

IN THE SUPREME COURT OF THE  
STATE OF MONTANA

Case No. DA 21-0533

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

Plaintiffs and 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 and Appellees.

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STAND UP MONTANA, a Montana  
non-profit corporation; JASMINE  
ALBERINO; TIMOTHY ALBERINO;  
VICTORIA BENTLEY; DAVID DICKEY;  
WESLEY GILBERT; KATIE GILBERT;  
KIERSTEN GLOVER; RICHARD  
JORGENSEN; STEPEHN PRUIETT;  
LINDSEY PRUIETT; ANGELA  
MARSHALL; SEAN LITTLEJOHN; and  
KENTON SAWDY,

Plaintiffs and Appellants,

v.

BOZEMAN SCHOOL DISTRICT NO. 7;  
MONFORTON SCHOOL DISTRICT NO. 27;  
and BIG SKY SCHOOL DISTRICT NO. 72,

Defendants and Appellees.

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***APPELLEE'S ANSWER BRIEF***

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

On Appeal from the Montana Eighteenth Judicial District Court  
Gallatin County, Cause No. DV-21-975B  
Before Hon. Rienne H. McElyea

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## **I. STATEMENT OF THE ISSUES**

1. Two district courts correctly ruled that parents are not entitled to preliminarily enjoin six school districts in Missoula and Gallatin counties from requiring students, staff and visitors to wear face coverings in school during a pandemic to mitigate the spread of COVID-19 and to keep in-person learning available to students. The district courts properly found that the face covering requirements do not violate the right to privacy or human dignity under Montana's Constitution.
2. The district courts properly determined that even if the face covering rules implicate constitutional protections, the rules are public health measures and satisfy constitutional scrutiny given that they were adopted to further the interests of the school districts and the public in stemming the spread of COVID-19.
3. The district courts properly found that Mont. Code Ann. § 40-6-701 does not allow every parent of every student to decide whether a child can disregard a school's health and safety rules, including the rule requiring students, staff and visitors to wear face coverings during a health emergency.
4. The district courts correctly ruled that Stand Up Montana did not demonstrate irreparable harm and found that the school districts relied on

reputable health care sources that recommended universal face coverings for all K-12 students.

5. The district courts correctly determined that since Stand Up Montana was unlikely to succeed on the merits of its constitutional claims or that it will suffer irreparable harm, the status quo was to leave the rules in place pending trial on the merits.

## **II. STATEMENT OF THE CASE**

This school year, six separate School Districts in Missoula and Gallatin counties (as well as other non-party districts in Montana) adopted or continued from the previous year non-discretionary rules that required students, staff and visitors to wear face coverings when they were on school property as part of their school reopening plans to mitigate the spread of COVID-19.

On August 24, 2021, Stand Up Montana and certain parents (hereinafter collectively referred to as “SUM”) filed a Complaint and Motion for Preliminary Injunction seeking to enjoin the face covering requirements of three school districts in Missoula County: Missoula County Public Schools (“MCPS”), Target Range School District (“TRSD”) and Hellgate Elementary School District. (SDR 001)<sup>1</sup>. The Complaint alleges several constitutional violations, but SUM sought an

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<sup>1</sup> The Appellee School Districts refer to their Appellees’ Appendix of Record as “SDR \_\_\_\_” and Appellants’ Appendix of Record as “AR\_\_\_\_”.

injunction only on its claims that the face covering rules violate the Montana constitutional rights of privacy and human dignity.

The Missoula District Court held a hearing on the motion for preliminary injunction on September 29, 2021. The District Court issued its Findings of Facts and Conclusions of law on October 1, 2021, denying the motion for preliminary injunction and finding the rules do not infringe upon any right to privacy or the right to human dignity in Montana’s Constitution; that SUM did not demonstrate irreparable harm; and that the granting the injunction would not preserve the status quo and minimize the harm to the parties. (SDR 144).

SUM filed a nearly identical Complaint, Motion for a Temporary Restraining Order and Motion for Preliminary Injunction in Gallatin County against Bozeman School District No. 7 (“BSD7”), Monforton School District No. 27 and Big Sky School District No. 72 on September 16, 2021. (SDR 181). SUM alleged the rules violated Montana’s right to privacy and human dignity and further alleged that newly enacted Mont. Code Ann. § 40-6-701 gives parents of students, and not the school districts, the right to direct their children’s education, including whether their children should wear cloth face coverings in violation of school policies.<sup>2</sup> The District Court denied a motion for temporary restraining order and

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<sup>2</sup> The statute was not in effect when Missoula District Court issued its order denying the preliminary injunction motion.

held a preliminary injunction hearing on October 15, 2021. The Court issued its Findings of Fact and Conclusions of Law and Order on October 20, 2021, also denying the injunction request also finding that SUM was unlikely to succeed on the merits of its privacy and human dignity claims; that it had not demonstrated irreparable harm; that the status quo militated against issuing the injunction; and that Mont. Code Ann. § 40-6-701 is not applicable and does not allow parents the right to decide whether their children wear face coverings in violation of the face covering rules. (SDR 303-319). The District Court also held that even if Mont. Code Ann. § 40-6-701 applied to the face covering rules, the rules satisfied the strict scrutiny analysis in that the rules were narrowly tailored and furthered a compelling state interest to mitigate the spread of COVID-19. (SDR 317).

SUM appealed both district court orders and they were consolidated on appeal.<sup>3</sup>

### **III. STATEMENT OF FACTS**

After weathering a year of school closures and part-time, in-person instruction, the Board of Trustees at each of the School Districts adopted reopening plans for the 2021-2022 school year that included universal face coverings in schools. The School Districts adopted their reopening plans after extensive public

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<sup>3</sup> During the appeal four of the original plaintiffs in Missoula case withdrew as parties.

and parent comment at public meetings and after considering local and state COVID-19 infection rates and after considering recommendations from the Centers for Disease Control, the American Association of Pediatricians (“AAP”), the Montana APA (“MAPA”), the Montana Nurses Association and local health departments. All of these entities relied on reputable studies and recommended in-school face coverings for K-12 students.

