

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.

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.

APPELLEES' APPENDIX OF RECORD

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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For Appellees

Appellees, Missoula County Public Schools District No. 1, Target Range
School District No 23, Hellgate Elementary School District No. 4, Bozeman
School District No. 7, Monforton School District No. 27, and Big Sky High School
District No. 72, hereby respectfully submit their Appendix of Record.

DATED this 7th day of April, 2022.

KALEVA LAW OFFICE

By: /s/ Kevin A. Twidwell
Kevin A. Twidwell
Attorneys for Appellees

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**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

**STAND UP MONTANA, a Montana
non-profit corporation; CLINTON
DECKER; JESSICA DECKER;
MARTIN NORUNNER; APRIL
MARIE DAVIS; MORGEN HUNT;
GABRIEL EARLE; ERICK
PRATHER; BRADFORD
CAMPBELL; MEAGAN
CAMPBELL; AMY ORR and
JARED ORR,**

Plaintiffs,

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.

Cause No.

Department No.

COMPLAINT

Plaintiffs, Stand Up Montana, Inc., Clinton Decker, Jessica Decker, Martin NoRunner, April Marie Davis, Morgen Hunt, Gabriel Earl, Erick Prather, Bradford Campbell, Meagan Campbell, Amy Orr, and Jared Orr, for their Complaint against Defendants 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, allege as follows.

INTRODUCTION

1. This is an action for injunctive relief brought by Plaintiffs on their behalf and on behalf of their minor children. Plaintiffs, the parents of minor children enrolled in Defendants' schools, seek a temporary restraining order, a preliminary injunction, and a permanent injunction against Defendants' mandatory masking rules implemented in their schools as a response to COVID-19. Plaintiffs' legal bases spring from the Montana and U.S. Constitutions. Under federal constitutional law, Plaintiffs, as parents of minor children, have a fundamental liberty interest in the care, custody, and control of their children. Under Montana constitutional law, Plaintiffs, as legal guardians of their children, have a right to invoke their children's fundamental constitutional rights. Defendants' mask mandates infringe on the rights of Plaintiffs and their children to privacy, dignity, and free

expression without the necessary showing of a compelling government interest in doing so. See, Art. II, §§ 4, 10, 15, and 34 Mont. Const.

Defendants' mask mandates are therefore unconstitutional and, to prevent irreparable harm, Plaintiffs seek injunctive relief.

PARTIES

2. Plaintiff Stand Up Montana is a registered Montana non-profit corporation in good standing with its principal place of business in Gallatin County, Montana. Its mission is to encourage Montanans, during the COVID-19 restrictions, to “stand up for the constitutionally protected liberties, to provide resources and support to individuals and businesses who have been discriminated against or harassed by unfair rules and regulations, and to support similar initiatives.” It has a membership of hundreds of individuals, including many in Missoula County who are the parents of children enrolled at Defendants' schools and who object to the mask mandates described herein.

3. Plaintiffs Clinton Decker and Jessica Decker reside in Missoula County, Montana. They are the parents of children enrolled at Defendant Missoula County Public Schools, Elementary District No. 1, High School District No. 1, Missoula County, State of Montana (MCPS) and at Defendant Hellgate Elementary School District No. 4 (HES).

4. Plaintiffs Martin NoRunner and April Marie Davis reside in Missoula County, Montana, and are the parents of a child enrolled in MCPS.

5. Plaintiff Morgen Hunt resides in Missoula County, Montana, and is the parent of a child enrolled in MCPS.

6. Plaintiff Gabriel Earle resides in Missoula County, Montana, and is the parent of a child enrolled at MCPS.

7. Plaintiff Erick Prather resides in Missoula County, Montana, and is the parent of a child enrolled at MCPS.

8. Plaintiffs Bradford Campbell and Meagan Campbell reside in Missoula County, Montana. They are the parents of child enrolled at HES.

9. Plaintiffs Amy Orr and Jared Orr recently had children enrolled in Defendant Target Range School District No. 23 (TRSD), but unenrolled them due to the TRSD mask mandate. The Orrs would like to return their children to TRSD and would do so but for the mask mandate.

10. Defendant MCPS is a public school district located in Missoula, Montana. It consists of one pre-school, one adult learning center, nine elementary schools, three middle schools, four high schools, and one alternative high school. It is governed by a board of trustees who have authorized the conduct challenged in this action.

11. Defendant TRSD is a public school district in Missoula County, Montana. It consists of one elementary school, pre-kindergarten through eighth grade. It is governed by a board of trustees who has authorized the conduct challenged in this action.

12. Defendant HES is a public independent elementary school district located in Missoula County, Montana. It consists of one elementary school, pre-kindergarten through eighth grade. It is governed by a board of trustees who has authorized the conduct challenged in this action.

13. Plaintiffs, through counsel, attempted to avoid litigation by formally demanding Defendants to reconsider and reject their mask mandates. According to counsel, Defendants had no response to Plaintiffs' demands.

JURISDICTION AND VENUE

14. As a court of general jurisdiction, the Court has jurisdiction over the parties and the subject matter of this civil action for declaratory and injunctive relief.

15. The venue is proper before this Court because Defendants are located in Missoula County.

16. Plaintiffs' claims for declaratory and injunctive relief are authorized by Title 27, Chapters 8 and 19, Mont. Code Ann., and Rules 57

and 65 of the Montana Rules of Civil Procedure, and the general legal and equitable powers of this Court.

GENERAL ALLEGATIONS

The Science of Universal Masking

17. 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

18. Both data and science suggest such a mandate for widespread and universal use is not justified or effective. (See, Declaration of Rodney X. Sturdivant, PhD., ¶¶ 42-65 (Aug. 11, 2021), attached hereto as Ex. A.)

19. 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

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)

asymptomatic people play in transmission. A recent study involving contract 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. (*Id.*, ¶ 43.)

20. 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.” (*Id.*, ¶ 44.)

21. 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. (*Id.*, ¶ 45.)

22. 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. (*Id.*, ¶ 46.)

23. 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. (*Id.*, ¶ 47.)

24. 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. (*Id.*, ¶ 48.)

25. 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.” (*Id.*, ¶ 49.)

26. 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. (*Id.*, ¶ 50.)

27. 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 is for 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. (*Id.*, ¶ 51.)

28. 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. (*Id.*, ¶ 52.)

29. 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 “hairstylist” 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. (*Id.*, ¶ 53.)

30. 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. (*Id.*, ¶ 54.)

31. 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. (*Id.*, ¶ 55.)

32. 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.” (*Id.*, ¶ 56.)

33. 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. (*Id.*, ¶ 57.)

34. In 2020 two more randomized trials including a control group add 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. (*Id.*, ¶ 58.)

35. 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 health care 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. (*Id.*, ¶ 59.)

36. 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. (*Id.*, ¶ 60.)

37. 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 state level the numbers were 27 per 100,000 with mask mandates and only 17 for no mandates. (*Id.*, ¶ 61.)

38. 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. (*Id.*, ¶ 62.)

39. 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 impacts healthy immune systems.

This issue could actually lead to increase susceptibility to Covid and other viruses long term. Other risks include foreign particles causing lung damage and microbial infections. (*Id.*, ¶ 63.)

40. Harms for mask wear for children is an increasing concern. While children are at very low risk of infection and tend to spread the virus and 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. (*Id.*, ¶ 64.)

41. A second impact of mask mandates is removing the freedom to choose from individuals and without compelling scientific 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. (*Id.*, ¶ 65.)

Defendants' Mask Mandates

42. Defendants, despite the science, have 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.

43. Defendants' universal mask mandates impose restrictions on Plaintiffs' children without considering whether the children are infected or reasonably believed to be infected with a communicable disease.

44. Defendants' universal mask mandates do not consider or accommodate children's individual needs under particular circumstances such as autism and asthma.

45. Defendants' universal mask mandates are scheduled to last until at least the first week of October 2021.

46. Defendants' mask mandates set a precedent and foreshadow an intention to impose a universal vaccine mandate when it becomes available for those aged 0-19.

No Competent Findings

47. Defendants have no express recognition or acknowledgment that their mask mandates infringe upon parental or student rights. They have made no express findings to the effect that the mask mandates are (a) supported by any compelling government interests (b) or narrowly tailored to serve the compelling government interest by (c) the least restrictive means.

48. Defendants lack the expertise or competence to make such findings. They have not retained or relied upon competent professionals in necessary fields, such as public health virology, to make any reliable assessment of the interests at stake or the alternative means in pursuing and serving such interests.

49. Given the science of cloth face coverings and mask, (see, ex. 1, the connection between masks and public health is so tenuous that Defendants would not be able to the strictures of the compelling government interest test if they had chosen to apply it—which they did not.

COUNT I

(Substantive Due Process)

50. Plaintiffs restate the foregoing.

51. Both as parents and on behalf of their children, Plaintiffs have a liberty interest, protected by the U.S. and Montana Constitutions, in the right to refuse an unwanted medical intervention such as cloth face coverings or masks. The right to bodily integrity and to refuse such unwanted medical treatments is deeply rooted in the historical traditions of the United States. The right to refuse medical treatment stems from the common law and the rights to bodily integrity and dignity.

52. Defendants' mask mandates consist of compulsory medical intervention and constitute a substantial interference with and violation of Plaintiffs' and their children's liberty interests.

53. Defendants' violation of Plaintiffs' and their children's liberty interests is causing and will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

54. Enforcement of the mask mandates would cause irreparable harm by threatening Plaintiffs with substantial penalties for not complying with mask mandate restrictions.

COUNT II

(Equal Protection)

55. Plaintiffs restate the forgoing.

56. Mask mandates exclusively for students at school. When none is imposed on the general population, it violates the students' rights to equal protection because the state's objective is to eradicate COVID-19 from the population as a whole. While Defendants have imposed mandates on students, there are constitutional limits to what a legislative majority may impose on any minority while leaving itself free of such constraints.

57. Children are at no greater risk from COVID-19 than the general population and do not benefit in any particular way from the mask mandate compulsion. Exempting the general adult population, which is demonstrably at far greater risk, from the universal mask mandate violates equal protection. Children may not be the subject of discrimination in the public's response to disease from which they are at negligible risk.

58. Defendants' violation of Plaintiffs' children's right to equal protection is causing and will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

59. Enforcement of the mask mandates would cause irreparable harm by threatening Plaintiffs' children with substantial penalties for not complying with mask mandate restrictions.

COUNT III

(Privacy)

60. Plaintiffs restate the foregoing.

61. Montana has a history of trampling on individual rights. For example, Montana passed sedition laws before and during WWI that were the strongest in the nation. That history served to focus the 1972 Montana Constitutional Convention on the vigilant protection of individual rights from the tyrannical government impulses, especially when animated by popular sentiment in a time of perceived emergency.³

62. Privacy in medical decision-making is one of the fundamental individual rights ensconced in the Montana Constitution's Declaration of Rights by the 1972 framers of the Montana Constitution. The U.S. Constitution also protects privacy in medical decisions.

63. Defendants' mask mandates compel uninfected and unexposed students to wear face masks on Defendants' campuses at all times when indoors. If students not infected with a communicable disease, or reasonably believed to be infected, choose through their parents to exercise their right to make their own private health care choices by

³ FEATURE: BOOK: SOME HEAVY LEGAL READING TO USHER IN 2006: RELIVING OUR STATE'S SHAMEFUL SEDITION ACT, 31 Montana Lawyer 8.

declining a face covering, Defendants bar them from Defendants' indoor spaces.

64. Defendants' COVID-19 response, in their mask mandates, denies the right of individual privacy guaranteed by Art. II, § 10, Mont. Const. and Amend. IX, U.S. Const. The right to personal privacy protects medical care choices. The right of privacy broadly guarantees individuals the right to make medical judgments affecting their bodily integrity and health, free from government interference. The right to privacy is implicated when a law infringes upon a person's ability to obtain or reject a lawful medical treatment.

65. Defendants' violation of Plaintiffs' and their children's privacy rights in making their own medical choices is causing. It will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

66. Enforcement of the mask mandates would cause irreparable harm by threatening the Plaintiffs' children with substantial penalties for not complying with mask mandate restrictions.

COUNT IV

(SB 400)

67. Plaintiffs restate the foregoing.

68. Senate Bill 400 approved by the Montana Legislature in 2021 will take effect on October 1, 2021. Defendants' mask mandates are scheduled to last beyond October 1, 2021.

69. Under SB400, Defendants may not interfere with the fundamental right of Plaintiffs to direct the health care and mental health of their children, unless Defendants have demonstrated 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.

70. Defendants' mask mandates interfere with Plaintiffs' right to direct their children's health care and mental health.

71. Defendants have demonstrated, or attempted to demonstrate, 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.

72. Defendants' violation of Plaintiffs' rights to direct their children's health care and mental health is causing. It will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

73. Enforcement of the mask mandates would cause irreparable harm by threatening Plaintiffs and their children with substantial penalties

for not complying with mask mandate restrictions.

COUNT V

(Human Dignity)

74. Plaintiffs restate the foregoing.

75. Human dignity is a fundamental right ensconced expressly in the Montana Constitution's Declaration of Rights.

76. The right of human dignity is the only right in Montana's Constitution that is "inviolable." It is the sole right in Article II carrying the absolute prohibition of "inviolability." No individual may be stripped of human dignity. No private or governmental entity has the right or the power to do so. Human dignity cannot be violated—no exceptions.

77. In the Western ethical tradition, especially after the Religious Reformation of the 16th and 17th centuries, dignity has typically been associated with the normative ideal of individual persons as intrinsically valuable, as having inherent worth as individuals, at least in part because of their capacity for independent, autonomous, rational, and responsible action. Under this conception, dignity is directly violated by degrading or demeaning a person.

78. Similarly, dignity is indirectly violated by denying a person the opportunity to direct or control his own life in such a way that his worth is

questioned or dishonored. For example, dignity could be indirectly undermined by paternalistic treatment—treating adults like children incapable of making autonomous choices for themselves, or by trivializing what choices they make about how to live their lives.

79. Respect for the dignity of each individual demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their consciences and convictions.

80. Defendants' mask mandates interfere with Missoula residents' ability to communicate with one another by means of facial expression.

81. The human face is the most distinguishing visible characteristic reflecting a person's individuality. The human face is what makes the individual most easily and readily recognizable. The human face is highly expressive, able to convey countless emotions without saying a word. And unlike some forms of nonverbal communication, facial expressions are universal. The facial expressions for happiness, sadness, anger, surprise, fear, and disgust are the same across cultures. Science has long recognized that people signal their feelings and emotions to each other by subtle movements, gestures, and facial expressions and that people's

ability (or inability) to accurately “send” and “receive” these nonverbal messages must have important implications for their social and emotional lives.

82. Defendants’ mask mandates demean students’ human dignity, undermines their individuality, interferes with their ability to read and show emotions, and hinders interpersonal communication and relations. It also strips them of their autonomy in deciding the appearance they wish to present to the public. It is, therefore, a violation of the Montana constitutional right to human dignity.

83. Defendants’ violation of Plaintiffs’ and their children’s right to human dignity is causing and will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

84. Enforcement of the mask mandates would cause irreparable harm by threatening Plaintiffs’ children with substantial penalties for not complying with mask mandate restrictions.

COUNT VI

(Freedom of Expression)

85. Plaintiffs restate the foregoing.

86. Freedom of expression is a fundamental right enshrined expressly in the Montana Constitution’s Declaration of Rights.

87. Given (a) the material lack of scientific basis for Defendants' COVID-19 response included in their mask mandates and (b) the response's lack of effectiveness both based on scientific studies and its demonstrated failure to curb the pandemic, compliance with Defendants' rules and orders, especially mask-wearing, is fraught with substantive meaning.

88. Wearing a mask constitutes to many an outward sign of trust in, loyalty to, or submission to the honesty, wisdom, and power of government. Wearing a mask functions for others as a virtue signal and an outward demonstration of their own social and moral superiority over those who fail to comply. For others, refusing to wear a mask is an external signal of mistrust in government and defiance to unsupportable demands of compliance for its own sake. Wearing a mask or not wearing a mask is, for some, a demonstration of partisan political affiliation.

89. Defendants' mask mandates infringe upon Plaintiffs' and their children's freedom to express their political and moral points of view in violation of the fundamental constitutional right to freedom of expression.

90. Defendants' violation of Plaintiffs' and their children's right to freedom of expression is causing and will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

91. Enforcement of the mask mandates would cause irreparable harm by threatening Plaintiffs' children with substantial penalties for not complying with mask mandate restrictions.

REQUEST FOR RELIEF

Accordingly, Plaintiffs request:

1. A declaration that Defendants' universal mask mandates against students are unconstitutional;
2. Injunctive relief in Plaintiffs' favor and against Defendants imposing a permanent injunction against enforcement of Defendants' mask mandates;
3. An award of attorney fees, expert witness fees, other costs of suit; and
4. Such other and further relief as may be appropriate in the circumstances.

DATED this 24th day of August 2021.

Respectfully Submitted,
RHOADES, SIEFERT & ERICKSON PLLC

By: /s/Quentin M. Rhoades
Quentin M. Rhoades
Pro Querente

DECLARATION OF RODNEY X. STURDIVANT, PHD.

I, Rodney X. Sturdivant, Ph.D., pursuant to § 1-6-105, MCA, hereby declare, under penalty of perjury, the following to be true and correct:

1. I am a resident of San Antonio, Texas. I am 56 years old and am otherwise competent to render this declaration. I am mentally sound and competent to attest to the matters set forth herein. The matters set forth in this Declaration are based upon my own personal knowledge, unless otherwise stated. I have personal knowledge of the matters set forth below, and could and would testify competently to them if called upon to do so.

Professional Background

2. I am an Associate Professor of Statistics at Baylor University and director of the Baylor Statistical Collaboration Center. I have been on the Baylor faculty since July, 2020. Prior appointments and professional experiences include Research Biostatistician, Henry M. Jackson Foundation (HJF) supporting the Uniformed Services University of Health Sciences, Professor of Applied Statistics and Director of the M.S. in Applied Statistics and Analytics at Azusa Pacific University, Chair of Biostatistics and Clinical Associate Professor of Biostatistics in the College of Public Health at The Ohio State University and Professor of Applied Statistics and Academy Professor in the Department of Mathematical Sciences, West Point. I hold two M.S. degrees from Stanford, in Operations Research and Statistics, and a Ph.D. in biostatistics from the University of Massachusetts – Amherst. I have taught courses involving advanced statistical methods at four institutions, and worked on collaborative research with researchers in a wide variety of medical and public health settings.

3. My primary research area involves application of applied statistics, particularly in fields of medicine and public health. Between 1996 and 2020, I have published articles in peer-reviewed journals and presented results at national and international conferences, including top-ranked journals and conferences in statistics, public health, epidemiology, medicine, and health policy. My work has included studies of infectious diseases or outbreaks such as Leishmania, Anthrax, Bird Flu, HIV/AIDS and recently COVID-19. I co-authored a popular textbook, Applied Logistic Regression, 3rd Edition, which has over 60,000 citations. I have used the text to teach the subject in universities and in workshops for applied statisticians around the country.

4. I have been actively researching the COVID-19 epidemic using my expertise in applied statistics and mathematical modeling, particularly the Susceptible-Infected-Recovered (SIR) models, commonly in use to forecast the COVID-19 epidemic. While working for HJF, I served as a senior advisor for a data analytics group supporting the White House OSTP and FEMA, and four analytics organizations within DoD working on Covid modeling and data analysis. To

date, I have published three papers^{1,2,3}, in peer-reviewed journals related to the epidemic and have two other articles currently in review. One of my published papers on COVID-19 is a review of appropriate use of models for forecasting. Issues with policy have been, in some part, due to the very issues discussed in this article. I have also been asked to act as reviewer for several publications of articles related to Covid research.

5. In November 2020, I testified for the County Commissioners and Judge of Colorado, Texas concerning a declaration challenging restrictions imposed by the Texas Governor. I extensively reviewed the evidence and data regarding the relatively low mortality and morbidity risk that SARS-CoV-2 infection poses to most people, particularly the young and healthy, as well as the evidence about the health impacts of policies involving restrictions, and the overall effectiveness of restrictions.

6. In October 2020, Harvard Professor Dr. Martin Kulldorff invited me to co-sign the Great Barrington Declaration he co-authored with Oxford Professor Dr. Sunetra Gupta and Stanford Professor Jay Bhattacharya. The Declaration was written from a global public health and humanitarian perspective, with special concerns about how the current COVID-19 strategies are forcing our children, the working class and the poor to carry the heaviest burden. I was joined in co-signing by over 40 highly regarded scientists analyzing the pandemic from a variety of perspectives.

7. The Declaration offers an alternative approach to the current COVID-19 strategies being implemented in jurisdictions across the United States and the world called Focused Protection. According to Focused Protection, the most compassionate approach to the COVID-19 pandemic is one that balances the risks and benefits of reaching herd immunity by allowing those who are at minimal risk of death and serious health outcomes to live their lives normally, while better protecting those who are at highest risk. Since October, the Declaration has been co-signed by at least 12,000 medical and public health scientists, and 35,000 medical practitioners. The Great Barrington Declaration is available at <https://gbdeclaration.org/>

Expert Opinions

Contrary to Good Public Health Practice, Restrictions Do Not Address the Key Risk Metrics, and Assume that COVID-19 Is Equally Dangerous to All Populations.

8. State restrictions reference case counts and percent positivity as metrics to decide whether to impose activity restrictions. These metrics, contrary to good public health practice, do

¹ Koehlmoos, T.P., Janvrin, M.L., Korona-Bailey, J., Madsen, C., and Sturdivant, R. (2020). COVID-19 Self-Reported Symptom Tracking Programs in the United States: Framework Synthesis. *Journal of Medical Internet Research* **22**(10):e23297. DOI: 10.2196/23297

² Thomas, D.M., Sturdivant, R., Dhurandhar, N.V., Debroy, S., and Clark, N. (2020). A primer on COVID-19 Mathematical Models. *Obesity* **28**(8), 1375-1377, doi:10.1002/oby.22881.

