entering summary judgment because a trial must be held on whether MCPS can show that mask mandates satisfy strict scrutiny.

In the two-step strict scrutiny analysis, step one is conceded. Mitigating COVID-19 is unquestionably a compelling government interest. *E.g., SUM*, ¶ 20 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206, 141 S. Ct. 63, 67 (2020)). This issue here is whether the record reflects a dispute of material fact on whether mask mandates in schools are narrowly tailored to serve the compelling interest.

To begin the analysis, SUM contends that the presence of an emergency is an insufficient reason to abandon the system of checks and balances or for the judicial branch of government to relax its constitutional diligence. The principle that “[g]overnment is not free to disregard the [Constitution] in times of crisis” applies in full force during the COVID-19 pandemic. *Roman Catholic Diocese of Brooklyn* 141 S. Ct. at 69 (Gorsuch, J., concurring). For example, the United States Supreme Court applied this fundamental principle to governmental limits in the face of the COVID-19 pandemic. In November 2020, during the height of the emergency, the Supreme Court set the standard in *Roman Catholic Diocese of Brooklyn*, when it enjoined the enforcement of an executive branch order in New York imposing occupancy restrictions on attendance at religious services in areas heavily affected by COVID-19. The Court held that “*even in a pandemic*, the Constitution cannot be *put away and forgotten*.” *Id.* at 68 (majority opinion, emphasis added). In its analysis of the applicants' likelihood of success on the merits, the Supreme Court found it problematic that houses of worship—spaces where people practice their

constitutional right to the free exercise of religion—faced more restrictions than businesses categorized as “essential.” *Id.* at 66–67.

“Stemming the spread of COVID-19 is unquestionably a compelling interest,” but ultimately concluded that effectuating the First Amendment's guarantees likely requires facing risks of infection while taking proper safety precautions rather than trying to avoid the threats altogether. *Id.* at 67. Thus, for example, the Supreme Court has similarly enjoined the enforcement of portions of the California Governor's tier system, including the complete prohibition on indoor worship. *Harvest Rock Church, Inc. v. Newsom*, 209 L. Ed. 2d 29, 141 S. Ct. 1289, 1290 (2021); *S. Bay United Pentecostal Church v. Newsom*, 209 L. Ed. 2d 22, 141 S. Ct. 716 (2021). In doing so, it recognized that “[e]ven in times of crisis—perhaps especially in times of crisis—we have a *duty* to hold governments to the Constitution.” *S. Bay United Pentecostal Church*, 141 S. Ct. at 718 (emphasis added).

Furthermore, mask mandates are not equivalent to imposing personal protective equipment (PPE) requirements on children. Requiring students to wear helmets or safety glasses does not put them at physical, psychological, or educational risk. But forced mask-

wearing, from evidence on the record here, does place them at risk of such harm. Mask mandates are, therefore, distinguishable from school requirements that students wear PPE in shop classes and science labs or protective gear for contact sports.

The question here is whether MCPS has produced evidence that supports the proposition that its mask mandates are narrowly tailored to serve the goal of stemming COVID-19. In this case, as the district court recognized, there is disputed evidence of the efficacy of masks in serving MCPS's goal. As the district court recognized, there is competing evidence on this point. SUM relies on a statistician who is an expert in pandemic evaluation, Dr. Rodney K. Sturdivant. Dr. Sturdivant cites, *inter alia*, a 2020 CDC meta-analysis that concludes, “*We did not find evidence that surgical-type face masks are effective in reducing laboratory-confirmed influenza*, either when worn by infected persons (source control) *or by persons in the general community* to reduce their susceptibility.”³ (See, Sturdivant Declar., ¶ 56, fn. 74

³ Citing Xiao J, Shiu E, Gao H, Wong JY, Fong MW, Ryu S, et al. *Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures*. Emerg Infect Dis. 2020;26(5):967-975. <https://doi.org/10.3201/eid2605.190994> (emphasis added).

(AR0044.) For its part, MCPS relies on an epidemiologist and a physician.