Additionally, each of the School Districts narrowly tailored their rules to provide exceptions to the rules and allowed for the relaxation of those rules based on a continual examination of COVID-19 transmission rates and recommendations from appropriate health care agencies. The non-discretionary face covering requirements at each School District remained in effect during the Fall 2021, but toward the middle or end of winter 2022, each district has relaxed their requirements, making face covering use optional for students, staff and visitors, as COVID-19 case counts decreased in the state and in their districts. Currently, wearing face coverings is optional at each of the School Districts.

**A. The Missoula County Face Covering Rules.**

*i. Missoula County Public Schools Face Covering Rules*

For the 2020-2021 school year, MCPS operated on a hybrid instruction model that included separating students into cohorts and providing part-time, in-person learning and off-site instruction for the first part of the year. MCPS required

students, staff, volunteers and visitors to wear face coverings, and it was able to offer in-person instruction for students four to five days a week depending on grade level before the end of that school year. (SDR 134 (Aff. Robert Watson ¶ 4 Aug. 31, 2021)).

On August 10, 2021, a majority of the MCPS Board of Trustees voted to continue the face covering requirement for a minimum of six weeks for the 2021-2022 school year. (SDR 136 (Aff. Watson ¶ 9)). The rule continued to require face coverings for all students, staff, volunteers and guests while indoors and on school busses. (SDR 136 (Aff. Watson at ¶ 9)). Under the rule:

- Face coverings were not required outdoors;
- Face coverings were not required when an individual is eating or drinking;
- In some circumstances, staff could lower a face covering while teaching, presenting, speaking or providing directions as long as they can maintain appropriate distance (6ft) from others. This decision was be left to the discretion of the individual staff member. However, staff members were to use face coverings when working with small groups or individual students;
- Staff members who were alone when working could remove their face coverings;
- Opportunities were be provided for students for routine “mask breaks” as determined by staff members provided appropriate distancing was be maintained.

(SDR 136 (Aff. Watson at ¶ 9)).

The Board adopted the rule after receiving public comment and a recommendation from the school administration and the MCPS COVID-19 task

force, which is comprised of district personnel, trustees, union representatives, parents, public health professionals and community members. It also relied upon the recommendations from the CDC, the APA, the MAPA and the Missoula County Health Department in adopting the rules.

The Board adopted the rule for a minimum of six weeks with the proviso that the District will routinely review the rules that may be altered depending on the local incident rate, local vaccination rate by age group and district data related to school associated positive cases and transmission. (SDR 136 (Aff. Watson at ¶ 10)).

*ii. Target Range School District Face Covering Rules*

For the 2020-2021 school year, TRSD operated on a hybrid instruction model that included separating students into cohorts and providing part time in-person learning and off-site instruction for part of the year. (SDR 115 (Aff. Heather Davis Schmidt ¶ 4 Aug. 27. 2021)). TRSD required students, staff, volunteers and visitors to wear face coverings, and it was able to offer in-person instruction for students five days a week before adjourning for summer break. (SDR 115 (Aff. Davis Schmidt ¶ 4.))

Based upon a recommendation from the TRSD District Covid-19 Task Force and the superintendent (and after receiving comments from parents and community members and responses to an anonymous survey,) on August 16, 2021, the TRSD

Board of Trustees adopted a school reopening plan that includes the following rules regarding face coverings:

- All students, staff, visitors, and volunteers would wear face coverings while indoors (except while eating, drinking, and during vigorous physical activity);
- All students, staff, visitors and volunteers would wear face coverings while on busses;
- Face coverings were optional while outdoors;
- Face coverings were required during indoor extracurricular activities including sports with the exception that face coverings were optional for athletes who were actively playing on the court and participating in the game.

(SDR 118 (Aff. Davis Schmidt ¶ 9.))

The District did not place a time limit on its requirement for face coverings, but the District's COVID-19 Task Force and Board of Trustees agreed to review the rules and requirements monthly and to make changes as COVID-19 circumstances evolve. (SDR 120 (Aff. Davis Schmidt ¶14)).

*iii. Hellgate Elementary School District Face Covering Rules*

During the 2020-2021 school year, Hellgate Elementary School District required students, staff and visitors to wear face coverings and was able to offer in-person instruction the entire year. (SDR 124 (Aff. Douglas Reisig ¶ 3 August 27, 2021). On August 23, 2021, upon the recommendation of the Superintendent and after significant public comment, the Board of Trustees approved a requirement for 2021-2022 that all students, staff members and visitors wear a face covering over



their mouths and noses for the first six weeks of class while in doors and school busses. (SDR 125 (Aff. Reisig ¶ 7)) The rule also states face coverings were not required for students:

- During breakfast/lunch opportunities;
- When classes were held outside and social distancing could be established;
- During student recess;
- During physical education classes when the square footage of the physical education gymnasium allowed for appropriate social distancing and minimized continuous contact that exceeds 15 minutes;
- During music classes when facilities allowed for appropriate social distancing and minimized continuous contact exceeding 15 minutes within the 6 ft. threshold; and
- During numerous daily scheduled face covering break opportunities for students.

(SDR 125 (Aff. Reisig ¶ 7)) .

The requirement was adopted for six weeks (or 27 school days) to allow adequate time to gather data about continued infection rates. The District agreed to make adjustments to the rules if necessary based on the average daily case rates in Missoula County. (SDR 130 (Aff. Reisig ¶ 18)).

## **B. The Gallatin County Face Covering Rules.**

### *i. Bozeman School District*

For the 2020-2021 school year, BSD7 operated on a hybrid instruction model where it provided part-time in person learning and part time offsite learning. It offered students in pre-kindergarten through fifth grade five days of in-person

learning using a cohort model starting in November 2020. Students in grades six through eight moved to five days of in-person instruction on February 1, 2021, and high school student moved to a schedule of four days of in-person learning and one day of offsite learning on January 27, 2021. Students, staff, volunteers and visitors were required to wear face coverings in district facilities (SDR 263 (Aff. Casey Bertram ¶ 3 Aug. 27, 2021)).

In 2020, BSD7 established a COVID-19 advisory task force that monitored health data, CDC guidelines, Gallatin County health data and specific BSD7 COVID-19 data in making decisions on how the District should respond to COVID-19. The task force met on July 8, 2021, to consider recommendations for the 2021-2022 school year and again on August 11, 2021, due to new and updated guidance being issued and rising community COVID-19 transmission. Upon the recommendation of the task force and the superintendent, a majority the trustees approved Policy No. 1905 which set the rules for face coverings on August 23, 2021. (SDR 264-265 (Aff. Bertram ¶ ¶ 7-11)).