³ Ronca, S.E., Sturdivant, R.X., Barr,K.L., and Harris, D. (2021). SARS-CoV-2 Viability on 16 common indoor surface finish materials. *Health Environments Research & Design Journal*, 1-16, doi:10.1177/1937586721991535

not consider the level of mortality risk of the disease or distinguish between people who face high mortality risk should they become infected and people who face low mortality risk. Good public health practice requires that the fraction of the population that is vulnerable, and the level of that risk, be considered among the criteria for imposing activity restrictions. In the paragraphs that follow, I review evidence on the size of the mortality risk with respect to COVID-19 infection, including evidence that shows that the risk is not uniformly imposed on the population.

9. The best evidence on the infection fatality rate from SARS-CoV-2 infection (that is, the fraction of infected people who die due to the infection) comes from seroprevalence studies. The definition of seroprevalence of COVID-19 is the fraction of people within a population who have specific antibodies against SARS-CoV-2 in their bloodstream. Seroprevalence studies provide better evidence on the total number of people who have been infected than do case reports, which miss infected people who are not identified by the public health authorities. Because they ignore unreported cases in the denominator, fatality rate estimates based on case reports are substantially biased upwards.

10. According to a meta-analysis⁴ by Dr. John Ioannidis of every seroprevalence study conducted with a supporting scientific paper (74 estimates from 61 studies and 51 different localities around the world), the median infection survival rate from COVID-19 infection is 99.77%. For COVID-19 patients under 70, the meta-analysis finds an infection survival rate of 99.95%. A more recent meta-analysis by scientists independent of Dr. Ioannidis' group, published in the National Bureau of Economic Research working paper series, reaches qualitatively similar conclusions⁵.

11. The mortality risks based on data now for COVID-19 are, for most age groups, very similar to those of the seasonal flu, typically around 0.1% overall, as pointed out by Dr. Anthony Fauci, Dr. H. Clifford Lane and Dr. Robert R. Redfield in a March *New England Journal of Medicine* article⁶, and much lower than for respiratory viruses such as SARS or MERS. For younger age groups, in particular, the rates are lower.

12. Very clearly, the mortality risk for those infected with SARS-CoV-2 is not the same for all patients. Older patients are at substantially higher risk of death if infected, while younger patients face a vanishingly small risk. In September 2020 the CDC updated its current best estimate of the infection fatality ratio—the ratio of deaths to the total number of people infected—for various age groups.⁷ The CDC estimates that the infection fatality ratio for people ages 0–19 years is .00003, meaning infected children have a 99.997% survivability rate. The CDC's best estimate of the infection fatality rate for people ages 20–49 years is .0002, meaning that young adults have

⁴ John P.A. Ioannidis, *The Infection Fatality Rate of COVID-19 Inferred from Seroprevalence Data*, Bulletin of the World Health Organization BLT.20.265892.

⁵ Andrew T. Levin, et al., *Assessing the Age Specificity of Infection Fatality Rates for COVID-19: Meta-Analysis & Public Policy Implications* (Aug. 14, 2020) MEDRxIV, <https://bit.ly/3gpIoIV>

⁶ Anthony S. Fauci, et al., *Covid-19 Navigating the Uncharted*, *The New England Journal of Medicine*, 382;13 (March 26, 2020), DOI: 10.1056/NEJMe2002387.

⁷ Coronavirus Disease 2019 (COVID-19), *COVID-19 Pandemic Planning Scenarios* (Sep. 10, 2020) CDC, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>.

a 99.98% survivability rate. The CDC's best estimate of the infection fatality rate for people age 50–69 years is .005, meaning this age group has a 99.5% survivability rate. The CDC's best estimate of the infection fatality rate for people ages 70+ years is .054, meaning seniors have a 94.6% survivability rate.

13. A study of the seroprevalence of COVID-19 in Geneva, Switzerland (published in the *Lancet*⁸) provides a detailed age break down of the infection survival rate in a preprint companion paper⁹: 99.9984% for patients 5 to 9 years old; 99.99968% for patients 10 to 19 years old; 99.991% for patients 20 to 49 years old; 99.86% for patients 50 to 64 years old; and 94.6% for patients above 65.

14. Age is an important factor for COVID-19 deaths. The other is co-morbidities, or other existing and serious medical conditions. As of November 21, 2020, the CDC reported that 94% of deaths reported for COVID-19 included at least one comorbidity, with an average of 2.6 additional conditions noted.¹⁰ Some comorbidities listed are clearly deaths not due to Covid at all – for example over 8,000 due to “intentional and unintentional injury”. The latter point has impacts about overall disease severity, suggesting it may be lower than estimated.¹¹ Regardless, it is clear that in addition to age, the other group at higher risk is those with underlying health issues.

15. Although COVID-19 affects various age groups and health conditions very differently, government restrictions assume that the disease affects everyone equally. This, too, is not justified by the scientific literature and represents poor public health practice. By assuming the disease affects everyone equally in its criteria for reopening, the State is forcing unnecessary restrictions on a large segment of the population that will needlessly devastate the lives of millions.

Public Health Principles Consider All Health Implications of Policies Rather than a Single Outcome

16. There is clear evidence that Plaintiffs and others have been and can be harmed from lockdowns and similar restrictions.

17. As numerous peer reviewed publications have demonstrated, and as the former FDA Commissioner has admitted, the lockdowns themselves are depriving people of life. They are literally causing people to die, including by suicide.¹² These deaths, sadly, are often in younger

⁸ Silvia Stringhini, et al., Seroprevalence of Anti-SARS-CoV-2 IgG Antibodies in Geneva, Switzerland (SEROCoV-POP): A Population Based Study (June 11, 2020) *The Lancet*, <https://bit.ly/3l87S13>

⁹ Francisco Perez-Saez, et al., *Serology-Informed Estimates of SARS-COV-2 Infection Fatality Risk in Geneva, Switzerland*, (June 15, 2020) OSF PREPRINTS, <https://osf.io/wdbpe>

¹⁰ See https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm table 3.

¹¹ Karl Dierenbach, CDC data suggest lockdowns could kill as many people as COVID, November 4, 2020, *The Federalist*, <https://thefederalist.com/2020/11/04/cdc-data-suggest-lockdowns-could-kill-as-many-people-as-covid/>

¹² Dr. Mike deBoisblanc, the head of California's John Muir Medical Center's trauma team says his area has seen more death from lockdown suicides than from the pandemic itself. “We’ve never seen numbers like this, in such a short period of time...I mean, we’ve seen a year’s worth of suicide attempts in the last four weeks”, Dr. deBoisblanc said in May, only two months after the lockdown was initiated. See <https://nypost.com/2020/05/24/california-city-has-seen-more-deaths-by-suicide-than-covid-19-doctor/>.

individuals representing far more life years lost than the median age of COVID-19 deaths which is greater than 75 years of age in the United States.¹³ Former FDA Commissioner Scott Gottlieb stated on October 21, 2020: “I would suspect that a good portion of the deaths in that younger cohort were deaths due to despair, due to other reasons. We’ve seen a spike in overdoses, and I would suspect that a good portion of those excess deaths in that younger cohort were from drug overdoses and other deaths that were triggered by some of the implications of we’ve gone through to try to deal with COVID-19.”¹⁴

18. One study acknowledges that “Medical and Public Health experts are not expert in this type [cost-benefit] of analysis” and argues that “cost and benefit should be measured in terms of human welfare in the form of length, quality, and wellbeing of lives, and ‘to make no assessment is just to make policy in a vacuum.’”¹⁵ The author, Joffe, MD, FRCPC, “present[s] a cost-benefit analysis of the response to COVID-19 that finds lockdowns are far more harmful to public health than COVID-19 can be.”¹⁶ The author finds that “on balance the lockdowns cost a minimum of 5X more WELLBY [wellbeing quality of life years los] than they save, and more realistically, cost 50-87X more. Importantly, this cost does not include the collateral damage discussed above [from disrupted healthcare services, disrupted education, famine, social unrest, violence, and suicide] nor the major effect of loneliness and unemployment on lifespan and disease.”¹⁷ Dr. Joffe concludes, that “[w]e must open up society to save many more lives than we can by attempting to avoid every case (or even most cases) of COVID-19. It is past time to take an effortful pause, calibrate our response to the true risk, make rational cost-benefit analyses of the trade-offs, and end the lockdown groupthink.”¹⁸

19. During the period from January to August, the average total number of deaths during the last three years in California has been 179,901 deaths. During this same period for 2020, the total deaths have been 201,007. This represents an excess mortality of 21,105 deaths. During this same period, however, there have only been 12,933 deaths attributed to (but not necessarily caused by) COVID-19. The remaining 8,172 deaths, and others across the country just like them, have been confirmed by the CDC’s Director Redfield to be caused by lockdowns and restrictions like those instituted by many local leaders: “We’re seeing, sadly, far greater suicides now than we are deaths from COVID. We’re seeing far greater deaths from drug overdose, that we are above

¹³ See <https://data.cdc.gov/NCHS/Provisional-COVID-19-Death-Counts-by-Sex-Age-and-S/9bhg-hcku>.

¹⁴ <https://www.dailywire.com/news/new-cdc-numbers-show-lockdowns-deadly-toll-on-young-people>.

¹⁵ <https://www.preprints.org/manuscript/202010.0330/v1>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* *Revolver News* conducted another study that analyzed the cost of lockdowns and that reached an alarming conclusion: “COVID-19 lockdowns are ten times more deadly than the actual COVID-19 virus in terms of years of life lost by American citizens.”¹⁸ <https://www.revolver.news/2020/08/study-covid-19-lockdowns-deadlier-than-pandemic-itself/>. In its study, *Revolver* found that “**an estimated 18.7 million life-years will be lost in the United States due to the COVID-19 lockdowns. Comparative data analysis between nations shows that the lockdowns in the United States likely had a minimal effect in saving life-years. Using two different comparison groups, we estimate that the COVID-19 lockdowns in the U.S. saved between a quarter to three quarters of a million life-years.**” *Id.*

excess, than we had as a background, than we are seeing deaths from COVID.”¹⁹ A CDC report on excess deaths suggests over 90,000 excess deaths due to COVID lockdown policies as of October 3, 2020.²⁰

20. These deaths caused by government action in response to COVID-19 include people being afraid to go to the hospital for another condition for fear of catching the coronavirus, loss of health insurance after layoffs, inability to afford medications after pay cuts, or the skyrocketing rates of depression in America’s adults, a condition that negatively impacts many aspects of health.²¹

21. “To assess mental health, substance use, and suicidal ideation during the pandemic, representative panel surveys were conducted among adults aged ≥ 18 years across the United States during June 24–30, 2020” by the CDC COVID-19 Response Team and others.²² The August 14, 2020 CDC Morbidity and Mortality Weekly Report titled “Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic” reported that in the midst of the lockdowns, “40% of U.S. adults reported struggling with mental health or substance use.”²³ Further, the CDC reported that 11% of U.S. adults surveyed had seriously considered suicide in the previous 30 days before they completed the survey.²⁴

22. An October study titled “Well-being of Parents and Children During the COVID-19 Pandemic: A National Survey” published in *Pediatrics* indicated that three months of restrictions (March through May) had a similar impact on children as well as their parents: more than one in four U.S. parents (27%) reported a decline in their own mental health, and about one in seven (14%) perceived a corresponding decline in their children’s behavioral health.²⁵

23. As acknowledged by the Assistant Secretary for Mental Health and Substance Use, Elinore F. McCance-Katz, M.D., Ph.D., and Michael Caputo, then assistant secretary for Public Affairs at the Department of Health and Human Services, lockdowns have resulted in: “calls to our Disaster Distress Helpline...[have] gone up 1,000 percent;” “throughout the country, you can see...calls to the Suicide Prevention Lifelines greatly increasing...we’ve seen an increase in the

¹⁹ <https://www.cnn.com/2020/07/14/health/us-coronavirus-tuesday/index.html>.

²⁰ Lauren M. Rossen, et al., Excess deaths associated with COVID-19, by age and race and ethnicity – United States, January 26 – October 3, 2020, October 23, 2020, CDC, https://www.cdc.gov/mmwr/volumes/69/wr/mm6942e2.htm?s_cid=mm6942e2_w

²¹ In late September 2020, the New York Times analyzed COVID-19 and excess deaths and found that “[f]rom March 15 through Sept. 5, the most recent date with reliable death statistics, estimated excess deaths were about 42 percent higher than the official coronavirus fatality count.” <https://www.nytimes.com/interactive/2020/05/05/us/coronavirus-death-toll-us.html>. It explained that this excess could, in part, be explained by the fact that “people have been scared to [seek care for ailments](#) that are typically survivable” and that “[d]rug deaths have also risen an average of [13 percent](#) so far this year over last year.” *Id.*

²² https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm?s_cid=mm6932a1_e&deliveryName=USCDC_921-DM35222.

²³ *Id.*

²⁴ https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm?s_cid=mm6932a1_e&deliveryName=USCDC_921-DM35222.

²⁵ <https://pediatrics.aappublications.org/content/146/4/e2020016824>.

proportion of emergency department visits that are due to suicide attempts;” “people reported...that they were new users of substances or increasing their use of substances;” deaths due to alcohol and drug use; people losing their jobs and their businesses; families losing their homes; people unable to access medical care; and increased domestic abuse. Dr. McCance-Katz described overbroad lockdowns best as the government having “used a sledgehammer when I think we needed a scalpel.”²⁶

24. A study of overdose related cardiac arrests²⁷ shows that the number in 2020 is 53% higher than 2018-2019 averages and rose sharply in April to 123% above baseline. The authors conclude: “the fallout from the COVID-19 pandemic—perhaps especially social isolation—is sharply accelerating fatal overdose trends”.

25. This is why the World Health Organization’s Dr. David Nabarro recently stated:

“We in the World Health Organization do not advocate lockdowns as the *primary* means of control of this virus. The only time we believe a lockdown is justified is to buy you time to reorganize, regroup, rebalance your resources, protect your health workers who are exhausted, but by and large, we’d rather not do it. ... And so, we really do appeal to all world leaders: stop using lockdown as your primary control method. Develop better systems for doing it.”²⁸

26. A recent review article which points out that paradoxically lockdown measures may increase risks from Covid-19 by compromising the immune system and physical and mental health of people.²⁹ The article also points out the disproportionate impacts on groups already facing inequalities.

Policies that Restrict and Remove Freedoms and Impact Overall Health and Well Being of Citizens must be Able to Demonstrate Potential for Significant Effectiveness Based on Science and Data

27. Data and science to support restrictions on freedom by the government, particularly those that deprive citizens of constitutionally guaranteed rights, should be extremely compelling. Epidemiological theory and best practices garnered over decades of research provide important

²⁶ <https://www.hhs.gov/podcasts/learning-curve/learning-curve-14-elinore-mccance-katz-assistant-secretary-of-substance-abuse-and-mental-health-services-administration.html?fbclid=IwAR0YOPSNPvjB0-5dkWGeCtM4gVPMHQHT4zImyj7WNU0NBqhTE8UJkojq2VM>.

²⁷ Joseph Friedman, et al., Overdose-related cardiac arrests observed by emergency medical services during the US COVID-19 epidemic, December 3, 2020, JAMA Psychiatry, <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2773768>

²⁸ <https://www.youtube.com/watch?v=x8oH7cBxgwE&feature=youtu.be&t=915>.

²⁹ Michaela C. Schippers, *For the greater good? The devastating ripple effects of the Covid-19 crisis*, September 29, 2020, Frontiers in Psychology, <https://www.frontiersin.org/articles/10.3389/fpsyg.2020.577740/full>

guidance in handling the pandemic, and strongly advise against many of the measures currently used. Studies of the data on measures employed by states and countries around the world suggest that they do not significantly alter the course or outcomes of the pandemic.

The Epidemic Science

28. A solid body of literature exists about epidemics such as Covid-19 which has informed planning documents for handling such an outbreak. The approaches differ from those used more than 50 years ago as scientist have better understanding of viruses, and data analysis has discovered important evidence about what works. Planning documents for pandemics in the US³⁰ as well as all major European countries³¹ reflect this literature which is well summarized in a paper by Donald Henderson, esteemed epidemiologist and leader of the effort to eradicate smallpox, and colleagues³². Specific interventions are discussed subsequently.

29. Quarantines. “The interest in quarantine reflects the views...when much less was known about the epidemiology...It is difficult to identify circumstances in the past half-century when large-scale quarantine has been effectively used in the control of any disease. The negative consequences of large-scale quarantine are so extreme...that this mitigation measure should be eliminated from serious consideration Voluntary home quarantine for individuals who are asymptomatic...to keep possibly contagious, but still asymptomatic, people out of circulation...raises significant practical and ethical issues”.³³

30. Travel restrictions. “Travel restrictions, such as closing airports and screening travelers at borders, have historically been ineffective.”³⁴ The article then cites the World Health Organization which notes: “screening and quarantining entering travelers at international borders did not substantially de- lay virus introduction in past pandemics . . . and will likely be even less effective in the modern era.”³⁵

31. Social gatherings. “public events with an expected large attendance have sometimes been cancelled or postponed, the rationale being to decrease the number of contacts with those who might be contagious. There are, however, no certain indications that these actions have had any definitive effect on the severity or duration of an epidemic...this prohibition might include church services, athletic events, perhaps all meetings of more than 100 people...closing theaters, restaurants, malls, large stores, and bars. Implementing such measures would have seriously disruptive consequences for a community if extended through the 8-week period of an epidemic

³⁰ CDC, *The National Strategy for Pandemic Influenza*, November, 2009 with 2017 update
<https://www.cdc.gov/flu/pandemic-resources/national-strategy/index.html>

³¹ European Centre for Disease Prevention and Control, *Influenza pandemic preparedness plans*,
<https://www.ecdc.europa.eu/en/seasonal-influenza/preparedness/influenza-pandemic-preparedness-plans>

³² Thomas V. Inglesby, et al., Disease mitigation measures in the control of pandemic influenza, September 5, 2006, *Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science* 4:26, DOI: [10.1089/bsp.2006.4.366](https://doi.org/10.1089/bsp.2006.4.366)

³³ *Id.*

³⁴ *Id.*

³⁵ World Health Organization Writing Group. *Nonpharmaceutical public health interventions for pandemic influenza, national and community measures*. 2006, *Emerg Infect Dis*; 12:88–94.

in a municipal area, let alone if it were to be extended through the nation's experience with a pandemic (perhaps 8 months)...a policy calling for communitywide cancellation of public events seems inadvisable.”³⁶

32. Social distance. “It has been recommended that individuals maintain a distance of 3 feet or more during a pandemic...the efficacy of this measure is unknown...such a recommendation would greatly complicate normal daily tasks like grocery shopping, banking, and the like.”³⁷

33. Masks and PPE. The science suggests use in certain settings, such as hospitals, and the N95 is recommended during a pandemic. Further, “studies have shown that the ordinary surgical mask does little to prevent inhalation of small droplets bearing influenza virus.”³⁸

34. School closures. “In previous influenza epidemics, the impact of school closings on illness rates has been mixed...schools are often closed for 1–2 weeks early in...outbreaks of influenza primarily because of high absentee rates...this would seem reasonable on practical grounds. However, to close schools for longer periods is not only impracticable but carries the possibility of a serious adverse outcome.”³⁹ The article is specifically considering previous epidemics, primarily influenza, which often were more severe for children. Covid-19 is different in that it holds little risk of serious outcomes for children.

35. A principal tenet of the Great Barrington Declaration (GBD) is that policies that apply to the entire population are actually likely to produce worse results when there is a clear age differential in terms of outcomes, as is the case for Covid-19. Epidemic theory, summarized by Dr. Ted Cohen and Dr. Marc Lipsitch, supports this position. The authors conclude: “for those pathogens that cause more severe disease among hosts of an older age, interventions that limit transmission can paradoxically increase the burden of disease in a population.”⁴⁰

Covid Data and Science Confirms Existing and Previous Epidemic Theory

36. Analysis of data collected throughout the pandemic confirms the theory. A comprehensive study of 188 countries over the first 8 months of pandemic⁴¹ shows that the primary factors associated with Covid-19 mortality are impacted by factors inherent to the country – latitude and longitude, age distribution, stagnation in life expectancy and economy for example. Stringency measures, to include lockdowns, are not associated with the outcome. Others have

³⁶ Thomas V. Inglesby, et al., Disease mitigation measures in the control of pandemic influenza, September 5, 2006, Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science 4:26, DOI: [10.1089/bsp.2006.4.366](https://doi.org/10.1089/bsp.2006.4.366)

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Ted Cohen and Marc Lipsitch, *Too little of a good thing: A paradox of moderate infection control*, March 26, 2008, *Epidemiology*, DOI: 10.1097/EDE.0b013e31817734ba

⁴¹ Quentin De Laroche Lambert, et al., *Covid-19 mortality: a matter of vulnerability among nations facing limited margins of adaptation*, November 2020, *Frontiers in Public Health*, <https://www.frontiersin.org/articles/10.3389/fpubh.2020.604339/full>

found similar results in comparing the data across countries⁴² and states.⁴³ In addition to factors such as age and income, levels of obesity and other population factors were associated with the outcomes. However, “full lockdowns, and wide-spread testing were not associated with COVID-19 mortality per million people”.⁴⁴

37. Much of the support cited for use of lockdowns and other non-pharmaceutical measures has been mathematical and statistical models. The models have been consistently wrong in their predictions and often misinterpreted or used incorrectly⁴⁵. One of the most often cited and utilized models is that of the Imperial College. However, the model and its conclusions have been analyzed and disproven. An analysis⁴⁶, based on the data, suggests in fact that the imperial college model that best fits the actual data is one which shows no effect of lockdowns or NPI’s. The paper concludes by pointing out the dangers of use of the models given their sensitivity to parameter estimates and that “claimed benefits of lockdown appear grossly exaggerated.”