Moreover, much has changed since the parties' competing expert witness disclosures were tendered in this case. Evidence of inefficacy continues to mount. In late January of this year, the most rigorous and comprehensive analysis of scientific studies conducted on the efficacy of masks for reducing the spread of respiratory illnesses — including Covid-19 — was published.⁴ See Jefferson T, Dooley L, Ferroni E, Al-Ansary LA, van Driel ML, Bawazeer GA, Jones MA, Hoffmann TC, Clark J, Beller EM, Glasziou PP, Conly JM. *Physical interventions to interrupt or reduce the spread of respiratory viruses*. Cochrane Database of Systematic Reviews 2023, Issue 1. Art. No.: CD006207. DOI: 10.1002/14651858.CD006207.pub6.⁵ Its conclusions were unambiguous: “Compared with wearing no mask in the community studies only, wearing a mask may make *little to no difference* in how

⁴The Court is requested to take judicial notice of the fact of publication of studies bearing on the subject matter herein that have been published since final judgment was entered in the case below, which substantiates SUM's proposition that a trial should be held for a fact finder to weigh the scientific evidence. *See* Mont. R. Evi. 201(b).

⁵ <https://www.cochrane.org/news/featured-review-physical-interventions-interrupt-or-reduce-spread-respiratory-viruses>

many people caught a flu-like illness/COVID-like illness (9 studies; 276,917 people); and probably makes *little or no difference* in how many people have flu/COVID confirmed by a laboratory test (6 studies; 13,919 people).” *Id.* (emphasis added). In sum, the best available evidence-based science indicates wearing masks in the community appears to make “little to no difference” to COVID-19 transmission.

Without material efficacy, mask mandates can hardly be defined as narrowly tailored to serve any government interest, compelling or otherwise. An inefficacious policy that interferes with fundamental rights in exchange for no discernable benefit is not narrowly tailored. If a government infringement on fundamental rights serves no practical or policy purpose, it is not, by definition, the “least restrictive” infringement on the fundamental rights at issue. Nor can a substantially inefficacious infringement be fairly considered “narrowly tailored” to serve a compelling government interest.

So, the fact dispute among the experts over masking efficacy, especially in view of the extant and growing evidence of harm, is material. For example, last month, on March 2, 2023, a new study was

published in a respected journal which included the following discussion:

Seeing the overall evidence for the efficacy of masks against viral transmission within the general population, from a purely evidence-based empirical perspective, ***masks for the public may be overrated in a pandemic response.*** There is discrepancy between the evaluation of virus protection by face mask based in evidence-based criteria (low) and the anticipated efficacy by authorities and mainstream media (high).

In contrast, it is known that masks bear several side effects and risks. There is a high risk of improper handling when the mask is used by the general population and by children. A lack of correlation between school mask mandates and pediatric COVID-19 cases could recently be shown in a vast study which replicated the CDC study and extended it to more districts and for a longer period, employing seven times as much data (November 30, 2021 instead of September 4, 2021, and 1812 counties instead 565 counties). The association between school mask mandates and cases did not persist in the extended sample. Other researchers found no significant differences in SARS-CoV-2 transmission due to face mask mandates in Catalanian schools. Instead, age was the most important factor in explaining the transmission risk for children attending school. Children and pregnant women are a special subgroup more susceptible to potential negative environmental factors (e.g. toxins) because the protective/conjugative mechanisms in early life tissues are less well developed. Data on a total of 25 930 children wearing face masks for 270 min per day showed that 68% complained about discomfort. Side effects included irritability (60%), headache (53%), difficulty concentrating (50%), less happiness (49%), reluctance to go to school/kindergarten (44%), malaise (42%) impaired learning (38%) and drowsiness/fatigue (37%). In addition, in another 6-min

experimental study, the masks frequently led to breathing problems in 100 school children between 8 and 11 years of age especially during physical exertion. Despite having the lowest risk of severe disease from a SARS-CoV-2 infection, *children have endured the most disproportionate disruption to their lives in their most formative years during the pandemic.* According to some studies, the reduction in viral transmission is not a pre-eminent cause that eclipses all other *potential harms, including children's physical, psychological and psychosocial well-being.*