The rule allowed the superintendent to establish or lift face covering requirements based on multi-week trends in associated grade band COVID-19 transmission using the “high” rate of transmission as defined by the CDC. (SDR 266 (Aff. Bertram ¶12)). The policy provided exemptions for face coverings when:

- Consuming food or drink
- Engaging in strenuous physical activity;

- Communicating with someone who is hearing impaired;
- Identifying themselves, receiving medical attention, are precluded from safely using a face covering due to a medical or developmental condition;
- Giving a speech or class presentation or course lesson; and
- Conducting a performance if there is at least six feet of distance from the gathering, class or audience.

(SDR 266 (Aff. Bertram ¶ 12)).

The trustees considered COVID-19 transmission data in the District and county, recommendations of the CDC, the AAP, MAAP, guidance issued by the U.S. Department of Education on reopening schools, which recommended “[m]ask-wearing and distancing where possible in non-fully vaccinated communities and school settings, in line with CDC K-12 guidance;” guidance received from Gallatin City-County Health Department Health Officer Lori Christenson and a local pediatrician. (SDR 267 (Aff. Bertram ¶ 14)).

In addition, the Board of Trustees received hundreds of emails and heard hours of public comment at its meetings on August 16 and 23, 2021. (SDR 267 (Aff. Bertram ¶ 17)). BSD7 continued to offer remote learning option for students and continued to monitor community and district COVID metrics to make changes to the policy when they were needed. (SDR 270-271 (Aff. Bertram ¶ 17-20)).

*ii. Big Sky School District Face Covering Rules.*

For the 2020-2021 school year, Big Sky School District operated on a hybrid instruction model that included placing students in cohorts, attending 50 percent of

the school week in person and receiving instruction online 50 percent of the remaining week. By the end of the school year, the District was open for in-person instruction for students five days a week. Throughout the year, the District offered a 100-percent remote option for students to participate in instruction with classmates virtually. (SDR 277 (Aff. Dustin Shipman ¶3 Sep. 27, 2021)). The District required students, staff, visitors to wear face coverings for the 2020-2021 school year. (SDR 277 (Aff. Shipman ¶4)).

Consistent with the District's desire to offer regular, in-person instructions for students for the 2021-2022 school year, the superintendent recommended to the Board of Trustees that it adopt a face covering policy. At the August 24, 2021, trustees meeting, the Board considered public comment that included comment made during the meeting as well as comments provided by email prior to the meeting. A majority of the Board adopted Policy 1905 requiring face coverings at that meeting. (SDR 278 (Aff. Shipman ¶¶7-9)).

Under Policy 1905, all staff members, volunteers, visitors, and students aged five (5) and older were required to wear a disposable or reusable face covering that covered the nose and mouth to protect colleagues and peers while present in any school building. Face coverings were not required when an individual was:

- consuming food or drink;
- engaged in physical activity;
- communicating with someone who is hearing impaired;
- receiving medical attention; or

- has a medical or developmental condition precluding use of a face covering.

(SDA 278-279 (Aff. Shipman ¶ 10)).

Policy 1905 also incorporated the requirement that students must wear face coverings on buses. The Centers for Disease Control (CDC) had also issued an order requiring face coverings on school buses.<sup>4</sup> (SDR 279 (Aff. Shipman ¶ 11)).

In making the recommendation to the Trustees, the superintendent considered the face covering recommendations from the CDC and the recommendation from the Gallatin City-County Health Department made to school districts within the county to follow CDC guidance regarding face coverings.

(SDR 280 (Aff. Shipman ¶13)).

The District continued to monitor COVID-19 transmission rates in Gallatin County, and continued to consider accommodations for students with disabilities, which may include medical conditions with respect to face coverings. (SDR 280 (Aff. Shipman ¶14-15)).

### *iii. Monforton School District Face Covering Rules*

During the 2020-2021 school year, Monforton School District required students, staff and visitors to wear face coverings and was able to offer in-person instruction the entire year. It also offered remote instruction for students who

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<sup>4</sup> <https://www.federalregister.gov/documents/2021/02/03/2021-02340/requirement-for-persons-to-wear-masks-while-on-conveyances-and-at-transportation-hubs>.

preferred that teaching modality. (SDR 289-290 (Aff. Darren L. Strauch ¶ 4-5 Sep. 29, 2021)). It used a cohort model for learning which limited interaction of students between classes and grades. (SDR 290 (Aff. Strauch ¶ 6)).

For the 2021-2022 school year, the District adopted a re-opening plan for full-time, in-person instruction five days per week to operate the schools as “normal” as possible that allowed for increased student interaction. (SDR 290 (Aff. Strauch ¶ 7)). This included adopting a policy that face coverings were optional. However, given a spike in COVID-19 cases shortly after school started with the face covering-optional policy, the Trustees held an emergency meeting on September 7, 2021, at which time the superintendent recommended that the District re-institute a face covering mandate based on case counts, COVID-19 transmission rates and recommendations from the CDC, and the Gallatin City-County Health Department. (SDR 293 (Aff. Strauch ¶ 18-19)).

A majority of the Board of Trustees adopted a face covering requirement at its September 7, 2021, meeting after hearing from the public. (SDR 294 (Aff. Strauch ¶ 20)). The Board adopted the requirement that all staff, volunteers, visitors, and school-aged students wear a face covering, or face shield while present in any school building, regardless of vaccination status. Face coverings were also required for any outdoor school activity with fifty (50) or more people

where physical distancing was not possible or is not observed. Students, staff, volunteers, and visitors were not required to wear face coverings when:

- consuming food or drink;
- engaged in strenuous physical activity;
- giving a speech, lecture, class presentation, course lesson, or performance when separated by at least six feet of distance from the gathering, class, or audience;
- communicating with someone who is hearing impaired;
- identifying themselves;
- receiving medical attention; or
- precluded from safely using a face covering, or face shield due to a medical or developmental condition.

(SDR 294-295 (Aff. Strauch ¶ 21)).