38. Data for individual countries and locations is overwhelming in demonstrating that mitigation measures and lockdowns are not effective. As an example, in September an article in Scientific American describes how the state of New Mexico “controlled” spread.⁴⁷ Just a few months later headlines described an alarming “surge” in cases and hospitalizations.⁴⁸ The story is easily repeated in other states and countries.

39. Perhaps the most extreme example of lockdown and mitigation measure ineffectiveness is found in Peru.⁴⁹ Unlike neighboring Brazil, heavily criticized for not taking strict measures, Peru locked down their country extremely early and with some of the harshest restriction in the world enforced by the military. They kept people in their homes, mandated both masks and

⁴² Bjørnskov, Christian, *Did Lockdown Work? An Economist’s Cross-Country Comparison*, August 2, 2020. Available at SSRN: <https://ssrn.com/abstract=3665588> or <http://dx.doi.org/10.2139/ssrn.3665588>

⁴³ James L. Doti, *A model to explain statewide differences in Covid-19 death rates*, November 20, 2020, available at SSRN: <https://ssrn.com/abstract=3731803> or <http://dx.doi.org/10.2139/ssrn.3731803>

⁴⁴ Rabail Chaudhry, et al. *A country level analysis measuring the impact of government actions, country preparedness and socioeconomic factors on COVID-19 mortality and related health outcomes*, July 2, 2020, EClinicalMedicine, <https://doi.org/10.1016/j.eclinm.2020.100464>

⁴⁵ Thomas, D.M., Sturdivant, R., Dhurandhar, N.V., Debroy, S., and Clark, N., 2020, *A primer on COVID-19 Mathematical Models*, Obesity 28(8), 1375-1377, doi:10.1002/oby.22881

⁴⁶ Vincent Chin, et al., December 10, 2020, *Effects of non-pharmaceutical interventions on COVID-19: a tale of three models*, <https://www.medrxiv.org/content/10.1101/2020.07.22.20160341v3>

⁴⁷ Christie Aschwanden, *How New Mexico controlled the spread of Covid-19*, September 15, 2020, Scientific American, <https://www.scientificamerican.com/article/how-new-mexico-controlled-the-spread-of-covid-19/>

⁴⁸ Jessica Garate, et al., *New Mexico health officials make dire predictions as Covid-19 cases surge*, November 5, 2020, KRQE <https://www.krqe.com/health/coronavirus-new-mexico/new-mexico-health-officials-make-dire-predictions-as-covid-19-cases-surge/>

⁴⁹ Jordan Schachtel, *The world’s toughest lockdown has resulted in the world’s highest COVID-19 death toll*, August 18, 2020, The Dossier, <https://jordanschachtel.substack.com/p/the-worlds-toughest-lockdown-has>

face shields, incorporated strict curfews and closed all but the most essential services. By August, Peru had among the highest per capita death rates with surges in cases greater than Brazil.

40. In addition to observed data, a randomized control trial (RCT) study of US Marine Recruits⁵⁰ examines effectiveness of mitigation measures. The study is published in a top journal, the New England Journal of Medicine, and is an extremely well designed and conducted study with very high compliance. The study group or more than 1800 participated in a two-week quarantine that included high quality cloth mask wearing, social distancing, isolation, and daily temperature and symptom checks. They lived on a closed college campus which they could not leave. They did not even have access to “personal electronics and other items that might contribute to surface transmission.” At the end of the study, roughly 2% of recruits in the study group tested positive. Meanwhile, in a group of over 1,500 marines who did not quarantine and follow the protocols slightly fewer (1.7%) tested positive over the same period.

41. A common criticism of the GBD approach is that it allows increased spread that makes it more, not less, possible to protect the most vulnerable. The assumption is that lockdown and other mitigation measures actually do reduce overall spread. Further, a study in England⁵¹ examined the risks for adults living in households with children. Among over 2.5 million adults over the age of 65 – therefore at increased risk – they found no association with Covid-19 outcomes for any age group of children in the home. The study further found that while there was a slight increase in infections when there were children ages 11-18 for adults under age 65, there was no increase of death. For children aged under 11, there was actually a reduction in the risk of death for adults under age 65.

Example of Universal Mask Mandates

42. A specific example of a mitigation measure governments have consistently mandated, is the use of facemasks, touted as “science”. Both data and science suggest such a mandate for widespread and universal use is not justified or effective.

43. When the 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 study⁵² involving contract 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

⁵⁰ A.G. Letizia, et al., *SARS-CoV-2 transmission among Marine recruits during quarantine*, November 11, 2020, The New England Journal of Medicine, DOI: 10.1056/NEJMoa2029717

⁵¹ Harriet Forbes, et al., *Association between living with children and outcomes from COVID-19: an OpenSAFELY cohort study of 12 million adults in England*, November 2, 2020, BMJ <https://www.medrxiv.org/content/10.1101/2020.11.01.20222315v1>

⁵² Lei Luo, et al., *Contact settings and risk for transmission in 3410 close contacts of patients with COVID-19 in Guangzhou, China: a prospective cohort study*, December 1, 2020, Annals of Internal Medicine, <https://pubmed.ncbi.nlm.nih.gov/32790510/>

remarkably large study⁵³, 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 1174 close contacts. This is also important in terms of who should quarantine; locking down asymptomatic people is not supported by these studies.

44. 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.”⁵⁴

45. The evidence prior to 2020 is captured in a review by the WHO. In 2019 they completed a systematic review of the scientific literature for all NPIs.⁵⁵ 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 and the “Danish Mask Study” significantly add to the quality of the literature, specifically in the community setting.

46. Support for mask effectiveness is largely based on laboratory studies. However, the evidence even in that setting 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.”⁵⁶ 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%.⁵⁷ 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.⁵⁸ The airborne nature of Covid-19 means that this performance is not effective when exposure is more than brief to the virus.⁵⁹ The studies cited

⁵³ Shiyi Cao, et al., Post-lockdown SARS-CoV-2 nucleic acid screening in nearly ten million residents of Wuhan, China, November 20, 2020, Nature Communications, <https://www.nature.com/articles/s41467-020-19802-w>

⁵⁴ Michael Klompas, et al., Universal masking in hospitals in the Covid-19 era, May 21, 2020, New England Journal of Medicine, <https://www.nejm.org/doi/full/10.1056/NEJMp2006372>.

⁵⁵ World Health Organization, 2019, *Non-pharmaceutical public health measures for mitigating the risk and impact of epidemic and pandemic influenza*.

⁵⁶ Samy Rengasamy, et al., *Filtration performance of FDA-cleared surgical masks*, 2009, J Int Soc Respir Prot, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7357397/pdf/nihms-1604065.pdf>

⁵⁷ Emily E. Sickbert-Bennett, et al., *Filtration efficiency of hospital face mask alternatives available for use during the COVID-19 pandemic*, August 11, 2020, JAMA Network, <https://jamanetwork.com/article.aspx?doi=10.1001/jamainternmed.2020.4221>

⁵⁸ Bhanu Bhakta Neupane, et al., June 2019, *Optical microscopic study of surface morphology and filtering efficiency of face masks*, DOI 10.7717/peerj.7142.

⁵⁹ John A. Lednicky, et al., *Viable SARS-CoV-2 in the air of a hospital room with COVID-19 patients*, September 11, 2020, International Journal of Infectious Diseases, <https://doi.org/10.1016/j.ijid.2020.09.025>

here involve surgical masks, likely better than most cloth masks worn by people.⁶⁰ Further, the time of wear and proper use is also likely better in the studies than when people wear masks for many hours.

47. 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.⁶¹

48. Even if masks filter some percentage of particles, the number of such particles is far greater than needed to cause a serious infection.⁶² 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.

49. The WHO, in 2020, changed recommendations about mask use quite suddenly in June or July. They published an “interim guidance” document⁶³ 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.”

50. 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.

51. 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 Kansas⁶⁴ suffers numerous flaws, most notably use of large counties for the

⁶⁰ Samy Rengasamy, et al., *Simple respiratory protection – Evaluation of the filtration performance of cloth masks and common fabric materials against 20-1000 nm size particles*, October 7, 2010, *Annals of Work Exposures and Health*, <https://academic.oup.com/annweh/article/54/7/789/202744>.

⁶¹ Dhaval Adjodah, et al., *Decrease in Hospitalizations for Covid-19 after mask mandates in 1083 US counties*, WITHDRAWN October 21, 2020, medRx, <https://www.medrxiv.org/content/10.1101/2020.10.21.20208728v2>

⁶² Lisa M. Brosseau et al, November 19, 2020, Letter to the Editor: Facial Masking for COVID-19, *New England Journal of Medicine*, <https://www.nejm.org/doi/full/10.1056/NEJMc2030886>

⁶³ World Health Organization, December 1, 2020, *Mask use in the context of COVID-19 Interim Guidance*.

⁶⁴ Van Dyke, et al., *Trends in County-Level COVID-19 Incidence in Counties With and Without a Mask Mandate – Kansas, June 1–August 23, 2020*, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6947e2.htm>.

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 is for mask mandates and their relationship to hospitalizations⁶⁵ 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.

52. Additional evidence from the CDC⁶⁶ includes primarily laboratory studies with flaws as noted previously. In one such study the authors note major “leakage jets” for cloth and surgical masks.⁶⁷ 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.⁶⁸

53. 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 York⁶⁹ 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.⁷⁰ 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.⁷¹

54. 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

⁶⁵ Heeson Joo, et al., February 5, 2021, *Decline in COVID-19 hospitalization growth rates associated with statewide mask mandates – 10 states, March – October 2020*, MMWR / February 5, 2021 / Vol. 70

⁶⁶ CDC, November 20, 2020, *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, <https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html>

⁶⁷ I.M.Viola et al., 2020, *Face coverings, aerosol dispersion and mitigation of virus transmission risk*. <https://arxiv.org/abs/2005.10720>external icon

⁶⁸ E.P. Fischer et al, 2020, *Low-cost measurement of face mask efficacy for filtering expelled droplets during speech*. <https://www.ncbi.nlm.nih.gov/pubmed/32917603>external icon

⁶⁹ W. Lyu et al, 2020, *Community use of face masks and COVID-19: evidence from a natural experiment of state mandates in the US*. <https://www.ncbi.nlm.nih.gov/pubmed/32543923>

⁷⁰ M.S. Gallaway et al, 2020, *Trends in COVID-19 incidence after implementation of mitigation measures – Arizona, January 22 – August 7, 2020*. <https://www.ncbi.nlm.nih.gov/pubmed/33031366>

⁷¹ M.J. Hendrix et al, May 2020, *Absence of apparent transmission of SARS-CoV-2 from two stylists after exposure at a hair salon with a universal face covering policy – Springfield Missouri*, <https://www.ncbi.nlm.nih.gov/pubmed/32673300>

about the use of masks for protection against wildfire smoke⁷² 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 masks⁷³. 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.

55. 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.

56. 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.”⁷⁴ 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.”⁷⁵ A third meta-analysis included both randomized trials and observational studies, a total of 31, and concluded “evidence is not

⁷² CDC, 2020, *Wildfire smoke and COVID-19*, https://www.cdc.gov/disasters/covid-19/wildfire_smoke_covid-19.html

⁷³ John T. Brooks, et al, February 19, 2021, *Maximizing fit for cloth and medical procedure masks to improve performance and reduce SARS-CoV-2 transmission and exposure, 2021*.
https://www.cdc.gov/mmwr/volumes/70/wr/mm7007e1.htm?s_cid=mm7007e1_x

⁷⁴ Jingyi Xiao, et al., *Nonpharmaceutical measures for pandemic influenza in nonhealthcare settings – personal protective and environmental measures*, May 2020, *Emerging Infectious Diseases*,
https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article

⁷⁵ T Jefferson, et al., *Physical interventions to interrupt or reduce the spread of respiratory viruses*, April 7, 2020, *MedRxiv*, <https://www.medrxiv.org/content/10.1101/2020.03.30.20047217v2>

sufficiently strong to support widespread use of facemasks as a protective measure against COVID-19.”⁷⁶

57. The European CDC, in similar fashion to the WHO December 2020 update, conducted an extensive review⁷⁷ 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.

58. In 2020 two more randomized trials including a control group add to the quality of available evidence documented by the WHO. The first 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.⁷⁸ 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.⁷⁹

59. 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 health care workers.⁸⁰ A quasi-experimental study of European data⁸¹ 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.⁸²

60. 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 was conducted pre-COVID but showed an actual increase in infection with cloth masks in a hospital setting. A more

⁷⁶ Julii Brainard, et al., *Facemasks and similar barriers to prevent respiratory illness such as COVID19: A rapid systematic review*, April 1, 2020, MedRxiv, <https://doi.org/10.1101/2020.04.01.20049528>

⁷⁷ ECDC, February 15, 2021, *Using face masks in the community: first update*, <https://www.ecdc.europa.eu/sites/default/files/documents/covid-19-face-masks-community-first-update.pdf>

⁷⁸ C Raina MacIntyre, et al., *A cluster randomized trial of cloth masks compared with medical masks in healthcare workers*, April 22, 2015, BMJ Open, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4420971/>

⁷⁹ Henning Bundgaard, et al., *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers A Randomized Controlled Trial*, November 18, 2020, Annals of Internal Medicine, <https://www.acpjournals.org/doi/10.7326/M20-6817>

⁸⁰ T. Jefferson, et al., November 20, 2020, *Do physical measures such as hand-washing or wearing masks stop or slow down the spread of respiratory viruses*, https://www.cochrane.org/CD006207/ARI_do-physical-measures-such-hand-washing-or-wearing-masks-stop-or-slow-down-spread-respiratory-viruses

⁸¹ Paul R. Hunter, et al, May 6, 2020, *Impact of non-pharmaceutical interventions against COVID-19 in Europe: a quasi-experimental study*, <https://www.medrxiv.org/content/10.1101/2020.05.01.20088260v1.full.pdf>

⁸² Lisa M Brosseau and Margaret Sietsema, April 1, 2020, *Commentary: Masks-for-all for COVID-19 not based on sound data*, <https://www.cidrap.umn.edu/news-perspective/2020/04/commentary-masks-all-covid-19-not-based-sound-data>

recent review noted a similar conclusion.⁸³ Physical and chemical attributes of respiration through a mask may scientifically describe reasons for increases in infections.⁸⁴

61. 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 study⁸⁵ 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.⁸⁶ Similar results were found looking more broadly: for example, at state level the numbers were 27 per 100,000 with mask mandates and only 17 for no mandates.

62. 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.^{87,88} Comparisons of the disease trajectory for like countries/counties consistently depict remarkably similar trajectories despite various level of mask mandates and usage.⁸⁹

63. The example of mask use is important for several reasons. First, there are potential consequences to extended mask use, both physiological and psychological.^{90,91,92} Studies are just beginning to emerge of actual physical harms from mask wear. Other studies have found issues

⁸³ <https://www.thieme-connect.com/products/ejournals/html/10.1055/a-1174-6591>

⁸⁴ Colleen Huber, December 7, 2020, Proposed mechanisms by which masks increase risk of COVID-19, PDMJ, https://pdmj.org/papers/masks_false_safety_and_real_dangers_part4/

⁸⁵ Scott Morefield, December 21, 2020, New study shows mask mandates had zero effect in Florida or nationwide, <https://townhall.com/columnists/scottmorefield/2020/12/21/new-study-shows-mask-mandates-had-zero-effect-in-florida-or-nationwide-but-the-l-n2581879>

⁸⁶ Justin Hart, December 20, 2020, RationalGround.com analysis, https://twitter.com/justin_hart/status/1340725090514653184/photo/1

⁸⁷ Ian Miller, November 2020, More mask charts, <https://rationalground.com/more-mask-charts/>

⁸⁸ Ian Miller, December 2020, Post-Thanksgiving mask charts: still no evidence that masks work, <https://rationalground.com/post-thanksgiving-mask-charts-still-no-evidence-that-masks-work/>

⁸⁹ Ian Miller, November 2020, Mask charts, <https://rationalground.com/mask-charts/>

⁹⁰ Baruch Vainshelboim, *Facemasks in the Covid-19 era: a health hypothesis*, November 19, 2020, Medical Hypothesis, doi: <https://doi.org/10.1016/j.mehy.2020.110411>

⁹¹ Sven Fikenzer, et al., *Effects of surgical and FFP2/N95 facemasks on cardiopulmonary exercise capacity*, June 30, 2020, Clinical Research in Cardiology, <https://doi.org/10.1007/s00392-020-01704-y>

⁹² Russell Blaylock, May 11, 2020, *Face masks pose serious risks to the healthy*, Technocracy, <https://www.technocracy.news/blaylock-face-masks-pose-serious-risks-to-the-healthy/>

with oxygen saturation levels^{93,94} which impacts healthy immune systems.⁹⁵ This issue could actually lead to increase susceptibility to Covid and other viruses long term.⁹⁶ Other risks include foreign particles causing lung damage⁹⁷ and microbial infections⁹⁸.

64. Harms for mask wear for children is an increasing concern. While children are at very low risk of infection, and tend to spread the virus and a much lower rate, masks have also become common for school openings. One is a large study in Germany among over 25,000 children⁹⁹ 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.¹⁰⁰

65. A second impact of mask mandates is removing the freedom to choose from individuals and without compelling scientific 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.¹⁰¹ 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

⁹³ A. Beder, et al, 2008, *Preliminary report on surgical mask induce deoxygenation during major surgery*, Neurocirugia, <http://scielo.isciii.es/pdf/neuro/v19n2/3.pdf>.

⁹⁴ Boris Borovoy, et al, September 13, 2020, *Hypoxia, hypercapnia and physiological effects*, PDMJ, https://pdmj.org/papers/masks_false_safety_and_real_dangers_part3/

⁹⁵ Dmitriy Lukashev, et al., 2006, *Cutting Edge: Hypoxia-inducible factor 1alpha and its activation-inducible short isoform functions of CD4 and CD8 T lymphocytes*, The Journal of Immunology, <https://www.jimmunol.org/content/177/8/4962>

⁹⁶ Colleen Huber, July 6, 2020, *Masks are neither effective nor safe: a summary of the science*, Primary Doctor Medical Journal, https://pdmj.org/papers/masks_are_neither_effective_nor_safe/index.html

⁹⁷ Boris Borovoy, et al, September 13, 2020, *Friable mask particulate and lung vulnerability*, PDMJ, https://pdmj.org/papers/masks_false_safety_and_real_dangers_part1/

⁹⁸ Boris Borovoy, et al, September 13, 2020, *Microbial challenges from masks*, PDMJ, https://pdmj.org/papers/masks_false_safety_and_real_dangers_part2/

⁹⁹ Silke Schwarz et al., January 2021, *Corona children studies “Co-Ki”: first results of a Germany-wide registry on mouth and nose covering (mask) in children*, <https://orcid.org/0000-0002-8199-8874>

¹⁰⁰ Carla Peeters, September 9, 2020, *Rapid response: Psychosocial, biological, and immunological risks for children and pupils make long-term wearing of mouth masks difficult to maintain*, the BMJ <https://www.bmj.com/content/370/bmj.m3021/rr-6>

¹⁰¹ Tom Jefferson and Carl Heneghan, July 23, 2020, *Masking the lack of evidence with politics*, <https://www.cebm.net/covid-19/masking-lack-of-evidence-with-politics/>

effective and safe vaccine should one be developed. Public distrust of medical professions, and actual science/data increases with potentially detrimental impacts.¹⁰²

Policies that Restrict and Remove Freedoms must be Supported by Appropriate and Correct Data

66. Testing, generally involving the RT-PCR test for the SARS-CoV-2 virus is at the heart of many decisions regarding mandates imposed by government authorities. Criteria such as number of new daily cases, number of hospitalized and the percent positivity are often used and require analysis of results from these tests. The available scientific information regarding the accuracy of COVID-19 PCR tests, as conducted by clinical laboratories in the U.S., suggests that they are not sufficiently accurate regarding infectivity risk to warrant the central role they play in the criteria that government officials have adopted for restricting activity. There are two major problems that render these criteria scientifically unjustified.

67. First, neither the new daily cases number nor percent positivity number represent random samples of the population, but rather represent results from selected populations who have been referred, or have self-referred, for testing. The selection process for testing may occur because a physician has a clinical suspicion of COVID-19 disease, because a person came into contact with someone else who tested positive, or because a workplace requires employees to be tested regularly. The first two groups are typically more likely to have COVID-19-like symptoms and more likely to be positive than a randomly chosen population, while the third group is not a random subset of the population and includes many asymptomatic people as well as essential workers who are at higher risk of exposure to SARS-CoV-2. The percent positivity number is thus a biased estimate of the actual transmission risk of COVID-19 in the population. Without population representative sampling for testing, the number does not reflect the risk of transmission and thus is scientifically unjustified as a criterion for imposing restrictions on normal activities.