Kisielinski, Kai et al., *Possible toxicity of chronic carbon dioxide exposure associated with face mask use, particularly in pregnant women, children and adolescents – A scoping review*, Heliyon, Volume 9, Issue 4, e14117 (footnotes omitted, emphasis added).⁶

The record in this case includes a great deal to undermine claims for masking efficacy. The 2023 Cochrane Database of Systematic Reviews determined, the 2020 CDC meta-analysis found, and the testimony of Dr. Sturdivant supports the proposition, that mask mandates “make little or no difference” in stemming the spread of COVID-19. In view of the harm to parental and student fundamental rights caused by forced masking—including care and bodily integrity—if MCPS cannot prove to the finder of fact that masks are materially

⁶ [https://www.cell.com/heliyon/fulltext/S2405-8440\(23\)01324-5?_returnURL=https%3A%2F%2Flinkinghub.elsevier.com%2Fretrieve%2Fpii%2FS2405844023013245%3Fshowall%3Dtrue#secsectitle0120](https://www.cell.com/heliyon/fulltext/S2405-8440(23)01324-5?_returnURL=https%3A%2F%2Flinkinghub.elsevier.com%2Fretrieve%2Fpii%2FS2405844023013245%3Fshowall%3Dtrue#secsectitle0120)

efficacious, the mask mandates fail constitutional muster. In sum, a trial will be necessary to weigh competing evidence, and a factual finding must be made. And at that trial—significantly—the ultimate burden of proof will fall squarely on MCPS.

3. Evidence of student risk created by forced masking is relevant in that it tends to establish a violation of fundamental rights and, therefore, the district court’s order in limine barring evidence of the risk is reversible error.

The district court ruled that the evidence of Dr. Hahn and Counselor Hahn, cited above, supporting the claim that masks present risks for student health, mental wellness, and educational attainment, is not relevant. As is stated: “It also finds that the proffered testimony from both Mr. [*sic*] Hahn and Ms. Hahn is inadmissible—and excluded—because it is not relevant *to the remaining issue*. (Order Granting Defendants’ Mot. in Limine at 7 (AR230) (emphasis added).) At that time, however, the district court had already dismissed all counts but substantive due process in its order granting the Rule 12(b)(6) motion. (Order RE Defs’ Mot. to Dismiss (AR194-233).) And it had already ruled, in the same order, that no fundamental

constitutional rights were at issue and that it would apply the rational basis test. (*Id.*)

Whether or not the evidence of risk to students is relevant under a rational basis analysis, the district court's resort to rational review was legally erroneous, prejudicial to SUM's rights, and, consequently, reversible error. Under the correct standard—strict scrutiny—the evidence of risk of harm to students created by MCPS's mask mandates is relevant to establish the violation of parents' rights to control the health care and education of their children and the bodily integrity and right to an education enjoyed by the students. Upon remand, the district court should be directed to reconsider its order in limine in light of the appropriate constitutional analysis.

CONCLUSION

Accordingly, SUM requests the Court to reverse the district court orders dismissing SUM's claims grounded in substantive due process and to remand the case with instructions for the district court to hold a trial to consider the evidence for SUM's allegations of physical, psychological, and educational harm to students, and the alleged

efficacy of forced masking. In doing so, the Court should further clarify, that the burden of sustaining strict scrutiny must fall upon MCSP.

DATED this 27th day of April 2023.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 14(9), I certify that Appellants' Opening Brief is printed with proportionately spaced Century text typeface of 14 point and double-spaced, except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is less than 10,000 words, excluding this certificate of compliance.

/s/ Quentin M. Rhoades
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CERTIFICATE OF SERVICE

I, Quentin M. Rhoades, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-27-2023:

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Representing: Elementary District No. 1, Hellgate Elementary School District No. 4, High School District No. 1, Missoula County, Missoula County Public Schools, State of Montana, Target Range School District No. 23

Service Method: eService

Electronically signed by Abby Fegely on behalf of Quentin M. Rhoades

Dated: 04-27-2023