Under the policy, staff members were permitted to remove their face coverings if students and members of the public were not present, they were at their individual workstation, and social distancing of at least six feet was maintained with other staff members. (SDR 295 (Aff. Strauch ¶ 21)).

#### **IV. STANDARD OF REVIEW**

The Supreme Court reviews the denial of a temporary or permanent injunction under the deferential “manifest abuse of discretion” standard. *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 21, 341 Mont. 368, 178 P.3d 696, citing *Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912. “A manifest abuse of discretion is one that is obvious, evident, or unmistakable.” *St. James Healthcare*, ¶ 21. A district court's conclusions of law are

reviewed to determine whether its interpretation is correct. *Yockey v. Kearns Properties, LLC*, 2005 MT 27, ¶ 12, 326 Mont. 28, 106 P.3d 1185, (citation omitted).

A party seeking a preliminary injunction must establish (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in the plaintiff's favor; and (4) a preliminary injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 21, 129 S. Ct. 365, (2008); Mont. Code Ann. § 27-19-201 (2021).

“[I]njunctive relief is an extraordinary remedy not available as a matter of right . . . The grant or denial of permanent or preliminary injunctive relief is highly discretionary and critically dependent on the particular facts, circumstances, and equities of each case.”

*Davis v. Westphal*, 2017 MT 276, ¶ 23, 389 Mont. 251, 405 P.3d 73 (collecting cases); *see also Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (“A preliminary injunction is an extraordinary remedy never awarded as of right”).

Importantly here, “the limited function of a preliminary injunction is to preserve the status quo and to minimize the harm to all parties pending full trial.” *Porter v. K & S P'ship*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981); accord *Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 401 Mont. 405, 473 P.3d 386. If a preliminary injunction will not accomplish these purposes, then it should not be



issued. *Id.*; *Driscoll*, ¶ 20. A preliminary injunction does not resolve the merits of a case but rather prevents further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on its merits. *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995).

## V. SUMMARY OF ARGUMENT

Article X, Section 8 of the Montana Constitution and Montana statutes provide local school district trustees with wide latitude in determining how best to operate their districts and provide them with the authority and requirement to adopt policies addressing student health. In response to the COVID-19 pandemic, the School Districts either closed their doors to students for periods or operated on a hybrid model of in-person and on-line instruction during much of the 2020-2021 school year. For in-person instruction, the School Districts required students and others to wear face coverings to stem the spread of the virus. As part of their reopening plans for the 2021-2022 school year, the School Districts adopted multi-layered plans that included the mandatory use of face coverings based on COVID-19 case counts in their districts and upon the recommendations that all K-12 students wear face coverings by reputable sources, including the CDC, the AAP, the MAPA, the Montana Chapter of the AAP, and local health authorities.

The two District Courts correctly denied SUM's motions for a preliminary injunction to prohibit the mandatory use of face coverings until a trial on the merits could be held. The District Courts' decisions were correct because:

First, the face covering requirements do not infringe on any Constitutional right of privacy or human dignity because the face coverings are not medical devices, and the requirement to wear a face covering does not constitute compulsory medical treatment. Instead, the rules are public health measures and do not implicate fundamental private, individual health care decisions under Montana jurisprudence.

Second, even if the face covering rules somehow infringe on SUM's constitutional rights (and they do not), the imposition is minimal and the rules meet all levels of constitutional scrutiny. The rules are narrowly tailored with various exceptions, including, for example, breaks from face coverings for students when they are eating or are outside, and the rules have been constantly evaluated and altered based on COVID-19 infection rates and recommendations from reputable health care organizations. Further, the rules are rationally related to and necessary to advance a compelling state interest in mitigating the spread of a communicable disease during a pandemic.

Third, Mont. Code Ann. § 40-6-701 does not give each parent of each student the unilateral right to demand that their children be allowed to violate a

face covering mandate as part of their parental rights. Although parents may have a fundamental right to determine whether their children attend public schools, this statute does not give each and every parent veto rights over how school districts operate their schools.

Fourth, because the face covering rules do not implicate Constitutional rights, SUM did not demonstrate that the rules cause irreparable harm to SUM or students. Additionally, the School Districts relied upon reputable sources and medical and scientific studies that demonstrate that face coverings mitigate the spread of COVID-19.

Finally, the District Courts properly rejected the injunction requests because doing so would not have preserved the status quo prior to trial.

## **VI. ARGUMENT**

The District Courts' decisions should be upheld because the School Districts properly exercised their Constitutional and statutory rights to adopt health and safety rules that do not infringe on any of SUM's rights by requiring students and others in school buildings to wear a face coverings. The rules were adopted after extensive parent and public comment and were based on the medical and scientific recommendations of local, state and national health care organizations. Neither Montana's Constitution nor this Court's precedent support SUM's claims that

requiring face coverings constitutes compulsory medical treatment in violation of any recognized right to privacy or human dignity.

**A. The Face Covering Rules Do Not Implicate Any Right to Privacy or Human Dignity Under the Montana Constitution.**

Although the Montana Constitution recognizes that Montanans have a right to privacy and to human dignity, the School Districts' rules do not violate either provision because the rules are public health measures - not rules that implicate a person's individual health care decisions. Further, requiring students to wear face coverings indoors at school during an outbreak of a communicable disease does not constitute the imposition of unwanted medical care.

- i. Universal Face Covering Rules are Public Health Measures that Do Not Infringe on SUM's Privacy Rights Because They Do Not Implicate Protected Individual Health Care Decisions.*

For its argument that face covering rules violate the parents' privacy rights, SUM incorrectly relies on Montana case law that protects an individual's right to make individual health care decisions in certain circumstances. Those decisions are inapplicable here because the face covering rules were adopted as public health measures and do not implicate any recognized privacy right to make individual health care decisions.