68. Second, the criteria do not account for the fact that the RT-PCR tests, as used in most laboratories around the US, likely register positive test results even for non-infectious viral fragments. Because the RT-PCR test is based on a very small sample of genetic material, the test amplifies the virus—if present—by a process of repeatedly doubling the concentration of viral genetic material.¹⁰³ If the sample genetic material is doubled enough times, the test will detect the presence of the virus even when the viral load is very small. Thus, although a positive test result indicates that a person has come into contact with the genomic sequence or some other viral antigen at some point in time, the mere presence of the viral genome is not sufficient, on its own, to indicate

¹⁰² Joseph A Ladapo, *Masks are a distraction from the pandemic reality*, October, 28, 2020, The Wall Street Journal, <https://www.wsj.com/articles/masks-are-a-distraction-from-the-pandemic-reality-11603927026>

¹⁰³ T. Jefferson, et al., *Viral Cultures for COVID-19 Infectivity Assessment – A Systematic Review (Update 3)* (Sept. 3, 2020), MEDRxIV, <https://www.medrxiv.org/content/10.1101/2020.08.04.20167932v3.full.pdf>.

infectivity.¹⁰⁴ In addition, viral genomic material can still be present—and thus detected if the sample is doubled enough times—weeks after an infected person has ceased to be infectious.¹⁰⁵

69. The problem arises from the fact that the implementation of the RT-PCR test for COVID-19 requires that clinical laboratories decide in advance how many doublings of the genetic material they will require before deciding that a sample is negative for the presence of the virus. This threshold, known as the “cycle time” of the test, determines both the rate at which a positive test result will be returned when the original sample does not include viral concentrations in sufficient amount to be infectious (hereafter, the functional false positive rate), and the rate at which a negative test result will be returned when the original sample does include viral concentrations in sufficient amount to be infectious (hereafter, the functional false negative rate). A higher cycle time threshold—requiring more doublings before declaring a negative test result—increases the functional false positive rate of the RT-PCR test because even if a non-infectious viral load is present in the sample obtained from the patient, a large number of permitted doublings could amplify whatever is present such that the test result is positive.

70. A systematic review of the literature on cycle time thresholds for the SARS-CoV-2 RT-PCR tests (encompassing 25 different published studies on the topic) concludes that “A binary Yes/No approach to the interpretation RT-PCR unvalidated against viral culture will result in false positives with segregation of large numbers of people who are no longer infectious and hence not a threat to public health.”¹⁰⁶ The scientific literature thus establishes the importance of cycle time thresholds in interpreting RT-PCR SARS-CoV-2 results.^{107,108}

71. This is important in the present context because RT-PCR tests are the basis of the case counts and percent positivity criteria used in many places. Both criteria are premised on a measurement that includes many people who are identified as SARS-CoV-2 positive but who pose little or no community transmission risk. When criteria do not make explicit the cycle time thresholds used by the laboratories analyzing the RT-PCR tests, the criteria are not scientifically justified in making decisions about policy.

72. Dr. Anthony Fauci spoke to this issue in July: “It's very frustrating for the patients as well as for the physicians...somebody comes in, and they repeat their PCR, and it's like 37 cycle threshold, but you almost never can culture virus from a 37 threshold cycle....so, I think if

¹⁰⁴ (*Id.*)

¹⁰⁵ (*Id.*)

¹⁰⁶ (*Id.*)

¹⁰⁷ Flora Marzia Liotti, et al., *Assessment of SARS-CoV-2 RNA test results among patients who recovered from COVID-19 with prior negative results*, November 12, 2020, JAMA Internal Medicine, doi:10.1001/jamainternmed.2020.7570

¹⁰⁸ Rita Jaafar, et al., *Correlation between 3790 qPCR positives samples and positive cell cultures including 1941 SARS-CoV-2 isolates*, September 28, 2020, Clinical Infectious Diseases, ciaa1491, <https://doi.org/10.1093/cid/ciaa1491>

somebody does come in with 37, 38, even 36, you got to say, you know, it's just dead nucleotides, period."¹⁰⁹ However, the guidelines in the US have largely remained unchanged.

73. In Europe, a group of over 20 scientists with incredible expertise in biology/virology and more, curated by the International Consortium of Scientists in Life Sciences (ICSLS) sent a letter¹¹⁰ to the editorial board of Eurosurveillance. They request retraction of a paper¹¹¹ published in January 2020 describing the RT-PCR method to detect SARS-CoV2. In an attached review¹¹², submitted to the journal for publication, they carefully and in detail describe “10 major scientific flaws” with “consequences for false positive results” in the original paper. Their analysis points out the importance of carefully interpreting PCR test results before automatically counting them as “cases”.

74. The WHO, in December, finally published guidance¹¹³ for PCR use to address the problem noting “the probability that a person who has a positive result (SARS-CoV-2 detected) is truly infected with SARS-CoV-2 decreases as positivity rate decreases, irrespective of the assay specificity.” The guidance points out that a positive test should be interpreted by looking at the Ct (cycles) and also consideration of “clinical signs and symptoms” before a diagnosis of a Covid case.

75. In many places, dramatic increases in testing among asymptomatic people (schools, workplaces for example) has led to inflated estimates of case numbers and corresponding policy decisions that needlessly impact healthy and non-contagious people. In addition, this approach distorts the true level of disease and distracts from efforts to protect those that are actually at risk and most vulnerable.¹¹⁴ When disease prevalence in a location is low, there is a danger from this approach of “pseudo-epidemics”, as previously observed in epidemics when PCR tests are used¹¹⁵,

¹⁰⁹ Daniel Payne, *In newly surfaced July interview, Fauci warns that widely used COVID tests may pick up 'dead' virus*, November 8, 2020, <https://justthenews.com/politics-policy/coronavirus/newly-surfaced-video-july-fauci-tests-dead-virus>

¹¹⁰ Pieter Borger, et al., *Retraction request letter to Eurosurveillance editorial board*, November 28, 2020, <https://cormandrostenreview.com/retraction-request-letter-to-eurosurveillance-editorial-board/>

¹¹¹ Victor M. Corman, et al., *Detection of 2019 novel coronavirus (2019-nCoV) by real-time RT-PCR*, January 21, 2020, Eurosurveillance 25(8), <https://doi.org/10.2807/1560-7917.ES.2020.25.3.2000045>

¹¹² Pieter Borger, et al., *External peer review of the RTPCR test to detect SARS-CoV-2 reveals 10 major scientific flaws at the molecular and methodological level: consequences for false positive results*, November 27, 2020, <https://cormandrostenreview.com/report/>

¹¹³ WHO, December 14, 2020, *WHO information notice for IVD users*, <https://www.who.int/news/item/14-12-2020-who-information-notice-for-ivd-users>

¹¹⁴ Jay Bhattacharya and Martion Kulldorf, *The case against Covid tests for the young and healthy*, September 3, 2020, <https://www.wsj.com/articles/the-case-against-covid-tests-for-the-young-and-healthy-11599151722>

¹¹⁵ Marilyn Larkin, *Curbing false positives and pseudo-epidemics*, March, 2007, The Lancet, [https://doi.org/10.1016/S1473-3099\(07\)70044-0](https://doi.org/10.1016/S1473-3099(07)70044-0)

in locations where the epidemic has passed due to false positives.^{116,117} Among the consequences observed when false positives occur are people then missing other medical treatment, in addition to unnecessary quarantine and isolation.¹¹⁸

76. Related to testing is the ultimate reporting of not just cases, but hospitalizations and deaths due to Covid-19. Hospitalizations are often a metric cited when justifying mandates. As testing has expanded, most hospitals now test all patients regardless of diagnosis. Thus, many admitted patients with a positive test result are not hospitalized for Covid-19, but are included in the reports on Covid-19 hospitalization. As an example, a Miami-Dade county survey¹¹⁹ found that over half of those listed as Covid-19 hospitalizations, 471 of 898, were not admitted for Covid-19. Similar issues then arise when deaths are counted.¹²⁰

77. Reporting of cases and deaths in many states are potentially inflated. As an example, in New York¹²¹ a “confirmed case” is a “positive test from a molecular test, such as a PCR test.” Thus, the issues with PCR testing play a role in the counts of cases. A “confirmed death” is a “death within 60 days of a positive molecular test.” Thus, again, PCR test issues play a role. Further, the death could be completely unrelated to Covid-19 using this definition.

August 2021 Update – Impact of New Variants

78. New variants of SAR-CoV2 are expected (Delta, Lambda, etc) as the virus seeks to live. The pandemic planning guidelines and response are unchanged – protect the vulnerable, care for the sick and allow and encourage others to live normal lives to avoid the devastating consequences outlined in this document. While new variants have different transmissibility and outcomes, the basic nature of the virus is the same in terms of effectiveness of NPIs such as mask wear. The virus is still spread via small airborne particles making masking, and many other behavior changes, ineffective as means to reduce spread in the population.

79. Data continues to show the lack of impact of masks in stopping an airborne virus. Countries praised for heavy mask wear (Japan, Iceland, Thailand, Czech Republic, Vietnam and many more) have since seen large outbreaks in keeping with locations with less mask use. Mask wear, among mitigation measures, is the most clearly ineffective based on months of observing

¹¹⁶ Association of American Physicians and Surgeons (AAPS), October 7, 2020, *Do we have a coronavirus pandemic or a PCR test pandemic*, <https://aapsonline.org/covid-19-do-we-have-a-coronavirus-pandemic-or-a-pcr-test-pandemic/>

¹¹⁷ Mike Yeadon, *The PCR false positive pseudo-epidemic*, December 1, 2020, <https://lockdownsceptics.org/the-pcr-false-positive-pseudo-epidemic/>

¹¹⁸ Brandon Healy et al., January 1, 2021, *The impact of false positive COVID-19 results in an area of low prevalence*, DOI: 10.7861/clinmed.2020-0839

¹¹⁹ Ben Conarck, *In Miami, a sign of widespread transmission: More non-COVID patients have the virus*, November 18, 2020, Miami Herald, <https://www.miamiherald.com/news/coronavirus/article247234864.html>.

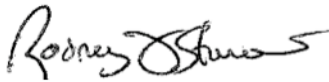
¹²⁰ Jennifer Cabrera and Len Cabrera, *Death certificate review raises questions about official number of Covid-19 deaths*, October 30, 2020, Alachua Chronicle, <https://alachuachronicle.com/death-certificate-review-raises-questions-about-official-number-of-covid-19-deaths/>

¹²¹ NYC Health Covid-19: Data, December 13, 2020, <https://www1.nyc.gov/site/doh/covid/covid-19-data.page>.

the pandemic data. A few examples of analysis of the data recently published include a study based on a very large database in U.S. schools showing no difference in spread in schools with and without mask wear.¹²² Another study looked at all U.S. states and found no difference in case growth rates based on mask mandates.¹²³ Former President Biden Covid advisor Michael Osterholm recently admitted that cloth and surgical masks are ineffective, finally confirming what data and studies have shown both during and prior to the current pandemic.¹²⁴

80. Efforts to produce studies designed to justify mandates continue to use flawed models or statistical methods that overstate potential benefits. A NY Times article¹²⁵ offers an example. The authors cite a study of students in North Carolina to provide evidence of masks working based on relatively low cases and outbreaks in schools. However, the authors themselves point out that there were no schools in the study where masks were not worn to use as a comparison. As previously pointed out, there are numerous examples of schools without mask wear with similar outcomes. Such evidence has been available since June of 2020. In Sweden (and many other European countries) schools were in person, no masks, throughout the entire pandemic with no deaths among children and less risk for teachers than for other similar working adults.¹²⁶

I DECLARE UNDER PENALTY OF PERJURY AND UNDER THE LAWS OF THE STATE OF MONTANA THAT THE FOREGOING IS TRUE AND CORRECT.



Rodney X. Sturdivant, Ph.D.

Date of Signature: August 11, 2021

Waco, Texas

¹²² Oster, E., et al., *COVID-19 Mitigation Practices and COVID-19 Rates in Schools: Report on Data from Florida, New York and Massachusetts*, May 21, 2021, BMJ, <https://www.medrxiv.org/content/10.1101/2021.05.19.21257467v1>

¹²³ Guerra, D. and Guerra, D., *Mask mandate and use efficacy in state-level COVID-19 containment*, MedRX, <https://www.medrxiv.org/content/10.1101/2021.05.18.21257385v2>

¹²⁴ Courtney O'Brien, *Former Biden COVID advisor says cloth masks ineffective, suggests Americans start wearing N-95 masks*, <https://www.foxnews.com/media/biden-covid-adviser-americans-need-to-wear-n95-masks>

¹²⁵ Kaneshia Zimmerman and Danny Benjamin Jr, August 10, 2021, *We studied one million students, universal masking works*, NY Times opinion, <https://www.nytimes.com/2021/08/10/opinion/covid-schools-masks.html>

¹²⁶ Jonas F. Ludvigsson et al, February 18, 2021, *Open schools, Covid-19, and child and teacher morbidity in Sweden*, New England Journal of Medicine, <https://www.nejm.org/doi/full/10.1056/NEJMc2026670>.

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Come now the Defendant School Districts and oppose Plaintiffs' motion for an expedited preliminary injunction hearing. The School Districts understand that a preliminary injunction motion cannot be resolved without a hearing, but there is no need for an emergency hearing in the few short days before school starts because 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 (Mont. 1995) (emphasis added). "[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 (Mont. 1981) (emphasis added).

Here, the School Districts in this case had face covering rules in effect for the 2020-2021 school year, and those Districts are continuing face covering requirements for the school year that starts after the Labor Day weekend. As such, the status quo in this case is that the School Districts should be able to continue to require students, staff, volunteers and visitors to use facial coverings until a trial can be held on the merits of Plaintiffs' claims. Given that the purpose of a preliminary injunction is to maintain the status quo, there is no reason to force a hearing in the days leading up to the first day of school.

Further, Plaintiffs' Complaint and Motion for a Preliminary Injunction indicate that they intend to challenge the science behind the School District face covering rules and they intend to have the "expert" listed in their motion testify to as much. The issue of medical science behind face covering is not properly before the Court when considering a preliminary injunction. Here, the issue is whether the Plaintiffs can make a prima facie case that the rules violate their constitutional rights. The Court does not need expert testimony about the science of face coverings to find that the rules do not violate the constitutional right to privacy in their own decisions regarding medical treatment, because, among other reasons, wearing a mask in schools is simply not "medical treatment." See *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 23, 366 Mont. 224, 231, 286 P.3d 1161, 1166 (holding that the individual right to privacy includes the individual's right to "obtain and reject **medical treatment**"). Plaintiffs cannot refuse to wear a mask any more than they can insist on receiving medical treatment from unlicensed providers, *Wiser v. State*, 2006 MT 20, ¶¶ 16-20, 331 Mont. 28, 33-34, 129 P.3d 133, 137-38, or insist on having access to a particular medication. *Mont. Cannabis Indus. Ass'n*, 2012 MT 201, ¶ 27. The same is true for the Plaintiffs' allegation that the face covering rules violate their human dignity rights because they limit an individual's right to see facial expressions or to make health care decisions for themselves. Expert testimony about the science of masking is unnecessary to

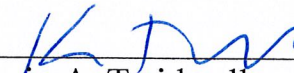
determine this issue.

As Missoula District Court Judge Hon. Jason Marks held in a recent lawsuit filed against Missoula County raising the same constitutional claims regarding masking rules, expert testimony is not appropriate at the preliminary injunction hearing. *See* Minute Entry, DV-32-2021-000063 (April 6, 2021) attached as an exhibit. Further, requiring the School Districts to locate and prepare experts to rebut Plaintiffs' expert opinions in the days before school starts and at a time when School District administrators and staff are in the last few days of preparing for the first day of school is impracticable and not necessary. In fact, requiring the School Districts to present expert testimony at a preliminary injunction hearing is no different than conducting an actual trial on the merits of Plaintiffs' claims.

For those reasons, the Court should deny Plaintiffs' request for an expedited hearing to occur prior the start of school, and it should reject any request from Plaintiffs to call expert witnesses to challenge the efficacy of face coverings at the preliminary injunction hearing.

DATED this 27th day of August, 2021.

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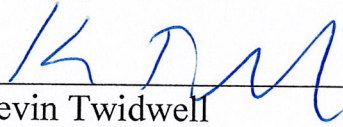
Certificate of Service

I hereby certify that I served a copy of the foregoing via e-mail, to the following:

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I, Kevin A. Twidwell, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 08-27-2021:

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Defendants Missoula County Public Schools No. 1¹, Target Range School District No. 23 and Hellgate Elementary School District No. 4 (“School Districts”) file this brief in opposition to Plaintiffs’ Motion for a Preliminary Injunction.²

INTRODUCTION

At a time when the community is experiencing a COVID-19 surge in cases, Plaintiffs are asking this Court to enjoin three Missoula-area school districts from continuing to require face coverings for students, staff and visitors at their schools to mitigate the spread of the disease among its students, many of whom are not of age to be vaccinated.

School Districts in Montana have expansive local control to adopt rules and practices that are in the best for their individual districts. After exhaustive consideration of local and national health data, the transmissibility of COVID-19 and its variants, recommendations for student face covering by the Centers for Disease Control, the American Academy of Pediatrics, along with extensive public comment, the School Districts in Missoula (and most other large Montana districts) have used their inherent authority under Montana’s Constitution and statutes to adopt reopening plans that include the continued use of face coverings

¹ MCPS includes the Missoula High School District No. 1 and Elementary School District. For convenience, we refer to both as MCPS in this brief. This brief also uses face coverings and masks interchangeably.

² In support of their opposition to the motion, Defendants have attached affidavits from MCPS Superintendent Robert Watson, Target Range Superintendent Heather Davis-Schmidt, and Hellgate Elementary Superintendent Douglas Reisig.

to mitigate the transmission of COVID-19 and to keep in-person instruction an option for Missoula students.³

Plaintiffs correctly note that the “loss of a constitutional right” is a suitable subject for the consideration of a preliminary injunction. While there are some Montana cases that address the constitutionality of school rules in circumstances in which student are deemed ineligible for extracurricular activities based on age, grade point average and marital status, the first question here is whether constitutionally protected rights are implicated in the first place. Plaintiffs’ right to “privacy” and “dignity” are not implicated by the mask requirements as noted below. What is essential to consider here is the reasonable, uniformly applied face covering requirements that allow all citizen students access to educational services under the Montana Constitution, whether those students are healthy, immunocompromised, or reside with healthy families or families with one or more immunocompromised members.

³ As an initial matter, Plaintiffs want this Court to determine that the science used by national and local health authorities in recommending face coverings for schools is not sound. This weighty task is not something that should be, or can be, accomplished at a hastily called preliminary injunction hearing and will require extensive litigation and testimony of a wide array of experts and not just the testimony of Plaintiffs’ “expert” listed in his pleadings. Be assured that the School Districts have relied upon significant epidemiological studies, data and local and national health care recommendations that schools require K-12 coverings, and they will provide that information at the appropriate time. But as this Court held in a recent lawsuit filed against Missoula County raising the same constitutional claims, the science behind the use of face coverings is not at issue in a preliminary injunction hearing regarding Plaintiffs’ constitutional claims. *See* Order attached as Exhibit 1. If the Court requires the School Districts to obtain and present expert testimony supporting the face covering rules at a preliminary injunction hearing, there is no difference between a hearing on a preliminary injunction and a full trial on the merits.

With that background, a preliminary injunction is appropriate only if Plaintiffs can demonstrate that they have a likelihood of success; that they will suffer irreparable harm if students and others are required to continue to cover their mouths and noses at the public schools; and after a weighing of the equities involved, deciding whether to enjoin the use of face coverings in schools is in the public interest. Underlying these factors is the fact that preliminary injunctions are proper only if they will preserve the status quo pending a decision on the merits of the claims. The Court should deny the Plaintiffs' motion for a preliminary injunction for the following reasons:

First, addressing the status quo prong, Plaintiffs' request that the Court enjoin the face covering requirements does not preserve the status quo – it alters the status quo. Here, all three School Districts required students, staff, volunteers and visitors to wear face coverings during the 2020-2021 school year, and the rules adopted for the 2021-2022 school year continue that requirement for the same individuals. As such, the status quo is to allow the School Districts to maintain the face covering requirements. As far as the School Districts can ascertain at this stage, the individual Plaintiffs had students in the public schools last year, and they did not assert a constitutional challenge to the face covering rules but waited until a week for school starts this year to seek redress.⁴ In short, Plaintiffs slept on any

⁴ Plaintiffs may argue that a statewide mask mandate prohibited a challenge last year, but Governor Gianforte rescinded the mask mandate in February 2021, and the School Districts continued their face coverings even after the mandate was lifted. Directive Implementing Executive Order 2-2021 attached as Exhibit 2.

rights they believe they have to challenge the rules, essentially admitting that face covering requirements do not implicate immediate or irreparable harm, and are not now entitled to a preliminary injunction.

Second, in deciding to issue a preliminary injunction, the Court must decide whether enjoining the face covering rules is in the best interest of the public by balancing of the equities involved in this case. Here, the School Districts have Constitutional and statutory authority that recognize the local control of elected trustees to supervise their schools and to adopt health and safety rules for students, staff and members of the public who enter school facilities. The rules were adopted to minimize the spread of COVID-19 and to allow the School Districts to maintain in-person instruction for this school year. Eliminating the ability to mandate masks would significantly disrupt School District operations and put in-person instruction at risk. The three School Districts implemented narrowly tailored rules that will be constantly reviewed and altered, if necessary, based on COVID-19 data and parental comment. Therefore, the equities and public interest weigh heavily against enjoining the face covering rules.

Finally, Plaintiffs cannot make a prima facie showing that they will likely succeed on the merits of their constitutional claims and that they will suffer any injury, let alone irreparable injury. Despite Plaintiffs' arguments, there is no constitutional right to attend classes or to enter school premises without wearing a

face covering when School Districts adopt rules to mitigate the spread of a communicable disease. Courts have uniformly found that face covering rules are constitutional and have rejected claims that face coverings infringe upon an individual's right to privacy in making their healthcare decisions. The same analysis applies to a claim of human dignity violation. As such, the preliminary injunction motion should be denied.

FACTUAL BACKGROUND

I. COVID-19

The Court should take judicial notice that the number of COVID-19 cases and hospitalizations in Missoula County have risen significantly this summer. *See* <https://www.missoulainfo.com/copy-of-data-dashboard>.

II. SCHOOL DISTRICT FACE COVERING RULES

a. School Districts Are Empowered to Adopt Rules Such as Face Covering Requirements.

Montana is unique in that the Montana 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 (2017) 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).