SUM's reliance on *Armstrong v. State* is misplaced. 1999 MT 261, 296 Mont. 361 989 P.2d 364. In that case, this Court held that "Article II, Section 10 of the Montana Constitution 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.” *Id.* ¶ 14 (declaring as unconstitutional statute prohibiting a certified physician assistant from performing a pre-viability abortion when requested by an individual). The Court found that an individual’s privacy rights are not inviolate as exceptions to the rule exist. *Id.* ¶ 75. Indeed, one of those exceptions is the need to protect the public (here students, staff and visitors) from a communicable disease. *Weems v. State*, 2019 MT 98, ¶ 19, 395 Mont. 350, 440 P.3d 4 (“Montana’s constitutional right to privacy is implicated when a statute infringes on a person’s ability to obtain a lawful medical procedure,” but “not every restriction on medical care impermissibly infringes that right.”); *Mont. Cannabis Indus. Ass’n*, 2012 MT 201, ¶ 22 (individual’s “right to seek health care is circumscribed by the State’s police power to protect the public’s health and welfare.”).

In this litigation, SUM does not seek access to constitutionally protected individual health care as in *Armstrong*. Instead, as the District Courts recognized, the face covering rules were adopted as public health measures aimed at the protection of public health and safety. Such public health measures are distinguishable from the private, individual health care decisions set forth in this Court’s privacy jurisprudence, and SUM’s attempts to read into those cases a parent’s right to ignore or veto school district face covering rules are incorrect. Put

simply, SUM's privacy claim is not a right that the Court has recognized and SUM's attempts to shoehorn into those cases the ability to reject wearing a face covering at school is faulty and incorrect.

*ii. Face Coverings are Not "Medical Devices," and School Rules Requiring Their Use to Stem a Pandemic is Not Medical Treatment.*

Both District Courts properly rejected SUM's claims that the face covering rules violated their rights to privacy by taking away parents' right ability to reject medical treatment for their children, finding that face coverings are not medical devices and face covering rules do not qualify as compulsory medical treatment. (SDR 151-153; SDR 275-276).

SUM argues that the District Courts elevated form over substance when they found that face coverings are not medical devices and requiring their use does not constitute the imposition of unwanted medical decisions on them. Despite SUM's protestations to the contrary, the weight of authority supports the District Courts' rejection of SUM's arguments. The Montana Legislature amended the criminal trespass statute in 2021 making it illegal to require proof of vaccinations or the wearing of face coverings to enter publicly funded businesses and designated face coverings as medical devices. However, the more specific COVID-19 liability law

that the District Courts correctly relied upon defines face coverings as personal protective equipment, not medical devices. Senate Bill 65 states in pertinent part<sup>5</sup>:

“Personal protective equipment” includes protective clothing...face masks.”

This definition and other authorities make it clear that there is a distinct difference between calling something a medical device and requiring actual medical treatment. Medical “treatment” is defined as “management in the application of medicines, surgery, etc.” *Treatment*, Dictionary. Com (April 4, 2022), [https://www.dictionary.com/browse/treatment?s=t\\_](https://www.dictionary.com/browse/treatment?s=t_) A face covering is no more a “medical treatment” for virulent disease than a motorcycle helmet, mandated by Mont. Code Ann. § 61-9-417, is a treatment for a head injury.

This conclusion is bolstered by recent COVID-19 jurisprudence where courts across the country have repeatedly held that face coverings are not medical devices and requiring the use of face coverings does not constitute medical treatment. “This argument fails because the mask mandate “no more requires a ‘medical treatment’ than laws requiring shoes in public places.” *Gunter v. North Wasco County School District Board of Education*, No. 3:21-cv-1661-YY, 2021 U.S. Dist. LEXIS 244199, at \*24-25 (D. Or. Dec. 22, 2021); *Health Freedom Def. Fund, Inc. v. City of Hailey*, 2022 U.S. Dist. LEXIS 43547 (“The wearing of a cloth (or even medical grade) face covering is not medical treatment.”); *Doe v.*

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<sup>5</sup> <https://leg.mt.gov/bills/2021/billpdf/SB0065.pdf>

*Franklin Square Union Free Sch. Dist.*, No. 2:21-5012-FB-SIL, 2021 U.S. Dist. LEXIS 206450, at \*45 (E.D.N.Y. Oct. 26, 2021) (“While the Mask Mandate was obviously intended as a health measure, it no more requires a “medical treatment’ than laws requiring shoes in public places ... or helmets while riding a motorcycle.”); *Lloyd v. Sch Bd of Palm Beach Cnty*, no. 9:21-cv-81715-KMM, 2021 U.S. Dist. LEXIS 210628, at \*25 (S.D. Fla. Oct. 29, 2021) (“The Court agrees that the circumstance of being required to wear a face covering is distinguishable from compulsory medical treatment and the School Board’s Mask Mandate, therefore does not implicate Plaintiff’s right to bodily autonomy.”); *Zinman v. Nova Southeastern U., Inc.*, 2021 U.S. Dist. LEXIS 165341 (S.D. Fla. Aug. 30, 2021) (noting that “nor can one plausibly allege that the government is requiring medical treatment by requiring individuals to wear a face mask”); *Cangelosi v. Sizzling Caesars LLC*, No. 20-2301, 2021 U.S. Dist. LEXIS 16131, at \*5 (E.D. La. Jan. 26, 2021) (face covering requirement does not force unwanted medical treatment); *Forbes v. Cnty. of San Diego*, No. 20-cv-00998-BAS-JLB, 2021 U.S. Dist. LEXIS 41687, at \*18-19, (S.D. Cal. Mar. 4, 2021) (requiring an individual to wear a face covering “is a far cry from compulsory vaccination, mandatory behavior modification treatment in a mental hospital, and other comparable intrusions into personal autonomy. The Court also doubts that requiring people to wear a face covering qualifies as ‘medical treatment’”);



*Machovec v. Palm Beach Cty.*, 310 So. 3d 941, 946 (Fla. Dist. Ct. App. 2021)(Requiring facial coverings in public settings is the same as a state prohibiting individuals from smoking in enclosed indoor workplace and face covering mandate did not implicate the constitutional right to refuse medical treatment.)

The same analysis is applicable here. SUM’s privacy claims fail because requiring students to place a layer of cloth over their mouth and nose to stem a pandemic is not compulsory medical treatment, and this Court has not recognized any Constitutional privacy right that allows every parent of every student the ability to ignore a rule requiring the use of a face covering indoors at school.

*iii. The District Courts Properly Found that SUM Did Not Meet its Burden to Show that Face Covering Rules Violate Any Human Dignity Rights.*

Both District Courts rejected claims that requiring face coverings violate a right of “human dignity” by depriving individuals of seeing each other’s facial expressions and taking away their right to control their own medical treatment. SUM did not provide the District Courts with any case law that supports this claim because no courts have recognized this supposed right.

It is true that Article II, Section 4 of the Montana Constitution provides “[t]he dignity of the human being is inviolable.” The Montana Supreme Court has held “the plain meaning of the dignity clause commands that the intrinsic worth

and the basic humanity of persons may not be violated.” *Walker v. State*, 2003 MT 134, ¶ 82, 316 Mont. 103, 68 P.3d 872. Using human dignity as a vehicle to challenge school district rules to protect health in schools and preserve in-person instruction is far beyond the bounds of any recognized right. The rule is a far cry from what existed in *Walker*, where inmates were housed in cells with blood, feces, and vomit, were served food through the same port that toilet cleaning supplies were provided, were stripped naked and given only a small blanket for warmth, denied prescribed medication and hot food, and were given punishments that exacerbated mental illness. *See Id.* ¶¶ 77-79.

SUM’s argument that this Court has not limited the right to dignity to inmate cases misses the point that its constitutional claim is based on the faulty argument that requiring face coverings takes away parents a right to direct their children’s medical care. As noted above, the School Districts’ rules requiring face coverings does not constitute compulsory medical treatment. *See supra*. Instead, the rules are public health measures based on recommendations from medical professionals and reputable health care organizations that have reviewed the efficacy of face coverings and found them to be effective in mitigating the spread of a communicable disease. Put simply, the Court has not recognized any human dignity right that allows parents to disregard face covering rules, which were

adopted – not for the purpose of treating an individual’s health care condition -- but for the protection of the community as a whole.

**B. The Face Covering Rules Satisfy All Levels of Constitutional Analysis.**

The District Courts correctly determined that SUM did not meet its burden to establish that parents have a constitutional right to preclude their children from wearing face coverings at school during a health emergency. In reaching those conclusions, the Missoula County District Court joined a majority of courts across the country that have evaluated school face covering rules under the rational basis test<sup>6</sup>. The Gallatin County District Court found that the face covering rules

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<sup>6</sup>*W.S. v Ragsdale*, 540 F. Supp 3d 1215 (N.D. Ga. 2021)(applying rational basis review); *Stepien v. Murphy*, No. 21-CV-13271 (KM) (JSA), 2021 U.S. Dist. LEXIS 235334, at \*12-13 (D.N.J. Dec. 7, 2021)(applying rational basis review). *Doe #1 v. Del. Valley Sch. Dist.*, No. 3:21-CV-1778, 2021 U.S. Dist. LEXIS 218514, at \*48 (M.D. Pa. Nov. 11, 2021)(same); *Lloyd v. Sch. Bd. Of Palm Beach Cnty.*, No. 9:21-cv-81715-KMM, 2021, U.S. Dist. LEXIS 210628, at \*27-28 (S.D. Fla. Oct. 29, 2021)(rational basis review applied); *Doe v. Franklin Square Union Free Sch. Dist.*, No. 2:21-5012-FB-SIL, 2021 U.S. Dist. LEXIS 206450, at \*47 (E.D.N.Y. Oct. 26, 2021); *Oberheim v. Bason*, No. 4:21-CV-01566, 2021 U.S. Dist. LEXIS 188843, at \*18-19 (M.D. Pa. Sep. 30, 2021)(rational basis applied); *Guilfoyle v. Beutner*, No. 2:21-cv-05009-VAP, 2021 U.S. Dist. LEXIS 195396, at \*44-45 (C.D. Cal. Sep. 14, 2021), *Case v. Ivey*, 542 F.Supp.3d 1245, 1279–81 (M.D. Ala. 2021).

satisfied all levels of Constitutional scrutiny, including the strict scrutiny analysis that applies to fundamental rights. Both District Courts are correct.

Although this Court has recognized some rights to make individual health care decisions are fundamental under the Montana Constitution, the Court has held that not all claims that impact health care are fundamental rights. *Wiser v. State*, 2006 MT 20, ¶19, 331 Mont. 29, 129 P.3d 133. In that case, a rule requiring a referral from a dentist for patients seeking treatment from denturists did not implicate a fundamental right to obtain health care, and the Court reviewed the rule under the rational basis test, meaning that it need only be rationally related to a legitimate state interest. *Id.* Additionally, in *Mont. Cannabis Indus. Ass'n v. State*, this Court ordered the district court to use the rational basis test in evaluating privacy claims under certain provisions of the Montana Marijuana Act. 382 Mont. 297, 368 P.3d 1131. There, the Court rejected the contention that that strict scrutiny applied, finding that the privacy right expressed in *Armstrong* (the protected right to personal autonomy for women seeking abortions from particular providers) was not present in the marijuana case merely because of a claim that plaintiffs had a right to privacy to particular drug. 1999 MT 261, 296 Mont. 361 989 P.2d 364. The Court held that the right asserted by the plaintiffs there was not a recognized right under the privacy provisions of the Constitution, and that the proper analysis was the rational basis test. (SDR 154-155)

These cases teach that just because a person claims a right to privacy has been violated does not mean courts automatically apply the strict scrutiny analysis reserved for fundamental rights. That is the case here. SUM's claims do not rest on a privacy right that has been recognized as fundamental, namely that parents have a privacy right to ignore health and safety rules at public schools during a pandemic. Therefore, the rational basis test used by the Missoula County District Court was appropriate as was its determination that the rules met the relatively low bar of rational basis scrutiny because the rules are rationally related to a legitimate interest of the School Districts and the community in mitigating the spread of COVID-19.

The Gallatin County District Court went further and held that the face covering rules there satisfy any level of constitutional analysis, including the strict scrutiny analysis. At an initial matter, SUM has recognized that "the compelling state interest at stake could be construed as the control of a pandemic." (AR 0125). This is unsurprising because the U.S. Supreme Court has held that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *See Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020).

Despite SUM's arguments, the face covering rules are also narrowly tailored and further the compelling interest in mitigating the transmission of COVID-19. As demonstrated by the facts above, the rules are narrowly tailored to

apply equally to anyone on school premises and are narrowly tailored to provide various exceptions to the rule, including breaks from face coverings, exceptions for outdoor activity and exceptions where social distancing can be maintained. These rules are certainly more narrowly tailored than a rule that closes the schools, requires all students to attend online schooling or mandates face coverings at all times without exception. Further evidence of narrow tailoring is found in the requirements that each district continued to evaluate data, parental concerns and health care recommendations on the use of face coverings, and agreed to relax those rules if and when the data supported doing so. This alone demonstrates that the rules are narrowly tailored.