The School Districts' right of local control has been recognized by Montana's governor, Greg Gianforte. The Governor's order rescinding the statewide mask mandate provided school districts the flexibility to consider local pandemic flares, such as the one Missoula County is undergoing now:

SCHOOLS Access to school is essential to the developmental, social, mental, and educational needs of school-age children. Schools should make reasonable efforts to follow school guidelines and best practices recommended by the CDC and the Montana Office of Public Instruction.

Directive Implementing Executive Order 2-2021. *See* Exhibit 2.

Further, in a letter to school districts the governor and the superintendent of schools simply urged school districts to consider public comment and data from the Department of Public Health and Human Services and local health departments in making masking decisions. *See* Letter from Greg Gianforte, Governor, State of

Montana and Elsie Arntzen, Superintendent of Public Instr., State of Montana, to Montana Dist. Superintendents and Trustees, (Aug. 6, 2021) (Attached as Exhibit 3). Montana’s school districts are diverse in size and population make-up, and the ability of Trustees to make decisions on what is best for their individual districts explains how rules can vary from district to district. Here, the Missoula School Districts considered wide ranging public comment and data from DPHHS, the Missoula health department and a myriad of local and national health care providers and health care organizations, as well as input from parents and students, in deciding to continue their face covering rules in their schools this year.

b. MCPS 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 adjourning for summer break. Aff. Robert Watson ¶ 4 (Aug. 30, 2021)

On August 10, 2021, a majority of the MCPS Board of Trustees voted to continue the face covering requirement at the schools for a minimum of six weeks for the 2021-2022 school year. Aff. Watson ¶ 9. The rule continues to require face

coverings for all students, staff, volunteers and guests while indoors and on school busses. Aff. Watson at ¶ 9. Under the rule:

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

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. Aff. Watson ¶ 3.

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. Aff. Watson ¶ 10.

c. 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. 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. Aff. Davis Schmidt ¶ 4.

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

- All students, staff, visitors, and volunteers will wear masks while indoors (except while eating, drinking, and during vigorous physical activity);
- All students, staff, visitors and volunteers will wear masks while on busses;

- Masks are optional while outdoors;
- Masks are required during indoor extracurricular activities including sports with the exception that masks will be optional for athletes who are actively playing on the court and participating in the game.

Aff. Davis-Schmidt ¶ 9.

The District did not place a time limit on its face coverings, but the District's COVID-19 Task Force and Board of Trustees will review the rules and requirements monthly and make changes as COVID-19 circumstances evolve. 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. Aff. Douglas Reisig ¶ 3 (Aug. 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. See Aff. Reisig ¶ 7. The rule also states face coverings will not be required for students:

- During breakfast/lunch opportunities;

- When classes are held outside and social distancing can be established;
- During student recess;
- During physical education classes when the square footage of the physical education gymnasium will allow for appropriate social distancing and minimized continuous contact that exceeds 15 minutes;
- During music classes when facilities will allow for appropriate social distancing and minimized continuous contact exceeding 15 minutes within the 6 ft. threshold; and
- During numerous daily scheduled mask break opportunities for students.

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 will then make adjustments if necessary based on the average daily case rates in Missoula County. See Aff. Reisig ¶ 18.

IV. The School Districts Considered a Wide Range of Recommendations in Continuing their Face Covering Rules

In deciding to continue a mask requirement under their reopening plans, all of the Districts separately and independently considered mask recommendations from the Centers for Disease Control (CDC), American Academy of Pediatrics, and Missoula City/County Health Department. *See* Aff. Davis-Schmidt ¶ 7; Aff.

Reisig ¶¶ 11-12; Aff. Watson ¶ 11. ⁵ The CDC’s guidance, which has been advocated by the United States Department of Education and Governor Gianforte for school districts to use to guide safe operations⁶, has stated:

Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority . . . Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.

K-12 Schools, Key Takeaways, Center for Disease Control and Prevention (August 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>. The CDC has been recognized as a federal agency “empowered to conduct studies, evaluations, tests, and emergency programs in order to prevent the spread of disease and to improve the public welfare.” *Mazur v. Merck & Co.*, 964 F.2d 1348, 1368 (3d Cir. 1992).

The American Academy of Pediatrics (AAP), which is an organization representing 67,000 pediatricians⁷, similarly recommended the universal use of face coverings for students over two years of age and all school staff (unless medical or developmental conditions prohibit use). The AAP based its recommendation on the following:

⁵ The Superintendent Affidavits each list additional factors and guidance they considered in deciding upon the face covering rules to adopt.

⁶ <https://www2.ed.gov/documents/coronavirus/reopening.pdf>

⁷ <https://www.aap.org/en/about-the-aap/>

- a significant portion of the student population is not eligible for vaccination
- protection of unvaccinated students from COVID-19 and to reduce transmission
- lack of a system to monitor vaccine status among students, teachers and staff
- potential difficulty in monitoring or enforcing mask policies for those who are not vaccinated; in the absence of schools being able to conduct this monitoring, universal masking is the best and most effective strategy to create consistent messages, expectations, enforcement, and compliance without the added burden of needing to monitor vaccination status
- possibility of low vaccination uptake within the surrounding school community
- continued concerns for variants that are more easily spread among children, adolescents, and adults.⁸

The AAP also noted “an added benefit of universal masking is protection of students and staff against other respiratory illnesses that would take time away from school.” *Id.* Of note, the AAP, as well as the CDC, have been referenced by courts as reliable sources. *See, e.g., In re Morris*, 189 Wash. App. 484, 493, 355 P.3d 355, 360 (2015), as corrected (Sept. 3, 2015) (prosecution use of position papers from AAP and CDC assisted in satisfying evidentiary standard in criminal matter); *ex rel. Memisovski v. Maram*, No. 92 C 1982, 2004 WL 1878332, at *51 (N.D. Ill. Aug. 23, 2004) (approving Illinois’ adoption of the AAP’s immunization

⁸ COVID-19 Guidance for Safe Schools, Purpose and Key Principles, (July 18, 2021) <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/>.

and well-child screening schedule as meeting the federal standard requiring a schedule to that “meets reasonable standards of medical and dental practice”).

Further, the Montana Medical Association, which represents 1,400 Montana physicians, sent a letter to School Districts this year urging them to implement masking for grades K-12 as part of a layered mitigation strategy to prevent the spread of COVID-19:

Children represent 15 percent of new COVID-19 cases in the US and hospitalizations of children due to COVID-19 are currently at an all-time high; many will struggle with long-term health consequences. We have reviewed the evidence on school mitigation measures, including universal masking, and conclude that they were important and effective in preventing SARS-CoV-2 spread in the last school year. In the setting of the Delta variant, its virulence, communicability, and effect on children, **we strongly recommend that all Montana school districts implement universal masking for grades K-12.**

See Exhibit 5: (Aff. Reisig ¶ 17) (emphasis in original).

Far from ignoring science as Plaintiffs suggest, the School Districts considered information and recommendations from the leading health authorities in the nation and in Montana when deciding to continue school operations with face coverings for this school year.

V. Preliminary Injunction Standards

The requirements for the issuance of a preliminary injunction are well known. A plaintiff seeking such relief 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, 172 L. Ed. 2d 249 (2008); Mont. Code Ann. § 27-19-201. Additionally, “injunctive 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, 264, 405 P.3d 73, 84 (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 (Mont. 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 (Mont. 1995).

ANALYSIS

I. A Preliminary Injunction is Improper Unless it Preserves the Status Quo. Here the Status Quo is to Continue Face Covering Rules.

In their filings, Plaintiffs simply ignore the fact that the School Districts had face covering rules during the 2020-21 school year and those rules continued with some minor changes (including some relaxation of requirements) for the 2021-2022 school year. Despite this, Plaintiffs seek a preliminary injunction to declare the face covering rules as null and void. However, the law is settled that a preliminary injunction is not appropriate if it does not preserve the status quo. *Porter*, 192 Mont. at 183, 627 P.2d at 840; Driscoll, ¶ 14.

Here, given that the School Districts had face covering rules last year and are continuing to require face coverings this year, the rules are the status quo and a preliminary injunction to declare the rules null and void is inappropriate.⁹

Further, according to the Complaint, the individual plaintiffs in this matter had children in the school districts last year and those students (and their parents) were subject to the mask requirements, yet they did not claim the rules were violating their constitutional rights. The absence of any legal challenge throughout

⁹ A Montana district court also recently found COVID-19 emergency measures are the status quo for the purpose of preliminary injunctions. In *Gallatin City-County Board of Health v. Rocking R Bar*, the Court granted a preliminary injunction to the local health board to enforce state and local rules on when certain businesses were required to close based on the status quo of the existing rules. *Finding of Fact, Conclusion of Law, and Or.*, No. DV-20-1278B (Mont. 18th Jud. Dist Ct. December 18, 2020), attached as Exhibit 4.

the entirety of the Districts’ return to in-person learning with face covering requirements underscores the impropriety of a preliminary injunction at this time. Mont. Code Ann. § 1-3-218. Though it is a new school year, the Districts’ COVID-19 responses are not remarkable, new, or a departure from the continued, well-considered efforts to secure the health and well-being of students, staff and families in the schools.

II. Granting a Preliminary Injunction Would Pose a Significant Disruption to the School Districts’ Ability to Provide In-Person Instruction.

One purpose of a preliminary injunction is to “minimize the harm to all parties pending final resolution on the merits.” *Driscoll*, ¶14. “The court has a duty to balance the equities and minimize potential damage when considering an application for a preliminary injunction.” *Four Rivers Seed Co. v. Circle K Farms*, 2000 MT 360, ¶ 12, 303 Mont. 342, 345, 16 P.3d 342, 344 (citing *Porter*, 192 Mont. at 180, 627 P.2d at 839); *see also Winter*, 555 U.S. at 24 (“In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”). Further, plaintiffs seeking a preliminary injunction must clearly demonstrate how the injunction requested serves the public interest. *Winter*, 555 U.S. at 20.

Here, the equities and the public interest prong weigh in favor of allowing the face covering rules to remain in effect until the merits can be decided. As noted above, the School Districts decided to continue their face covering rules to

slow the spread of COVID-19 and to allow them to offer in-person instruction to their students.

A. Enjoining the Face Covering Rules Will Greatly Disrupt School District Functions and Jeopardizes In-Person Instruction.

Under the face covering rules, the School Districts will be constantly analyzing local COVID-19 data and plan to make adjustments to the rules based on that data. *See* Aff. Davis-Schmidt ¶ 14; Aff. Reisig ¶ 18; Aff. Watson ¶¶ 10, 14. Importantly, Superintendents from the Districts agree that providing in-person learning to their students is their goal for this year and that eliminating a face covering requirement at this time would cause a significant disruption to the Districts and their goal of in-person instruction.

At MCPS:

It is my professional opinion that without a multi-layered approach, which includes a masking requirement as has been stated herein, there would be disruption to the school environment and MCPS's ability to provide in-person learning would be jeopardized... If there were to be a significant outbreak in the school, MCPS may have to shut down schools due to lack of staffing.

Based upon concerns and comments by parents when the Board of Trustees made its decision on face coverings on August 10, 2021, there could also be significant disruption due to the likelihood of increased requests by parents to transfer their children to MCPS's online academy if face coverings were not required in schools. MCPS has made staffing determinations based upon the enrollment of students in the online academy. If face coverings were not required, MCPS would have difficulty accommodating parent requests to enroll in the online academy because it

has not assigned adequate staff to provide online instruction if more students were to seek online instruction.

Based upon my professional training and experience, it is my opinion that having a masking requirement will assist MCPS with being able to provide in-person learning for students. It is my professional opinion that the masking requirements adopted by MCPS Board of Trustees will decrease the possibility of disruption to a significant outbreak to the MCPS community and increase the possibility that students will be able to engage in learning in person if that is their preference.

See Aff. Watson ¶¶ 17-20.

At Target Range:

It is my professional opinion that an elimination of a masking requirement would be significantly disruptive to the District's operations and places the ability of the District to offer in-person instruction at risk. The CDC's guidance indicates that with multiple strategies in place, including mandatory masking, the ability to access in-person learning (even with some transmission of COVID-19) remains intact.

Without these strategies, of which masking is a vital component, there is a risk of increased infection and exposure to staff members and students. This, in turn, would require increased quarantining of staff members and students and may result in the District having to shut down its schools due to a lack of staff and students.

Based upon my professional training and experience, it is my opinion that having a masking requirement will assist the District with being able to provide in-person learning for students. It is my professional opinion that the masking requirements adopted by the District's Board of Trustees will decrease the possibility of disruption to a significant outbreak to the Target Range school community and increase the possibility that students will be able to engage in learning in person.

See Aff. Davis-Schmidt ¶¶ 17-19.

At Hellgate Elementary:

It is my professional opinion that without a layered approach, that includes a masking requirement as has been stated herein, there would be disruption to the school environment and the District's ability to provide in-person learning would be in jeopardy.

The District lacks an adequate pool of substitutes to be able to cover for teachers if there was a significant outbreak of COVID-19 at school. There is a concern that due to the limited pool of substitutes that the District would be unable to remain open for in-person learning if there was a significant outbreak in the school community.

Based upon my professional training and experience, it is my opinion that having a masking requirement will assist the District with being able to provide in-person learning for students. Due to the increasing infections in Missoula County and the concerns related to the Delta variant, I believe that the masking requirements adopted by the District's Board of Trustees will decrease the possibility of disruption to a significant outbreak to the Hellgate Elementary School community.

See Aff. Reisig ¶¶ 20-22.

As demonstrated herein, the School Districts have the right to adopt face covering rules to protect the health and safety of its students, staff, volunteers and visitors. Given the COVID-19 levels in Missoula, the rules they adopted are narrow and are substantially related to their duties and goals of safely educating Missoula's youth in person.

III. Plaintiffs Cannot Demonstrate that they likely will prevail on the Merits of their Constitutional claims or Demonstrate Irreparable Harm.

Although proof of a constitutional violation may sometimes constitute harm when considered at a preliminary injunction stage, here the Plaintiffs have not shown that a constitutional violation has, or will, occur because continuing face

masking rules do not violate Plaintiffs' right of privacy to make their own healthcare decisions. *See Armstrong v. State*, 1999 MT 261, ¶ 75, 296 Mont. 361, 390, 989 P.2d 364, 384. Also, plaintiffs have not met their burden to show face coverings harm their human dignity.

A. Plaintiffs' Privacy Rights Are Not Violated.

Plaintiffs offer no support for the argument that wearing a face covering constitutes a deprivation of their right to privacy by taking away their ability to reject medical treatment. Instead, in the emerging case law surrounding face covering requirements, courts have specifically and repeatedly held that requiring masks does not constitute medical treatment. *E.g.*, *Cangelosi v. Sizzling Caesars LLC*, No. 20-2301, 2021 U.S. Dist. LEXIS 16131, at *5, 2021 WL 291263 (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, 2021 WL 843175 (S.D. Cal. Mar. 4, 2021) (requiring an individual to wear a mask “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 mask qualifies as ‘medical treatment’”); *Machovec v. Palm Beach Cty.*, 310 So. 3d 941, 946 (Fla. 4th DCA 2021), review denied, No. SC21-254, 2021 WL 2774748 (Fla. July 2, 2021) (Requiring facial coverings in public settings is akin to the State's prohibiting individuals from

smoking in enclosed indoor workplaces...and mask mandate did not implicate the constitutional right to refuse medical treatment.)

Plaintiffs may argue that face coverings are “medical devices” under the recently enacted changes to Montana’s criminal trespass law. Mont. Code Ann. § 45-6-203(2021). But the case law and the other authorities make it clear that there is a distinct difference between calling something a medical device and actual medical treatment. Medical “treatment” is defined as “management in the application of medicines, surgery, etc.” Treatment, Dictionary. Com, <https://www.dictionary.com/browse/treatment?s=t>. (last visited Aug. 27, 2021). 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. Requiring people to cover their nose and mouth to prevent them from unknowingly infecting others and protect them from being infected themselves is not “medical treatment” under any reasonable construction of that term.

Plaintiffs rely on the Montana Supreme Court decision in *Armstrong* for their argument, when in fact, that case supports the School Districts’ decision to continue requiring face coverings this school year. In *Armstrong*, the Montana Supreme 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.” 1999 MT 261, ¶ 14, 296 Mont. 361,

367, 989 P.2d 364, 370 (declaring unconstitutional statutes prohibiting a physician assistant-certified from performing a pre-viability abortion). But the Court there held that this right was not inviolate as exceptions to the rule exist. *Id.* at ¶ 75. One of those exceptions is the need to protect the public (here students, staff and visitors) from a deadly disease. *See Ruona*, 136 Mont. at 557-58, 323 P.2d at 30-31; *Jacobson*, 197 U.S. 11, 25 S. Ct. 358 (rejecting constitutional challenges to state statute authorizing local boards of health to compel vaccinations where the local health board deemed it necessary to protect public health); *Weems v. State*, 2019 MT 98, ¶ 19, 395 Mont. 350, 359, 440 P.3d 4, 10-11 (“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. (The individual’s “right to seek health is circumscribed by the State’s police power to protect the public’s health and welfare.” *Mont. Cannabis Indus. Ass’n*, 2012 MT 201, ¶ 22). So, even under the authorities that Plaintiffs cite, the law does not preclude the use of such face coverings.

Here, Plaintiffs have not made a threshold showing that requiring students and others in the schools to wear a face covering violates their right to make their own healthcare decisions. Given this failure, Plaintiffs do not have a likelihood of success on their claims, and if they cannot meet this burden, they have not met the requirement that they show they have been irreparably harmed.

B. Plaintiffs' Human Dignity Rights Are Not Violated.

Plaintiffs' claim the face covering rules violate their right of "human dignity" in that requiring masks prohibits individuals from seeing each other's facial expressions and takes away their right to control their own medical treatment. Plaintiffs have provided no case law that supports this claim. That is because no court has found that face coverings degrade individuals or detract from their worth as human beings. Consequently, Plaintiffs cannot prove a violation of their right to human dignity.

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. However, human dignity is not a stand-alone right under the Montana Constitution, but instead buttresses actionable rights, such as the right to be free from cruel and unusual punishment. *See id.*, at ¶73, 81, 84. 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 the 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.

Here, the face covering rules simply require students and others in the schools to take reasonable measures to protect themselves and their classmates and staff from the spread of COVID-19 by wearing face coverings. Plaintiffs’ suggestion that the rules violate this right because they interfere with a student’s ability to read facial expressions or to make health care decisions for themselves does not rise to the level of a deprivation of any Constitutional right, and we have found no case law that has found as much. Even if it did, such an imposition is minimal compared to the interests the School Districts have in stemming the spread of a communicable disease. As U.S. Chief Justice Roberts recently stated in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), the Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” *Id.* at 1613. When officials “undertake to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad”... and should not be subject to second-guessing by the judiciary that lacks the background, competence, and expertise to assess public health.... *Id.* at 1613–14.

IV. The Face Covering Rules Pass Muster Under any Level of Constitutional Analysis.

School District Trustees are required to effect policies for the operation of schools in conjunction with their responsibilities to all citizens under the Constitution. For instance, in *State, ex rel., Bartmess v. Bd. of Trustees of Sch. Dist. No. 1*, 223 Mont. 269, 726 P.2d 801 (1986) the right to participation in extracurricular activities was deemed a right deserving of Constitutional protection and subjected to the middle tier analysis. Cases in other jurisdictions that have construed claims that mask mandates are unconstitutional have analyzed mask requirements under the rational basis review. *Machovec. v. Palm Beach County; W.S. v Ragsdale*, 2021 WL 2024687 (N.D. Ga. 2021).

Plaintiffs here argue that the right to privacy is a fundamental right and therefore the proper analysis is whether the face covering rules serve a compelling state interest. Even if that is true, face covering rules meet that level of scrutiny. In their brief in support of their motion, Plaintiffs recognize that “the compelling state interest at stake could be construed as the control of a pandemic,” and this is clear from U.S. Supreme Court jurisprudence. *See Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (“Stemming the spread of COVID-19 is unquestionably a compelling interest”).

Regardless of whatever level of scrutiny that is applied, the face covering rules survive because, despite Plaintiffs’ arguments, the face covering rules are narrowly tailored to serve an important, legitimate or compelling interest in mitigating the transmission of COVID-19. As seen above, the rules are narrowly

tailored to apply equally to anyone on school premises and are narrowly tailored to provide various exceptions to masking, including mask breaks, exceptions for outdoor activity, and exceptions where social distancing can be maintained. These rules are certainly narrower than a rule that closed the schools, required all students to attend online schooling or mandated face coverings at all times without exception. Additionally, the rules require the School Districts to continually evaluate data, parental input and health care recommendations on the use of face coverings, and those rules will be relaxed if and when the data support doing so. This alone demonstrates that the rules are narrowly tailored.

The face covering requirement promotes a healthy workplace for school district employees and visitors and reduces the risk of closure to all students due to staff absences or quarantine requirements. The countervailing right to educational services is enhanced for all students, regardless of health status. Plaintiffs' application for injunctive relief compromises the established rights of others, by carving out an exception from reasonable rules requiring face coverings while on school property, essentially defeating the generally accepted, reasonably implemented, preventative protections to all students and all staff, not just those who prefer to refrain from wearing a face covering for the limited period of time they or their children on school property.

Additionally, many schools, including MCPS and Hellgate Elementary, are offering alternate online access to the educational program for students who refuse

to wear a mask or cannot do so for other reasons. This undercuts the argument that the right to participate has been restricted from the outset. Refusal to wear a mask is not an inherent trait or condition upon which eligibility is determined, but a reasonable rule governing whether participation in instruction is in-person or virtual.

As a final note on narrow tailoring, Plaintiffs allege that the School Districts should target students more vulnerable to COVID-19 and subject them to additional restrictions while allowing the remaining students to dispel with the mask requirements. This is not a realistic approach and does not take into account the School Districts' obligations to provide services to students with disabilities under the Americans with Disabilities Act, 42 U.S.C § 12101 *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* Such an approach is unworkable, could be construed as discriminatory and would result in many more students being denied the ability to attend school in person in the Fall.