In sum, the rules pass all levels of constitutional scrutiny, including the strict scrutiny analysis.

**C. Newly Enacted § 40-6-701 Does Not Allow Parents to Decide Which School Rules Their Children Will Follow.**

As the outset, it should be recognized that Montana is unique in that its Constitution and its statutes provide school districts with wide latitude in determining what is best for each district. This local control is established under Article X, section 8 of the Montana Constitution, which states:

School district trustees. The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.

Further, the school boards' right of local control is set forth in Mont. Code Ann. §

20-9-309(2)(h), which provides that:

[P]reservation of local control of schools in each district vested in a board of trustees pursuant to Article X, section 8, of the Montana constitution.

School boards have many duties, including health related requirements for its students as set forth in Mont. Code Ann. § 20-3-324 and Admin. R. Mont. 10.55.701(2)(s) (2021) (requiring school districts to adopt policies addressing student health issues). Moreover, once adopted, students attending school have an obligation to comply with the rules of the school that the student attends. Mont. Code Ann. § 20-5-201(1)(a).

Based partly on this Constitutional authority, the Gallatin County District Court found that the new statute does not abrogate the School Districts' ability to establish health and safety rules at their districts and correctly rejected SUM's claims that Mont. Code Ann. § 40-6-701 allows individual parents to send their children to school without face coverings in violation of the School Districts' face covering rules<sup>7</sup>. (SDR 316-317). The statute states in relevant 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.

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<sup>7</sup> The statute was not in effect when the Missoula Court denied Plaintiffs' Motion for Preliminary Injunction.

Mont. Code Ann. § 40-6-701 (2021).

SUM has not and cannot demonstrate that sending a child to school without a face covering during a pandemic in violation of a school health and safety rule qualifies as a parent's "fundamental right ...to direct...the education...of their children" as required by the plain language of the statute. Contrary to SUM's interpretation of the statute, the language of the new law does not expand any fundamental rights parents have regarding their children's education to include a right to ignore face covering rules. This Court has not yet had the opportunity to interpret the new statute, but federal courts have recognized that parents' fundamental rights in making educational decisions for their children are limited. For example, a state cannot force a student to attend a public school because parents have a fundamental right to send their children to a private school instead. *Pierce v Soc'y of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925). But even though parents have some rights to control this aspect of their children's education, there are limits to what parents can demand of their public schools. *Runyon v. McCrary*, 427 U.S. 160 96 S.Ct. 2586 (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"). Relying on these Supreme Court cases, 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 fundamental right generally to direct how a public school teaches their child.

*Fields v. Palmdale Sch. Dist.* 427 F.3d 1197, 1206-07 (9<sup>th</sup> Cir. 2005) (citations omitted). Applying these precepts, courts in the age of COVID have rejected the precise claim SUM makes 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.*, No. 3:21-cv-1661-YY, 2021 U.S. Dist. LEXIS 244199 (D. Or. Dec. 22, 2021).

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 19. 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.* No. 2:21-5012-FB-SIL, 2021 U.S. Dist. LEXIS 206450, at \*45 (E.D.N.Y. Oct. 26, 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*, 2021 U.S. Dist. LEXIS 183649 (M.D. La., Sept. 24, 2021) (noting that "there is no fundamental constitutional right to not wear a mask"); *Denis v. Ige*, 2021 U.S.

Dist. LEXIS 164694 (D. Haw., Aug. 31, 2021) (dismissing challenge to a statewide face covering-mandate with prejudice because such mandates "do not infringe on fundamental rights"); *Klaassen v. Trustees of Indiana U.*, 2021 U.S. Dist. LEXIS 133300 (N.D. Ind., July 18, 2021) (denying a motion for a preliminary injunction against a university's face covering mandate and COVID-19 testing protocol because the court "decline[d] the students' invitation to expand substantive due process rights to include the rights not to wear a mask or to be tested for a virus");

The same analysis applies here. Neither this Court nor Montana's Constitution<sup>8</sup> explicitly states that the right to an education is a fundamental right much less that parents have a fundamental right to direct all aspects of a child's education. For example, the Court has found that the right to participate in extracurricular school activities is certainly part of a child's educational process, but the Court held that that this aspect of a child's education is not a fundamental right. *State ex rel. Bartmess v. Board of Trustees*, 223 Mont. 269, 726 P.2d 801, (1986). Under SUM's interpretation of the new statute, the parents in *Bartmess*

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<sup>8</sup> Article X, Section 1(3) of the Montana Constitution states: The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

could have demanded that their fundamental right to direct their child's education required the school district to allow a child to participate in extracurricular activities even if the student did not meet the minimal grade point requirement for such participation. This demonstrates that the statute is subject to differing interpretations and reading the statute to allow each parent the fundamental right to direct every aspect of every student's education includes the right to violate the school's face covering rules is contrary to case law and common sense.

SUM and *Amicus* argue that the Gallatin County District Court erred because the Legislature intended the new statute to be one of general applicability not subject to more than one interpretation and that the District Court's decision allows school districts to violate other state laws. Of course, the School Districts do not argue that they are exempt from such statutes. This law's purpose, however, was to create "a cause of action and create an appeals process for a parent in a situation where their rights have been terminated as a parent." Mont. Sen. Jud. Comm. SB 400, 67<sup>th</sup> Leg. (April 1, 2021, at 9:54:33). *Amicus*' retrospective assertions to the contrary are not persuasive or credible given that the legislators who signed onto the *Amicus* brief could have included language in the statute to identify which aspects of a child's education is subject to parental direction. It did not do so and therefore the statute (if it applies at all) is subject to interpretation based on the plain language of the statute and on existing case law that sets the

parameters of what constitutes a parent's fundamental right in directing a child's education.