CONCLUSION

As demonstrated above, the School Districts have broad authority to regulate the conduct of students while attending school and to impose reasonable rules while in attendance for the protection of the student and others in the schools. This authority is generally supported unless a constitutional right is violated. Here, regardless of whether the Governor or the local health department rescinds or

relaxes mask requirements generally, a strong rationale for the face covering requirements is easily documented for student safety purposes and to ensure that there is sufficient staff to operate the schools. Much like a dress code requirement, the face covering requirement is premised on accepted standards governing student and staff safety, which can be supported by the need to optimize conditions which limit transmission of the COVID-19 virus to students, staff and visitors to school.

The Plaintiffs have not made the necessary showing that the narrowly tailored face covering rules violate their privacy rights to direct their own healthcare decisions or that wearing a mask takes away their human dignity. Further and importantly, the balance of equities does not favor Plaintiffs, would not preserve the status quo of continued face covering at schools and could endanger the ability of the School Districts to offer in-person instruction. The motion for preliminary injunction should therefore be denied.

DATED this 30th day of August, 2021.

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Kevin A. Twidwell

Certificate of Service

I hereby certify that I served a copy of the foregoing via e-mail, to the following:

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CERTIFICATE OF SERVICE

I, Kevin A. Twidwell, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Answer Brief to Motion to the following on 08-31-2021:

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Representing: Martin Norunner, Erick Prather, Clinton Decker, Jared Orr, Jessica Decker, Meagan Campbell, Stand Up Montana, Gabriel Earle, Morgen Hunt, Bradford Campbell, Amy Orr, April Marie Davis

Service Method: eService

Elizabeth O'HALLORAN (Attorney)

1911 S. Higgins

Missoula MT 59801

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

Service Method: eService

Elizabeth A. Kaleva (Attorney)

1911 S. Higgins Ave.

Missoula MT 59801

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

Service Method: eService

Electronically signed by Kaylie Ray Robison on behalf of Kevin A. Twidwell

Dated: 08-31-2021

MONTANA DISTRICT COURT
MISSOULA COUNTY

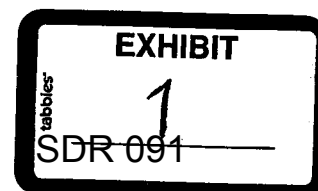
MINUTE ENTRY

Date: 04/06/2021 02:30 PM**Event Type:** Conference - Scheduling**Case Number:** DV-32-2021-0000063-IJ**Presiding Judge:** Jason Marks**Stand Up Montana et al vs Ellen Leahy et al.****Department:** 4**Appearances:** Presiding Judge: Jason Marks; Catherine Rebish, Court Reporter; Donna Duffy, Court Clerk.

Appearing in person, counsel for the Plaintiffs, Quentin Rhoades, and appearing by video conference and counsel for the Defendants, Anna Conley and Ryan Heuwinkel, came into court, this being the time set for a scheduling conference.

Thereupon, a discussion was held between counsel and the Court about the status of the case. Upon inquiry by the Court, counsel for the Defendants advised they will file a Motion to Dismiss by April 12, 2021. Counsel for the Plaintiffs requested their response be due by April 28, 2021, which was granted. The Defendant's reply shall be due by May 5, 2021. After further discussion, the Court advised it will not take expert testimony at the Preliminary Injunction hearing on May 6, 2021 and May 7, 2021.

cc: Quentin Rhoades, Esq.
Anna Conley, Esq.
Ryan Heuwinkel, Esq.



STATE OF MONTANA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER No. 2-2021

EXECUTIVE ORDER ESTABLISHING A STATE OF EMERGENCY

WHEREAS, COVID-19, a respiratory disease that can result in serious illness or death, is caused by SARS-CoV-2 Virus, which is a new strain of Coronavirus that had not been previously identified in humans and can easily spread from person-to-person;

WHEREAS, the Center for Disease Control (CDC) identifies the potential public health threat posed by COVID-19 both globally and in the United States as "high," and has advised that person-to-person spread of COVID-19 will continue to occur globally, including within the United States;

WHEREAS, the Montana Department of Public Health and Human Services (DPHHS) recognizes COVID-19 as a threat to the health of Montana residents;

WHEREAS, proactive mitigation measures to slow the spread of the virus is in the best interests of the State of Montana and its people;

WHEREAS, on March 13, 2020, the President of the United States declared a national state of emergency due to a nationwide outbreak of COVID-19;

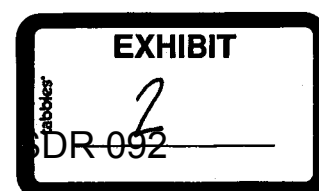
WHEREAS, under Montana law, Mont. Code Ann. § 10-3-302(3), a declaration of emergency by the President of the United States establishes continuing conditions of emergency;

WHEREAS, Montana law also authorizes the State to coordinate and direct a coordinated public health response to communicable disease outbreaks as specified in Title 50, MCA; and

WHEREAS, under these conditions pursuant to Mont. Code Ann. §§ 10-3-302, 10-3-311, and 10-3-312, the Governor may mobilize state resources to protect life, health, and property and may expend funds up to the amount determined by the Office of Budget and Program Planning to meet contingencies and needs arising from these conditions.

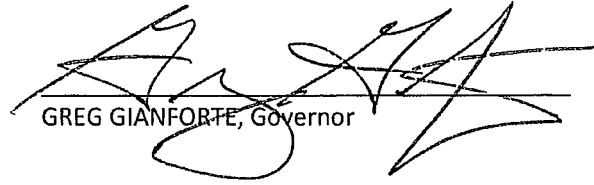
NOW, THEREFORE, I, GREG GIANFORTE, Governor of the State of Montana, pursuant to the authority vested in me under the Constitution, Mont. Code Ann. §§ 10-3-103, 10-3-104, 103-302, and any other applicable statutes, do hereby rescind Executive Order 2-2020 and 3-2020 and declare that a statewide emergency running concurrent to the emergency declaration of the President of the United States exists.

THIS ORDER is effective immediately.





GIVEN under my hand and the GREAT SEAL of
the State of Montana this 13 day of January,
2021

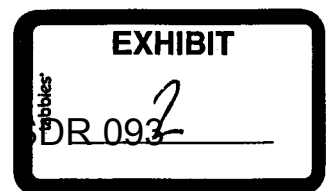


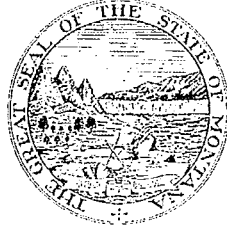
GREG GIANFORTE, Governor

ATTEST:



CHRISTI JACOBSEN, Secretary of State





August 6, 2021

Dear Montana District Superintendents and Trustees,

As we all prepare for students to return to the classroom for the 2021-2022 school year, we join parents, students, and educators in looking forward to a return to normalcy in learning for those whose lives and educational opportunity were disrupted over the last 17 months.

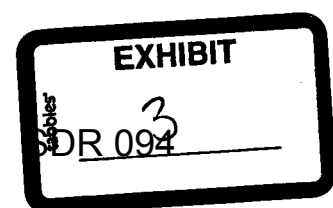
As we have heard from hundreds of parents across Montana, it is critical our kids get back into the classroom in as normal a setting as possible so they may learn, develop, and grow.

As you know, the Montana Constitution grants elected boards of trustees in each school district the supervision and control of schools. As such, we urge you to refer to two key sources as you prepare to decide what environment Montana's kids will encounter when they return to their classroom.

First, we urge you to ensure the voices of Montana parents and families are heard before making decisions about children going back to school, particularly decisions regarding universal masking of students. We have heard from parents throughout the state who are concerned about the impact of universal masking on their kids' academic, emotional, and social development, particularly for elementary-aged students and students with disabilities and who believe strongly that wearing face masks and other coverings should be optional, voluntary, and a matter of family choice.

Second, we encourage you to refer to data from the Montana Department of Public Health and Human Services (DPHHS) as you consult with local health departments on any decisions. DPHHS officials have data on the virus' transmission rates among school-age children, as well as incidents of severe complications from the virus among children, including hospitalizations and death.

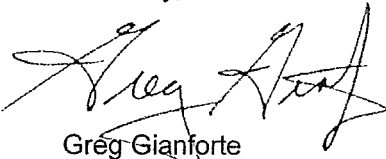
As you are aware, safe, effective COVID-19 vaccines have been available at no cost to all Montanans 16 years and older, including teachers and school administrators, since April 1, 2021. We continue to encourage Montanans who have not been vaccinated to consult with their health care provider about getting a vaccine. Parents are the primary decision makers for their children's health matters, and they must be at the center of any discussions on vaccinations.



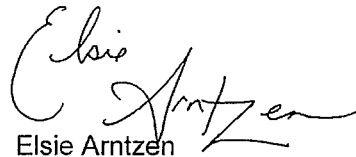
While the CDC has repeatedly changed its mask recommendations over the last 16 months, trustees and superintendents should give due consideration to available data and the voices of Montana parents as it relates to whether their children are required to wear masks in schools.

As you consider how students will safely enter their classroom, know that we want this school year to be a success for our students, educators, and parents. We are here to help you as partners in any way we can. Our doors are always open; please reach out to us as you continue putting Montana students first.

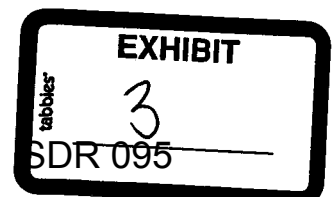
Sincerely,



Greg Gianforte
Governor



Elsie Arntzen
Superintendent of Public Instruction



GALLATIN COUNTY CLERK
OF DISTRICT COURT
JENNIFER GRANDON

2020 DEC 18 AM 11:36

FILED

BY H DEPUTY

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

GALLATIN CITY-COUNTY,
BOARD OF HEALTH, and HEALTH
OFFICER MATT KELLEY,

No. DV-20-1278B

Plaintiffs,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER GRANTING
PRELIMINARY INJUNCTION**

vs.

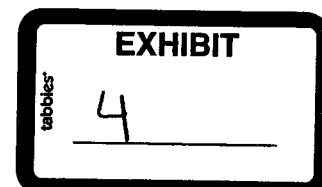
ROCKING R BAR,

Defendant.

On November 25, 2020, Plaintiffs Gallatin City-County Board of Health ("Board") and Health Officer Matt Kelley ("Health Officer") filed a Civil Action to Enforce Board Rule, Health Officer Order, and Governor's Directive and Application for Temporary Restraining Order and Preliminary Injunction ("Civil Action"), with supporting Affidavits of Matt Kelley and Andy Knight.

On November 27, 2020, this Court denied Plaintiffs' application for a temporary restraining order. That same date, this Court ordered Defendant to appear and show cause why Plaintiffs' application for a preliminary injunction should not be granted. Defendant Rocking R Bar filed its Answer to the Civil Action on December 9, 2020.

This Court held a hearing on Plaintiffs' application for a preliminary injunction on December 15, 2020. Present at the hearing for Plaintiffs were Gallatin County Attorney Marty Lambert, Chief Civil Deputy County Attorney Erin Arnold, and Gallatin City-County Health



Officer Matt Kelley. Present for Defendant were attorney Brian Gallik and Mike Hope, owner of Defendant Rocking R Bar.

The Court received evidence and heard testimony from witnesses on behalf of both parties. Both parties filed proposed Findings of Fact and Conclusions of Law to support the Court's determination as to the merits of Plaintiffs' application for a preliminary injunction.

From the testimony and evidence presented, this Court makes the following Findings of Fact:

FINDINGS OF FACT

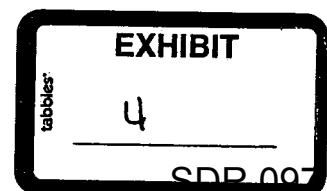
1. The Court adopts as Findings of Fact those facts set forth in its oral order, dated December 16, 2020. The Court supplements its oral findings with the following Findings of Fact. To the extent the oral order and written order are inconsistent, this written order controls.

2. Governor Steve Bullock declared a state of emergency in Montana due to the global outbreak of the COVID-19 Novel Coronavirus ("COVID-19") on March 12, 2020. The Gallatin County Commission also proclaimed a state of emergency.

3. COVID-19 is a respiratory disease that can result in serious illness or death and can easily spread from person-to-person.

4. The virus presents unique challenges. The virus is novel. Human beings had no immunity prior to the first cases of the virus in late December 2019. COVID-19 affects people differently and makes diagnosis and treatment difficult. The virus is easily transmitted by asymptomatic and mildly symptomatic individuals. Asymptomatic people are those who have COVID-19 but do not know they are infected.

5. In late March 2020, Governor Bullock issued a Stay at Home Directive temporarily closing all nonessential businesses and operations to curtail the spread of COVID-19.



6. Defendant Rocking R Bar is a business located at 211 East Main in Bozeman, Gallatin County, Montana. The Rocking R Bar is owned and operated by Mike Hope.

7. Mike Hope has been proactive as an industry leader and has helped to educate and shape local and state-wide restrictions on bar and restaurant owners and operators. Hope is an advocate for restaurant/bar best practices in the face of the pandemic, for bar/restaurant owners' rights and for his employee's rights.

8. In April 2020, Governor Bullock announced the re-opening of the state in phases. Phase 1 and 2 addressed social distancing, hours of operation, limitation on seating, sanitation requirements, among other conditions.

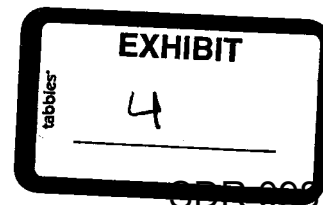
9. Matt Kelley ("Kelley") is Gallatin County's health officer. Kelley is responsible for addressing public health issues in Gallatin County. Kelley, in conjunction with the Gallatin City-County Board of Health ("Board"), develops local rules designed to support and enforce efforts to limit the spread of COVID-19.

10. The Board adopted emergency health rules similarly restricting the operation of certain businesses in Gallatin County due to the COVID-19 pandemic.

11. Governor Bullock's phase 1 and 2 re-opening guidelines initially required bars to close at 11:30 p.m. The closing time was later extended to 12:30 a.m. Mike Hope advocated for the later closing time as more economically palatable to the bar industry. Gallatin County followed the same closing time for bars as was directed by Governor Bullock.

12. By late summer, early fall of 2020, COVID-19 positive cases began to increase statewide.

13. Kelly and the Board agreed upon specific and measurable factors to consider before imposing additional or more restrictive measures. These factors included: (1) the number of COVID-19 cases, hospitalizations, and deaths in Gallatin County; (2) the availability of diagnostic



testing and the percentage of positive tests; (3) staffing capacity to conduct contact tracing in a thorough and effective manner; (4) whether business owners and the public comply with public health rules; (5) data indicating known sources of new infections in the community; and (6) wastewater treatment sampling. By November 6, 2020, the indicators suggested additional measures were necessary.

14. A State Report for Montana issued by the White House identified Montana as “in the red zone for cases,” with the “10th highest rate in the country,” and “in the red zone for test positivity,” with the “highest rate in the country.” *Kelley Aff.*, ¶ 16 (quoting Ex. A, State Report for Montana, 1 (Nov. 15, 2020)).

15. The daily case count for COVID-19 cases in Gallatin County as of November 6, 2020, showed a steep increase in the number of cases from on or about September 28, 2020 through the first week of November 2020. Pl. Exhs. 1.

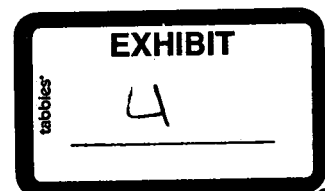
16. During that same time frame, Gallatin County experienced a marked increase in COVID-19 cases in people aged 20-29 years. Pl. Exh. 2

17. Pl. Exh. 3 showed a large increase in hospitalizations due to COVID-19 in Gallatin County during that time frame.

18. Pl. Exh. 4 showed that Gallatin County’s COVID-19 cases per 100,000 population entered the “critical” range during October 2020.

19. The test positivity rate in Gallatin County became concerning. The World Health Organization recommends a test positivity rate below 5% as a criterion for re-opening businesses. Public health experts say a positivity rate above 10% may mean more testing is necessary in order to avoid missing significant number of cases in the community.

20. As of December 8, 2020, the 7-day rolling average of percent positive cases in Gallatin County was 15.5%.



21. Hospitalizations are on the rise. Gallatin County's inability to meet the health needs of the community and surrounding areas may lead to deteriorating access to care and quality of care.

22. The surge in COVID-19 cases has outstripped the ability of the Gallatin City-County Health Department to identify, contact, and monitor individuals potentially exposed to the virus. The ability to adequately monitor for new cases and to conduct appropriate contact tracing is paramount to preventing further spread of COVID-19.

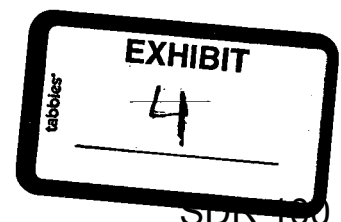
23. Testing capacity also is strained in Gallatin County.

24. In Gallatin County, the age group that shows the earliest and highest growth rate of COVID-19 infections is individuals in their late teens and twenties. This growth started during the third week of September 2020 and was followed by similar, though less extreme growth, in other age groups in early October.

25. The high infection rate in young adults is concerning because infections among young adults transfer to and drive outbreaks in other age groups in the community, including vulnerable individuals in sensitive settings, such as long-term care and assisted living centers.

26. Pl. Exh. 15 and 16 both describe the association of the spread of COVID-19 in bars and restaurants. Pl. Exh. 15, "Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults", Morbidity and Mortality Weekly Report, September 11, 2020, at page 1262; Pl. Ex. 16, "Assessing coronavirus disease 2019 (COVID-19) transmission to healthcare personnel," Infection Control & Hospital Epidemiology (2020), at table 4, pg. 5.

27. Pl. Exh. 17 and 18 both describe recent percentage increases in COVID-19 infections among persons aged 25-44 years. Pl. Exh. 17, Morbidity and Mortality Weekly Report, posted online on October 20, 2020, at page 1; "Transmission Dynamics by Age Group in COVID-19 Hotspot Counties", Morbidity and Mortality Weekly Report, October 16, 2020, page 1.



28. The State Medical Officer, Dr. Greg Holzman emphasized that the studies showed an association related to COVID-19 spread and the contact with bars and restaurants. The scientific community relies on associations related to the spread of the virus to advise public health officials how to act to reduce the spread of COVID-19.

29. On November 6, 2020, the Board adopted EHR-2020-004-C, titled "Second Extension and Amendment of Emergency Local Health Rule Relating to COVID-19" relating to Phased Reopening; Phased Two. *Id.*, ¶ 40; Civil Action, ¶ 5 (Nov. 25, 2020).

30. Exhibit 1 to EHR-2020-004-C sets forth the reopening guidelines for Phase Two in Gallatin County and states:

Restaurants, coffee shops, bars, bowling alleys, breweries, distilleries and casinos . . . must close between the hours of 10:00 p.m. and 4:00 a.m. (except when providing carry-out or delivery services) These businesses must continue to maintain strict physical distancing and must otherwise adhere to the reopening guidelines in compliance with Appendix A and C, attached. . . .

B. Except when providing carry-out or delivery services, these businesses must close their doors and have all patrons out between the hours of 10:00 p.m. and 4:00 a.m. . . .

ii. **An owner, operator, or employee of a restaurant, coffee shop, bar, bowling alley, brewery, distillery, or casino who does not close and have no patrons within the business during the hours of 10:00 p.m. and 4:00 a.m. or other closing time provided by law, except when providing carry-out or delivery services, is in violation of this Emergency Health Rule. . . .**

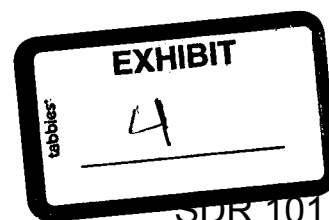
D. **An owner, operator, or employee of a restaurant, coffee shop, bar, brewery, bowling alley, distillery, or casino who does not comply with the guidelines provided in Appendices C, attached, is in violation of this Emergency Health Rule.**

Aff. Kelley, Ex. D (emphasis in original); Civil Action, Ex. 1.

31. Appendix C to Exhibit 1 provides in pertinent part:

Amended Phase Two Guidance for . . . Bars

The required time of closure at these establishments is from 10:00 p.m. to 4:00 a.m., except for carry-out and delivery services.



Id.

32. On November 6, 2020, the Health Officer signed HO-2020-005-B. Aff. Kelley, ¶ 41; Civil Action, ¶ 5.

33. Exhibit 1 to the Health Officer Order is worded in a similar manner to Exhibit 1 to the Board Rule and states:

Restaurants, coffee shops, bars, bowling alleys, breweries, distilleries and casinos . . . must close between the hours of 10:00 p.m. and 4:00 a.m. (except when providing carry-out or delivery services) These businesses must continue to maintain strict physical distancing and must otherwise adhere to the reopening guidelines in compliance with Appendix A and C, attached. . . .

1. Except when providing carry-out or delivery services, these businesses must close their doors and have all patrons out between the hours of 10:00 p.m. and 4:00 a.m. . . .

ii. **An owner, operator, or employee of a restaurant, coffee shop, bar, bowling alley, brewery, distillery, or casino who does not close and have no patrons within the business during the hours of 10:00 p.m. and 4:00 a.m. or other closing time provided by law, except when providing carry-out or delivery services, is in violation of this Order.**
...

D. An owner, operator, or employee of a restaurant, coffee shop, bar, brewery, bowling alley, distillery, or casino who does not comply with the guidelines provided in Appendices C, attached, is in violation of this Order.

Aff. Kelley, Ex. E (emphasis in original); Civil Action, Ex. 2 (emphasis in original).

34. Appendix C of the Health Officer Order is identical to Appendix C of the Board Rule and states:

Amended Phase Two Guidance for . . . Bars

The required time of closure at these establishments is from 10:00 p.m. to 4:00 a.m., except for carry-out and delivery services.

Id.



35. On November 17, 2020, the Governor issued a directive titled “Directive implementing Executive Orders 2-2020 and 3-2020 and limiting size for public gatherings and events and limiting bar and restaurant capacity and hours,” signed November 17, 2020 (“Governor’s Directive”).

36. The Governor’s Directive directs local public health authorities, like the Board and Health Officer, to assist in the Directive’s administration and enforcement. It states:

Enforcement: This Directive, along with any prior Directive that implements and references the public health authorities of DPHHS provided in Title 50, constitutes a “public health . . . order[]” within the meaning of § 50-1-103(2), MCA, and is enforceable by the Attorney General, DPHHS, a county attorney, or other local authorities under the direction of a county attorney.

- Local public health agencies are directed to assist in the administration of this Directive, consistent with § 50-1-202(2)(a), MCA. All officers and agencies of the state are directed to assist in the administration and enforcement of this Directive, consistent with § 10-3-305(2), MCA.

Aff. Kelley, Ex. F; Civil Action, Ex. 3.

37. Like EHR-2020-004-C and HO-2020-005-B, the Governor’s Directive provides in pertinent part:

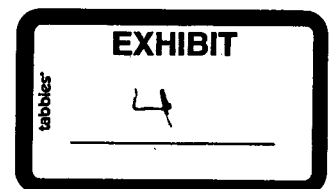
I. Restaurants, Bars, Breweries, Distilleries, and Casinos to Operate at 50 percent Capacity and Close No Later Than 10:00 PM

...

- These businesses will be required to close their doors and have all patrons out by 10:00 p.m.
- Businesses may reopen after 4:00 a.m.

Aff. Kelley, Ex. F; Civil Action, Ex. 3.

38. Kelley made the Gallatin City-County Health Board aware of the data described in Pl. Exhs. 1-4 during the board’s November 6, 2020, meeting. It was during that meeting that the Board adopted the 10:00 p.m. closure time for bars and restaurants within Gallatin County.



39. The Rocking R Bar is in compliance with state and local laws with the exception of the hours of operation. Hope admits to extending the hours of operation past 10:00 p.m. after the Board instituted a closing time of 10:00 p.m. Hope argues it is not economically feasible to remain in operation, in compliance with all of the other restrictions, and close the Rocking R Bar at 10:00 p.m.

40. For the time frame March 16, 2020 through December 7, 2020, the Rocking R Bar's revenues decreased \$249,188.58 from the previous year. Hope acknowledged that the Rocking R Bar received \$84,000 from the Small Business Association to help defray the impacts of the COVID-19 pandemic. Hope admitted the Rocking R Bar received \$71,542.00 of Montana Coronavirus Relief Grant Awards to help defray the impacts of the COVID-19 pandemic.

41. Hope opined the Board did not take into account the economic impact of its closure rule upon the hospitality industry when it adopted the rule. Hope testified that the hospitality industry was being unfairly singled out for enforcement of the Board's rules and the Health Officer's orders.

42. The Rocking R Bar received a written warning that failure to comply with the Rule, EHR-2020-004-C, and the Order, HO-2020-005-B, might result in civil action being taken against it.

43. The Rocking R Bar admits that it was open between 10:00 p.m. and 12:30 a.m. on November 11, 13, 14, 16, 17, 20, and 21, 23, and 24, 2020. Answer, ¶¶ 22, 24, 32, 36, 41 (Dec. 9, 2020).

44. Any factual findings contained in the following Conclusions of Law are hereby incorporated in these Findings of Fact.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Any Conclusions of Law contained in the foregoing Findings of Fact are hereby incorporated herein. The Court further adopts as Conclusions of Law those Conclusions of Law set forth in its oral order, dated December 16, 2020. The Court supplements its oral findings with the following Conclusions of Law. To the extent the oral order and written order are inconsistent, this written order controls.

2. This Court has jurisdiction over Plaintiffs' application for a preliminary injunction per § 3-5-302(1), MCA.

3. Venue is proper in Gallatin County based on § 25-2-118, MCA.

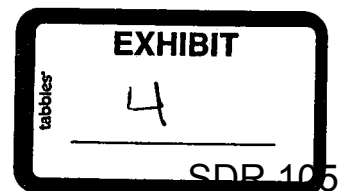
4. The Board and Health Officer seek a preliminary injunction pursuant to § 27-19-201(1) and (2), MCA, requiring the Rocking R Bar to comply with EHR-2020-004-C, HO-2020-005-B, and the Governor's Directive.

5. Section 27-19-201, MCA, provides in pertinent part:

When preliminary injunction may be granted. An injunction order may be granted in the following cases:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; [or]
- (2) When it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant[.]

6. The subsections of § 27-19-201, MCA, are disjunctive, such that "a court need find just one subsection satisfied in order to issue a preliminary injunction." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 13, 401 Mont. 405, 473 P.3d 386 (citing *BAM Ventures, LLC v. Schiffman*, 2019 MT 67, ¶ 14, 395 Mont. 160, 437 P.3d 142).



7. A district may issue a preliminary injunction “to preserve the status quo and minimize the harm to all parties pending final resolution on the merits.” *Id.* (quoting *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73, citing *Porter v. K & S Partnership*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981), and citing *BAM Ventures*, ¶ 16 and *Yockey v. Kearns Properties, LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185).

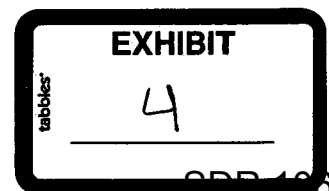
8. The “status quo” is the “last actual, peaceable, non[-]contested condition which preceded the pending controversy.” *Id.* (quoting *Benefits Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 14, 334 Mont. 86, 146 P.3d 714 (brackets in original), and citing *BAM Ventures*, ¶ 18, and *State v. BNSF Ry. Co.*, 2011 MT 108, ¶ 17, 360 Mont. 361, 254 P.3d 561).

9. A district court may issue a preliminary injunction if it finds “that an applicant made a prima facie showing she will suffer a harm or injury – ‘whether under the “great or irreparable injury” standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA.”” *Id.*, ¶ 15 (quoting *BAM Ventures*, ¶ 16).

10. Prima facie means “‘at first sight’ or ‘on first appearance but subject to further evidence or information.’” *Id.* (quoting *Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4, ¶ 18, quoting *Black’s Law Dictionary*, “prima facie” (10th ed. 2014)).

11. Thus, when considering whether to issue a preliminary injunction, a district court must not “determine the underlying merits of the case giving rise to the preliminary injunction, as such an inquiry is reserved for a trial on the merits.” *Id.*, ¶ 12 (quoting *BAM Ventures*, ¶ 7, citing *Caldwell v. Sabo*, 2013 MT 240, ¶ 19, 371 Mont. 328, 308 P.3d 81).

12. Accordingly, to obtain a preliminary injunction in this matter, the Board and Health Officer must demonstrate either: (1) “a prima facie case that they will suffer some degree of harm and are entitled to relief” under § 27-19-201(1), MCA; or (2) “that they will suffer an ‘irreparable injury’” under § 27-19-201(2), MCA. *Id.*, ¶ 17. This Court also must conclude that the preliminary



injunction will “preserve[] the status quo and minimize[] the harm to both parties pending a final resolution of the matter on the merits.” *Id.* (citing *Davis*, ¶ 24).

13. Based on the foregoing authority and for the reasons explained below, the Court concludes the Board and Health Officer are entitled to a preliminary injunction under § 27-19-201(1), MCA as it appears the applicant is entitled to the relief requested and the relief “consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.”

14. The preliminary injunction is necessary to preserve the status quo and minimize the harm to both parties pending this Court’s final resolution of the Civil Action on its merits.

15. Because the Board and Health Officer are entitled to preliminary injunctive relief under § 27-19-201(1), MCA, it is unnecessary for this Court to determine if the other disjunctive subsections of § 27-19-201, MCA, are satisfied.

16. The Board is constituted under the authority of § 50-2-106, MCA, as a local board of health and has all of the powers and duties set forth at § 50-2-116, MCA, to carry out the purposes of the public health system.

17. The Health Officer is the local health officer appointed by the Board pursuant to §50-2-116(1)(a), MCA, and has all of the powers and duties to carry out the purposes of the public health system set forth at § 50-2-118, MCA.

18. The purpose of Montana’s public health system is delineated at § 50-1-105(2), MCA, and includes protecting and promoting the public’s health by:

- (a) promoting conditions in which people can be healthy;
- (b) providing or promoting the provision of public health services and functions, including:
 - (i) monitoring health status to identify and recommend solutions to community health problems;
 - (ii) investigating and diagnosing health problems and health hazards in the community; . . . [and]



(vi) implementing and enforcing laws and regulations that protect health and ensure safety;

19. Pursuant to § 50-2-116(1)(f), MCA, the Board has the duty to “identify, assess, prevent, and ameliorate conditions of public health importance” by abating public health nuisances and taking “public health measures as allowed by law;”

20. A “condition of public health importance” is defined as “a disease, injury, or other condition that is identifiable on an individual or community level and that can reasonably be expected to lead to adverse health effects in the community.” § 50-1-101(2), MCA,

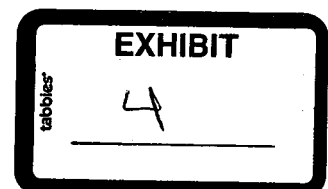
21. Section 50-2-116(2)(c), MCA, authorizes a board to “adopt regulations that do not conflict with 50-50-126 or rules adopted by [the Montana Department of Public Health and Human Services]: (i) for the control of communicable diseases; . . . and (vi) to implement the public health laws; . . .”

22. Pursuant to § 50-2-118(1), MCA, the Health Officer may “make inspections for conditions of public health importance and issue written orders for compliance or for correction, destruction, or removal of the condition;”

23. A Health Officer can also “take steps to limit contact between people in order to protect the public health from imminent threats, including but not limited to ordering the closure of buildings or facilities where people congregate and canceling events; . . .” § 50-2-118(2), MCA.

24. All statutes, including those relied on herein, enjoy the presumption of constitutionality. *Driscoll*, ¶ 16 (citing *City of Billings v. Cty. Water Dist.*, 281 Mont. 219, 227, 935 P.2d 246, 250 (1997)).

25. Plaintiff has made a prima facie showing that EHR-2020-004-C and HO-2020-005-B were lawfully adopted pursuant to § 50-2-116, MCA, and § 50-2-118, MCA, which are presumed to be constitutional.



26. The Board and Health Officer have made a prima facie showing that they will suffer some degree of harm and are entitled to relief. *Driscoll*, ¶ 17.

27. EHR-2020-004-C, HO-2020-005-B, and the Governor's Directive all require restaurants and bars in Gallatin County to close between the hours of 10:00 p.m. and 4:00 a.m., unless providing carry-out or delivery services.

28. If a bar does not close between the hours of 10:00 p.m. and 4:00 a.m., EHR-2020-004-C and HO-2020-005-B both provide that such conduct amounts to a violation of the Emergency Local Health Rule and Health Officer Order.

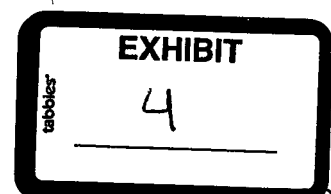
29. The Rocking R Bar admits to violating EHR-2020-004-C, HO-2020-005-B, and the Governor's Directive by remaining open and serving patrons after 10:00 p.m.

30. The Board and Health Officer will be unable to carry out their duties to protect the public from the introduction and spread of COVID-19 if restaurants and bars, like the Rocking R Bar, do not comply with local health rules and orders designed to limit the spread of COVID-19 in the community. § 50-2-116(1)(g), MCA.

31. A preliminary injunction is the appropriate remedy to preserve the status quo and minimize the harm to all parties pending final resolution of this matter on the merits. *Driscoll*, ¶ 13 (citations omitted).

32. The last "actual, peaceable, non-contested condition" that preceded the pending controversy is the circumstance in which the Rocking R Bar operated lawfully, in compliance with the public health measures imposed by the Governor, Board, and Health Officer to limit the spread of COVID-19.

33. The status quo requires that the Rocking R Bar close between 10:00 p.m. and 4:00 a.m. each day in compliance with EHR-2020-004-C, HO-2020-005-B, and the Governor's Directive.



34. The Court does not have sufficient facts or law before it at this time to decide the merits of any of the Answer's Affirmative Defenses. Accordingly, the Court does not rule on the merits of the defenses by granting the preliminary injunction.

35. The Court notes that statutes are presumed to pass constitutional muster, and at this early juncture in this case the Court has no basis to determine that the presumption of constitutionality of the statutes at issue has been overcome.

36. The Court concludes the Board and Health Officer are entitled to a preliminary injunction.

37. Subject to § 25-1-401, MCA, on granting a preliminary injunction, a court "shall require a written undertaking to be given by the applicant for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." § 27-19-306(1), MCA.

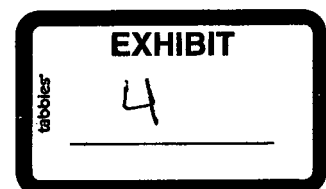
38. Section 25-1-402, MCA exempts a county or city from the requirements of § 27-19-306 when it is a party to a civil action.

39. Further, a court may waive a written undertaking in the interest of justice. § 27-19-306(1)(b)(ii), MCA.

40. The Board is a local health board created pursuant to § 50-2-106, MCA by an interlocal agreement between Gallatin County, Montana and the City of Bozeman, Montana.

41. The Court concludes that, because the Board a political subdivision of local government, no bond should be required in this case.

42. This Court further concludes that the requirement for a written undertaking should be waived in the interest of justice.

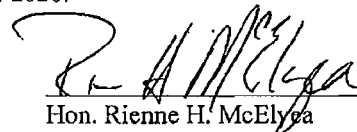


ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters the following order:

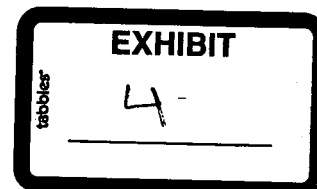
1. Plaintiffs' Application for Preliminary Injunction is GRANTED.
2. Defendant, and its officers, agents, employees, attorneys, and those persons in active concert or participation with them, shall abide by all requirements of EHR-2020-004-C, HO-2020-005-B, and the Governor's Directive, and shall close each day at 10:00 p.m. and not reopen until 4:00 a.m. the following morning.
3. The Gallatin County Sheriff and any peace officer with jurisdiction shall take all necessary steps to enforce the terms of the Preliminary Injunction.
4. In the interest of justice and pursuant to §§ 27-19-306 and 25-1-402, MCA, no bond or security shall be posted or is required at this time.
5. The Preliminary Injunction shall take effect immediately and remain in effect until March 1, 2021 or until further order of the Court.
6. Each party shall bear its own attorney's fees and costs.

DATED this 18th day of December 2020.

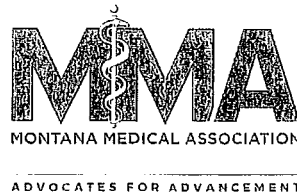

Hon. Rienne H. McElyea
District Judge

c: Marty Lambert
Erin Arnold
Brian Gallik

} emailed
12/18/20



MMA Executive Office
2021 Eleventh Ave. Ste 1
Helena, Montana
59601-4890



August 18, 2021

Hellgate Elementary
Attn: Doug Reisig, Superintendent
2385 Flynn Lane
Missoula, MT 59808

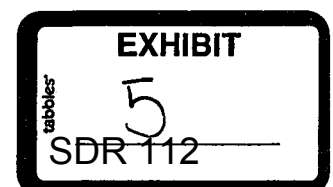
Dear Superintendent Reisig,

As medical professionals, we recognize and value the critical work teachers, school staff, and administrators do to educate our children. Each of us could easily name multiple teachers who gave us skills that have made us who we are today. It is with admiration, gratitude, and deep respect that we are reaching out to you to offer our assistance and expertise.

As the leading physician organization representing 1,400 Montana physicians, we are very concerned about the start of the school year amidst increasing COVID-19 cases, hospitalizations, and deaths occurring in Montana.

Children represent 15% of new COVID-19 cases in the US, and hospitalizations of children due to COVID-19 are currently at an all-time high; many will struggle with long-term health consequences. We have reviewed the evidence on school mitigation measures, including universal masking, and conclude that they were important and effective in preventing SARS-CoV-2 spread in the last school year. In the setting of the Delta variant, its virulence, communicability, and effect on children, **we strongly recommend that all Montana school districts implement universal masking for grades K–12.** The data we have reviewed and our ongoing monitoring of events in the southeastern United States inform the need for timely, prudent steps that will help keep Montana children safe and schools open for learning. For any time periods when COVID cases are steadily increasing, and at such a high level, our recommendations will serve to limit the burden of serious health outcomes in our communities and decrease avoidable COVID-related disruption of school.

Universal masking is an important component of layered mitigation strategies to prevent SARS-CoV-2 spread in schools. We acknowledge that this is not a permanent change, and there are specific situations that may call for the adaptation of guidelines to fit local conditions. Policies that fit your risk level now can be reevaluated as cases decrease. We would be honored to work with any superintendent as part of a team to help with planning.



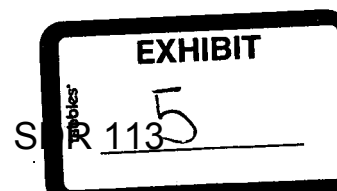
We empathize with the pressures you are facing from caring parents and community members with firmly held convictions. We are also aware of the amount of misinformation and disinformation that is flowing through our community. As educational professionals, we know you are constantly working to keep our schools a safe environment for kids to learn and play. We realize the tough job you have, weighing the risk and benefits of all decisions. We want to let you know we are available and would like to work with you to ensure you have the most up-to-date medical information to make informed decisions.

Thank you again for all you do for Montana students and families. We hope you will reach out to the Montana Medical Association if we can be of assistance.

Sincerely,



Pamela V. Cutler, M.D.
Montana Medical Association President



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Attorneys for Defendants

MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY

STAND UP MONTANA, a Montana non-profit corporation; CLINTON DECKER; JESSICA DECKER; MARTIN NORUNNER; APRIL MARIE DAVIS; MORGEN HUNT; GABRIEL EARLE; ERICK PRATHER; BRADFORD CAMPBELL; MEAGAN CAMPBELL; AMY ORR and JARED ORR,

Plaintiffs,

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.

Cause No. DV 21-1031

Dept. No. 2

AFFIDAVIT OF HEATHER DAVIS SCHMIDT, Ed.D.

STATE OF MONTANA)
 :SS.
County of Missoula)

Heather Davis Schmidt, Ed.D., being first duly sworn, states as follows:

1. I am the Superintendent of Target Range School District. I have served as a superintendent for six years; I am beginning my seventh year as a superintendent and beginning my second year as superintendent for Target Range. I have a Doctorate in Education (Ed.D.) and carry a Class Three Administrative License with a superintendent endorsement in Montana.

2. Target Range School District has an enrollment of approximately 555 students and has approximately 75 staff members. The District serves students from pre-kindergarten through eighth grade.

3. In July 2020, the District convened a COVID-19 Task Force. The Task Force is comprised of District personnel (administrators, supervisors, teachers, and classified staff), trustees, representatives of employee unions, a representative of the parent-teacher organization, and a parent who is also a local pediatrician.

4. The District’s Task Force met routinely throughout the 2020-2021 school year to consider planning related to the COVID-19 pandemic. During the 2020-2021 school year, the District operated on a hybrid instruction model, separating students into cohorts and providing part-time in person learning and part-time asynchronous (offsite) instruction. However, due to the work of the Task Force,

the District was able to transition to in-person learning for students five-days a week. Students, staff members, and visitors were required to wear face coverings during the 2020-2021 school year.

5. The District's Board of Trustees has adopted a school safety policy – Board Policy 7060 – which authorizes the District through the superintendent to require the use of personal protective equipment (which include face coverings) when necessary to protect the safety of students, staff members, and visitors.

6. The District's Task Force met multiple times over summer 2021. The District held an optional staff meeting and a family forum to answer questions and hear input regarding return to school plans for fall the first week of August 2021. The Parent Teacher Organization President and unions distributed and collected anonymous surveys that were reviewed by the Task Force as well.

7. The District's Task Force considered guidance and resources that included:

- Missoula City-County Health Department (MCCHD) continuously updated guidance and health orders for Missoula County schools; weekly Missoula County data updates; bi-weekly meetings with Missoula County health officer and Missoula County school superintendents.
- Centers for Disease Control (CDC) - continuously updated guidance for schools; CDC indicators and thresholds for risk of introduction and transmission of COVID-19 in schools.

- Harvard University School of Public Health - Risk Reduction Strategies for Reopening Schools.
- Montana Governor's Office - Plan for Safely Reopening; Outbreak Response Protocols for Schools.
- Montana Office of Public Instruction (OPI) - Reopening Montana Schools Guidance.
- Children's Hospital of Colorado - Risk Based Approach to Reopening Schools Amid COVID-19.
- American Academy of Pediatrics (AAP) - COVID-19 Planning Considerations: Guidance for School Reopening.
- The Montana Chapter of the American Academy of Pediatrics - Reopening Recommendations for Schools.
- Massachusetts Department of Education - Reopening schools, supplies recommendations.
- Harvard University Center for Ethics/Brown University School of Public Health - Schools and the Path to Zero.
- Montana Public Education Center (MT-PEC) Planning checklist for reopening schools.

- US Department of Education Regional Education Laboratory for the Pacific Region (McREL International) - Research report: Considerations for Reopening Pennsylvania Schools.
- US Department of Education - FERPA and virtual learning in COVID-19.
- Privacy Technical Assistance Center - Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices.
- National Center on Research for Education Access and Choice - The Effects of School Reopenings on COVID-19 Hospitalizations.