In any event, assuming *arguendo* that the statute is applicable and somehow implicates a parents' fundamental right to ignore school district rules during a health emergency as part of a supposed right direct their children's education, the Gallatin County District Court correctly found that rules satisfy the strict scrutiny analysis the statute requires. (SDR 316-317). As noted above, mitigating a pandemic is a compelling interest, and the rules are narrowly tailored to further that interest.

**D. The District Courts Correctly Determined that SUM Failed to Meet Its Burden to Demonstrate Irreparable Harm in Part Because The School Districts Relied on Recommendations From Reputable Public Health Agencies and Studies That Have Found Face Coverings Mitigate COVID-19 Spread.**

Throughout SUM's brief, it argues that the School Districts have not made specific findings that face coverings are effective against the spread of COVID-19. SUM argues that by submitting an affidavit by a statistician, it has provided undisputed proof that face coverings do not work, and as such, SUM has proven parents are suffering irreparable harm. The District Courts properly rejected this claim, first finding (as stated above) that SUM was not likely to succeed on its Constitutional claims, and second, that the School Districts relied on reputable scientific studies and medical recommendations for K-12 masking by local, state,

and national medical authorities. SUM’s repeated statements that the School Districts have not countered their statistician’s review of medical studies are simply untrue and do not address the majority of studies that express the opposite view from reliable scientists.

As an example, each of the School Districts relied in part on findings by the CDC:

Given new evidence on the B.1.617.2 (Delta) variant, CDC has updated the guidance for fully vaccinated people. CDC recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status. Children should return to full-time in-person learning in the fall with layered prevention strategies in place.<sup>9</sup>

Further, the School Districts relied upon guidance issued by the AAP recommending face coverings for all in K-12 schools. The AAP recommended “[a]ll students older than 2 years and all school staff should wear face masks at school (unless medical or developmental conditions prohibit use).” It also “strongly advocates that all policy considerations for school COVID-19 plans should start with a goal of keeping students safe and physically present in school.”

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<sup>9</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

<sup>10</sup> <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>.

The science behind those face covering recommendations is sound and accepted. *Arc of Iowa v. Reynolds*, No. 4:21-cv-00264, 2021 U.S. App. LEXIS 25349 (S.D. Iowa Sept. 13, 2021) (“The Court has looked at the data concerning the effectiveness of masking to reduce the transmission of COVID-19 and it overwhelmingly supports the CDC and AAP’s recommendations.”).<sup>11</sup> The CDC has consistently been cited as an acceptable rationale for government officials during the pandemic. *See, e.g., Denis v. Ige*, 538 F. Supp. 3d 1063, 1078 (D. Haw. May 12, 2021) (“In the midst of a pandemic, it is clearly reasonable for state and local officials to follow the CDC's guidance”); *Henry v. DeSantis*, 461 F. Supp. 3d 1244, 1255 (S.D. Fla. 2020) (“The Executive Orders explain the Governor used scientifically-based-research policies from the U.S. Centers for Disease Control. There is nothing arbitrary about the Governor's actions. Using science, medicine, and data, the Governor took reasonable steps clearly related to the legitimate interest in protecting the public health”); *Beahn v. Gayles*, No. GJH-20-2239, 2021 U.S. Dist. LEXIS 139794, \*7 (D. Md. July 26, 2021) (“Plaintiffs also do not allege facts suggesting that the policy lacked a rational basis; indeed, as the Directives

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<sup>11</sup> The Gallatin County District Court also took judicial notice that in late September the Gallatin City County Health Department reported that local districts without mask requirements experienced many more positive COVID-19 cases compared to those with mask requirements. (SDR 318)

were issued in response to rising COVID-19 infection rates and based on CDC guidance regarding reopening schools”); *Harris v. Univ. of Massachusetts, Lowell*, No. 21-CV-11244-DJC, 2021 U.S. Dist. LEXIS 162444, \*8 (D. Mass. Aug. 27, 2021) (“Defendants’ affidavits attest that the Vaccine Policy was supported by, among other things, CDC guidance and research that the vaccines were safe and effective at reducing the incidence and severity of COVID-19 . . . .”)

The affidavits of the School District superintendents in this matter demonstrate that they relied on, in part, the recommendations from the CDC and the AAP when adopting the face covering rules. The District Courts reviewed the information and correctly found that SUM’s contention that it provided undisputed proof about the efficacy of face coverings was not persuasive. Again, the District Courts did not commit a manifest abuse of discretion in rejecting SUM’s claims that it presented uncontroverted evidence of face coverings’ efficacy.

**E. The District Courts Properly Found that the Status Quo Is to Continue the Face Covering Rules.**

“[T]he limited function of a preliminary injunction is to preserve the status quo and to minimize the harm to all parties pending full trial.” *Porter v. K & S P’ship*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981); accord *Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 401 Mont. 405, 473 P.3d 386. If a preliminary injunction will not accomplish these purposes, then it should not be issued. *Id.*; *Driscoll*, ¶ 20. A preliminary injunction does not resolve the merits of a case but

rather prevents further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on its merits. *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995). The District Courts properly found that enjoining the face covering rules would not preserve the status quo given that SUM failed to establish it was likely to succeed on the merits or that it would suffer irreparable harm if the face covering policies were allowed to remain in place.

## VII. CONCLUSION

The District Courts properly denied the Motions for Preliminary Injunction when they determined that SUM is unlikely to succeed on the merits of its Constitutional or statutory claims; that it did not demonstrate that the face covering rules are causing irreparable harm; that the School Districts relied upon reputable sources to conclude that using face coverings mitigates the spread of COVID-19; and the status quo required that the preliminary injunction be denied. The District Courts' decisions should be upheld because they correctly interpreted the law and there was no manifest abuse of discretion in denying the injunction.

DATED this 7<sup>th</sup> day of April, 2022.

By: /s/ Kevin A. Twidwell  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to LR 7.1(d)(2), according to the Microsoft word-processing system, this brief contains 9,197 words, excluding caption, certificate of compliance, table of contents and authorities, exhibit index, and any certificate of service.

DATED this 7<sup>th</sup> day of April, 2022.

By: /s/ Kevin A. Twidwell  
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**Certificate of Service**

I, the undersigned of Kaleva Law Offices, Attorney for Plaintiffs, hereby certify that I served a copy of the foregoing document by CM/ECF, which will send notice to all counsel of record.

DATED this 7<sup>th</sup> day of April, 2022.

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