In addition to this guidance and these resources, the Task Force reviewed feedback from and resources shared by individual staff members, parents, community members, and physicians in the Target Range community.

8. Based upon this information, the Task Force recommended that the Board of Trustees adopt a masking requirement for students, staff members, visitors, and volunteers. I made this recommendation to the Board of Trustees at the August 16, 2021, meeting.

9. At the August 16th meeting, a majority of the District's Board of Trustees approved a school re-opening plan that included the following rules regarding face coverings:

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

10. The AAP has recommended “universal masking because a significant portion of the student population is not yet eligible for vaccines, and masking is proven to reduce transmission of the virus and to protect those who are not vaccinated.” (<https://services.aap.org/en/news-room/news-releases/aap/2021/american-academy-of-pediatrics-updates-recommendations-for-opening-schools-in-fall-2021/>).

11. The CDC, MCCHD, AAP, and American Academy of Family Physicians have indicated that vaccinations are the best way to promote an end to the COVID-19 pandemic. However, many of our students are under the age of 12 and are not eligible to be vaccinated. As such, these same organizations are recommending

masking in school buildings as the best method to help protect students from transmission of COVID-19.

12. Adopting a face covering requirement allows the District to eliminate static grouping. Static grouping (or the use of “cohorts”) involves keeping students in the same groups and limiting their movement and interaction with others.

Eliminating static grouping allows for increased course options for middle school students as well as increased extracurricular activities. By requiring face coverings, the District is seeking to reduce the transmission of COVID-19 where students are given increased opportunity to interact with another.

13. The District has and continues to consider accommodations for students with disabilities, which may include medical conditions, with respect to face coverings.

14. The District’s Task Force and Board of Trustees intend to review the rules and requirements monthly and make changes as COVID-19 circumstances evolve.

15. It is the District’s expectation that the masking requirement will no longer be necessary when students between the ages of 5 and 11 will have an opportunity to become fully vaccinated and key indicators in the local community data demonstrate low to moderate transmission.

16. It is my professional opinion that the health, safety, and welfare of the District’s students and staff members are at risk due to Delta variant of COVID-19.

17. It is my professional opinion that an elimination of a masking requirement would be significantly disruptive to the District's operations and places the ability of the District to offer in-person instruction at risk. The CDC's guidance indicates that with multiple strategies in place, including mandatory masking, the ability to access in-person learning (even with some transmission of COVID-19) remains intact.

18. Without these strategies, of which masking is a vital component, there is a risk of increased infection and exposure to staff members and students. This, in turn, would require increased quarantining of staff members and students and may result in the District having to shut down its schools due to a lack of staff and students.

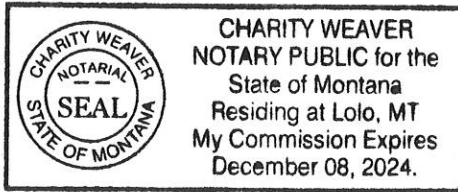
19. Based upon my professional training and experience, it is my opinion that having a masking requirement will assist the District with being able to provide in-person learning for students. It is my professional opinion that the masking requirements adopted by the District's Board of Trustees will decrease the possibility of disruption to the Target Range school community and increase the possibility that students will be able to engage in learning in person.

Dated this 27th day of August, 2021.


Heather Davis Schmidt

STATE OF MONTANA)
 :SS.
County of Missoula)

SUBSCRIBE AND SWORN TO before me this 27 day of August, 2021,
by Heather Davis Schmidt.



Charity Weaver
Notary Public

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 Elizabeth A. O'Halloran
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Attorneys for Defendants

MONTANA FOURTH JUDICIAL DISTRICT COURT
 MISSOULA COUNTY

STAND UP MONTANA, a Montana non-profit corporation; CLINTON DECKER; JESSICA DECKER; MARTIN NORUNNER; APRIL MARIE DAVIS; MORGEN HUNT; GABRIEL EARLE; ERICK PRATHER; BRADFORD CAMPBELL; MEAGAN CAMPBELL; AMY ORR and JARED ORR,

Plaintiffs,

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.

Cause No. DV 21-1031

Dept. No. 2

AFFIDAVIT OF DOUGLAS REISIG, Ed.D.

STATE OF MONTANA)
 :SS.
County of Missoula)

Douglas Reisig, Ed.D., being first duly sworn, states as follows:

1. I am the Superintendent of Hellgate Elementary School District. I have served as a superintendent for 34 years, 22 of those years have been with the Hellgate Elementary School District. I have a Doctorate in Education (Ed.D.) and carry a Class Three Administrative License with a superintendent endorsement in Montana.

2. Hellgate Elementary School District has an enrollment of 1,485 students and employs 113 certified/administrative staff members and 72 classified staff members. Hellgate Elementary School District serves students from pre-kindergarten through eighth grade.

3. During the 2020-2021 school year, the District remained open for in-person instruction five days a week during the school year as was planned in the District's calendar. Students, staff members, and visitors were required to wear face coverings during the 2020-2021 school year. Due to our commitment to student and staff safety through increased cleaning protocols and the use of personal protective equipment, including the use of face coverings, the District did not have to shut down at any time during the 2020-2021 school year for reasons related to COVID-19.

4. The District’s Board of Trustees has adopted a school safety policy – Board Policy 7060 – which authorizes the District through the superintendent to require the use of personal protective equipment (which include face coverings) when necessary to protect the safety of students, staff members, and visitors.

5. The District seeks to offer instruction as “normal” for the 2021-2022 school year as can practicably occur during the ongoing COVID-19 pandemic. The District plans to continue to offer in-person instruction to its students five days a week during the 2021-2022 school year (excepting scheduled days for staff training and school breaks).

6. Consistent with the District’s desire to offer a regular schedule of instruction for students, I recommended to the District’s Board of Trustees on August 23, 2021, that the Board adopt a six-week face covering mandate for the start of the 2021-2022 school year which is scheduled to begin on September 1, 2021.

7. At the August 23, 2021, a majority of the Board of Trustees approved the requirement that all students, staff members, and visitors be required to wear a face covering over their mouth and nose for a six-week period while indoors in a District facility or on District buses. Face coverings will be provided by the District; individuals may wear their own chosen face coverings provided they do not depict any inappropriate images, words, or political slogans. Face coverings will not be required for students:

- during breakfast/lunch opportunities for students
- when classes are held outside and social distancing can be established
- during student recess
- during physical education classes when the square footage of the physical education gymnasium will allow for appropriate social distancing and minimized continuous contact that exceeds 15 minutes
- during music classes when facilities will allow for appropriate social distancing and minimized continuous contact exceeding 15 minutes within the 6 ft. threshold
- during numerous daily scheduled “mask break” opportunities for students outside

8. I made the recommendation to require face coverings because:

(1) a significant portion of the District’s student population is not eligible to be vaccinated because they are under the age of 12;

(2) local and national medical and public health professionals have stated that there is evidence that supports that the use of face coverings offers protection against COVID-19 and can reduce transmission;

(3) it is significantly difficult for staff to monitor and/or enforce voluntary masking procedures on a daily basis and a huge burden is placed on staff to know who should or should not be masked when their focus and attention should be on instruction of students; and

(4) there are heightened concerns regarding the Delta variant, which is now reported as the predominant variant of COVID-19, and is more easily spread among children, adolescents, and adults.

9. Additionally, I have been monitoring data from the Missoula City-County Health Department (MCCHD) through its COVID-19 Data Dashboard. Based upon review of the data, transmission within Missoula County is rising. The MCCHD has a goal of an average daily case rate of less than 25 per 100,000 people for 2 consecutive weeks. On August 23, 2021, MCCHD reported that this metric had risen to an average daily case rate of 41 per 100,000 people. MCCHD also reported that nearly 15% of all current on that date cases are in children and adolescents between 0 and 19 years of age.

10. Information supplied by MCCHD as well as local reporting reveals that hospitalizations within Missoula County are increasing and there are concerns about hospitals reaching capacity.

11. In making my recommendation, I considered recommendations from the Centers for Disease Control (CDC) issued in August 2021. The CDC has stated: “Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority.” It also stated: “Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.” <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

12. The American Academy of Pediatrics (AAP) also issued recommendations for the universal use of face coverings for all students and staff members who are two years of age or older unless there are medical or developmental conditions that prohibit face covering use. <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 AAP recommends a layered approach to include universal face covering use, ventilation, testing, quarantining, and cleaning and disinfecting in order to make in-person learning as safe as possible.

13. I received information and statements supporting a face covering mandate from several local medical providers and a public health official. These professionals, who are also parents, indicated the heightened risk for students and staff due to the Delta variant and urged masking as a mitigation strategy to help keep students safe until a vaccination is available for them.

14. District teachers and I observed students wearing face coverings during the 2020-2021 school year. We observed students understanding the purpose of face coverings was to keep themselves and others safe and that the use of face coverings helped to ensure that they could continue to come to school. Students were cooperative during the 2020-2021 school year in wearing face coverings.

15. Additionally, regardless of the District's determination regarding its own facilities, students would be required to wear face coverings on District-provided

transportation. As of February 1, 2021, the CDC has required face coverings on all school buses, regardless of whether the buses are operated by the district or a third party. *Order under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 Code of Federal Regulations 70.2, 71.31(b), 71.32(b)*. The only permitted exceptions are while eating, drinking or taking medication for brief periods; communicating with a person who is hearing impaired when the ability to see the mouth is essential for communication; if the person is unconscious, incapacitated, unable to be awakened, or otherwise unable to remove the face covering without assistance; or when necessary to temporarily remove the face covering to verify one's identity or when asked to do so by a law enforcement official (there are other exceptions applicable to aircraft). Children under age 2 years and individuals with a disability who cannot wear face covering due to the disability are exempted from the face covering requirement. Bus drivers, when alone, may remove their face coverings.

16. The District has and continues to consider accommodations for students with disabilities, which may include medical conditions, with respect to face coverings.

17. Subsequent to the Board of Trustees' decision to require face coverings, I received a letter from the president of the Montana Medical Association (MMA) which "strongly recommended that all Montana school districts implement universal masking for grades K-12." According to the MMA:

Children represent 15% of new COVID-19 cases in the US, and hospitalizations of children due to COVID-19 are currently at an all-time high; many will struggle with long-term health consequences. We have reviewed the evidence on school mitigation measures, including universal masking, and conclude that they were important and effective in preventing SARS-CoV-2 spread in the last school year. In the setting of the Delta variant, its virulence, communicability, and effect on children, **we strongly recommend that all Montana school districts implement universal masking for grades K-12.**

(emphasis supplied).

18. The District's face covering requirement has been instituted at this time for a period of 6 weeks or 27 school days. This time period was selected to allow adequate time to gather data about continued infection rates within the community. The District's Board of Trustees can consider average daily case rates in Missoula County at its October meeting and make any adjustments to its protocols, which could include its masking rules, as appropriate.

19. It is my professional opinion that the health, safety, and welfare of the District's students and staff members are at risk due to the Delta variant.

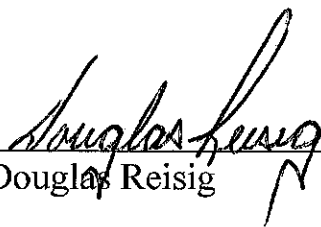
20. It is my professional opinion that without a layered approach, that includes a masking requirement as has been stated herein, there would be disruption to the school environment and the District's ability to provide in-person learning would be in jeopardy.

21. The District lacks an adequate pool of substitutes to be able to cover for teachers if there was a significant outbreak of COVID-19 at school. There is a

concern that due to the limited pool of substitutes that the District would be unable to remain open for in-person learning if there was a significant outbreak in the school community.

22. Based upon my professional training and experience, it is my opinion that having a masking requirement will assist the District with being able to provide in-person learning for students. Due to the increasing infections in Missoula County and the concerns related to the Delta variant, I believe that the masking requirements adopted by the District's Board of Trustees will decrease the possibility of disruption to a significant outbreak to the Hellgate Elementary School community.

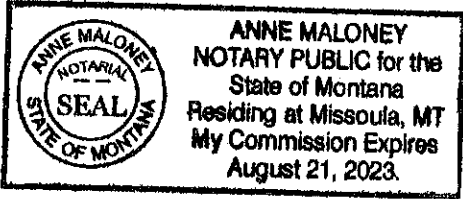
Dated this 27 day of August, 2021.



Douglas Reisig

STATE OF MONTANA)
 :SS.
County of Missoula)

SUBSCRIBE AND SWORN TO before me this 27th day of August, 2021,
by Douglas Reisig.



Anne Maloney
Notary Public

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Attorneys for Defendants

MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY

STAND UP MONTANA, a Montana non-profit corporation; CLINTON DECKER; JESSICA DECKER; MARTIN NORUNNER; APRIL MARIE DAVIS; MORGEN HUNT; GABRIEL EARLE; ERICK PRATHER; BRADFORD CAMPBELL; MEAGAN CAMPBELL; AMY ORR and JARED ORR,

Plaintiffs,

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.

Cause No. DV 21-1031

Dept. No. 2

AFFIDAVIT OF ROBERT WATSON, Ed.D.

STATE OF MONTANA)
 :ss.
County of Missoula)

Robert Watson, Ed.D., being first duly sworn, states as follows:

1. I am the Superintendent of Missoula County Public School District (MCPS).

I have served as a superintendent for nine years and am beginning my third year as superintendent for MCPS. I have a Doctorate in Education (Ed.D.) and carry a Class Three Administrative License with a superintendent endorsement in Montana.

2. MCPS has an enrollment of approximately 9,200 students and employs approximately 1,500 staff members. It operates a preschool, nine elementary schools, three middle schools, four high schools, an alternative program, and an online academy.

3. During the 2020-2021 school year, MCPS convened a COVID Task Force that met regularly throughout the school year that considered data regarding COVID transmission both in the community as well as within MCPS schools. The COVID Task Force is comprised of district personnel (including administrators, teachers, and classified personnel), trustees, representatives of employee unions, parents, public health professionals, and community members.

4. MCPS had a re-opening plan for the 2020-2021 school year that conditioned its provision of in-person learning on a multitude of factors, including the COVID

transmission data. MCPS operated on a hybrid instruction model, separating students into cohorts and providing part-time in person learning and part-time asynchronous (offsite) instruction. However, by the end of the school year, MCPS was offering in-person learning for students four to five days a week, depending on grade level.

5. During the 2020-2021 school year, MCPS students and staff were required to wear face coverings.

6. Although there were occasions during the surge of increased number of infections in November 2020 when entire classrooms were quarantined, MCPS did not have to shut down any schools during the 2020-2021 school year.

7. MCPS delayed making any decisions regarding masking for the 2021-2022 school year until final guidance had been released by the Centers for Disease Control (CDC) and other health organizations. After the guidance was issued by the CDC and the American Academy of Pediatrics (AAP), MCPS convened its COVID Task Force to consider various options regarding masking. These options included recommended use of face coverings as well as required use of face coverings.

8. Taking into account the information provided by the COVID Task Force and comments by members, MCPS administration recommended to the Board of

Trustees that face coverings be required for all students, staff, volunteers and guests when indoors and on buses.

9. On August 10, 2021, a majority of the MCPS Board of Trustees voted to approve masking rules. Face coverings are required for all students, staff, volunteers and guests when indoors and on buses, regardless of vaccination status. The rules apply to all MCPS K-12 facilities as well as its administrative offices.

The rules also include the following:

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

10. The Board of Trustees adopted the rules for a minimum of six weeks from the start of the school year. The District’s Administration, COVID Task Force and Board of Trustees will be routinely reviewing the rules. Factors that will be used in decision making include, but are not limited to, local incident rate (new cases, per

100,000, on a 7-day rolling average), local vaccination rate by age group, and district data related to school-associated positive COVID cases and/or transmission.

11. In making the recommendation, MCPS administration considered recommendations from the Montana Chapter of the American Academy of Pediatrics, the CDC, and the Missoula City/County Health Department (MCCHD) as follows:

- Children younger than 12 years do not have the opportunity to be vaccinated and will not likely have this opportunity until late fall/early winter.
- CDC guidance regarding who is determined to be a close contact has changed to acknowledge the use of face coverings in K-12 settings. During the 2020-2021 school year, any student within 6 feet of a positive case would be considered a “close contact” and would have to quarantine, 10-14 days. For the 2021-2022 school year, if *both* the positive case and other students are correctly and consistently using face coverings, the other students may not be considered close contacts and may not have to quarantine.
- The Delta variant of this virus has now been detected in Montana, and this variant has been found to be much more contagious as well as even cause mild disease in vaccinated people. Cases and hospitalizations are increasing from earlier this month, and the Delta variant is rapidly becoming the predominant variant in Montana.

12. I have continuously monitored local data provided by MCCHD. On August 10, 2021, I provided the most current information from the MCCHD Data Dashboard (<https://www.missoulainfo.com/data>) to the Board of Trustees.

MCCHD tracks average daily new cases per 100,000 people during a 7-day period.

On August 10, 2021, the incident rate was 24 cases per 100,000, which according to MCCHD was a “tipping point” for the department’s COVID suppression measures. I also reported vaccination rates reported by MCCHD for eligible adolescents (12 years of age and older). The vaccination rate for children between the ages of 12 and 14 years was lower than 38%, and the vaccination rate for individuals between the ages of 15 and 19 years was lower than 57.6%.

13. Since my report to the Board of Trustees on August 10, 2021, I have continued to monitor data through MCCHD’s Data Dashboard. As of August 23, 2021, the average daily new case rate was 41 cases per 100,000 people. The vaccination rates were 38% for children between the ages of 12 and 14 years and 57.6% for adolescents between the ages of 15 and 19 years, which was not a significant change from the vaccination rates on August 10, 2021.

14. The recommendation, adopted by the Board of Trustees, was to require masking for students, staff, visitors, and volunteers for a minimum of six weeks. The reason for this time period is to allow for the gathering of data from our schools. During the 2020-21, MCPS decisions were based not only on community data but also District-specific data. Because of the dynamic nature of the COVID-19 virus, decisions have not been based on data from an isolated week. MCPS adopted a six-week time frame in order to permit the gathering of sufficient data

over a limited time period in order to make a decision that is in the best interests of our students, staff members, and school community as a whole.

15. MCPS has and continues to consider accommodations for students with disabilities, which may include medical conditions, with respect to face coverings.

16. It is my professional opinion that rules requiring face coverings help to reduce transmission of COVID-19 in school, which increases the opportunity for in-person learning.

17. It is my professional opinion that without a multi-layered approach, which includes a masking requirement as has been stated herein, there would be disruption to the school environment and MCPS's ability to provide in-person learning would be jeopardized.

18. Under current CDC guidance, students are not considered to be "close contacts" with other students if they are within three feet of one another and are wearing face coverings. Accordingly, if there was a student who becomes infected with COVID-19, MCPS anticipates that only a limited number of students may be impacted because only those students within a three-foot distance are potentially impacted. Without face coverings, this distance would be increased to six feet, which increases the impact on other students because there is a wider radius of students MCPS would be required to consider as close contacts. By requiring face

coverings, MCPS anticipates that less students will be required to quarantine away from school due to exposure.

19. Although the CDC permits a three-foot distance for students, a six-foot radius is still the metric used to determine close contacts for staff members.

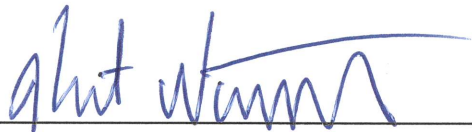
Because face coverings can reduce the potential for transmission, MCPS is hopeful that there will not be a significant outbreak impacting staff members. If there was a significant outbreak in the school, MCPS may have to shut down schools due to lack of staffing.

20. Based upon concerns and comments by parents when the Board of Trustees made its decision on face coverings on August 10, 2021, there could also be significant disruption due to the likelihood of increased requests by parents to transfer their children to MCPS's online academy if face coverings were not required in schools. MCPS has made staffing determinations based upon the enrollment of students in the online academy. If face coverings were not required, MCPS would have difficulty accommodating parent requests to enroll in the online academy because it has not assigned adequate staff if more students were to seek online instruction.

21. Based upon my professional training and experience, it is my opinion that having a masking requirement will assist MCPS with being able to provide in-person learning for students. It is my professional opinion that the masking

requirements adopted by MCPS Board of Trustees will decrease the possibility of disruption to a significant outbreak to the MCPS community and increase the possibility that students will be able to engage in learning in person if that is their preference.

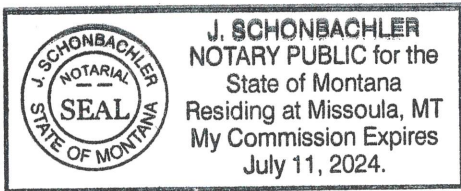
Dated this 30 day of August, 2021.




Robert Watson

STATE OF MONTANA)
 :SS.
County of Missoula)

SUBSCRIBE AND SWORN TO before me this 30 day of August, 2021,
by Robert Watson.





Notary Public

MONTANA DISTRICT COURT
MISSOULA COUNTY

MINUTE ENTRY

Date: 09/07/2021 02:30 PM

Event Type: Conference - Scheduling

Case Number: DV-32-2021-0001031-CR

Presiding Judge: Jason Marks

**Stand Up Montana et al vs Missoula County
Public Schools et al.**

Department: 4

Appearances: Presiding Judge: Jason Marks; Catherine Rebish, Court Reporter; Donna Duffy, Court Clerk.

Counsel for the Plaintiffs, Quentin Rhoades, and counsel for the Defendants, Kevin Twidell, came into court, this being the time set for a scheduling conference.

Thereupon, after a discussion between counsel and the Court, the Court set a preliminary injunction hearing on **Wednesday, September 29, 2021 from 9:00 A.M. to 11:00 A.M.**, and the parties agreed to proceed under the Rule 6 of the Uniform District Court Rules Simplified Procedures for Civil Action. The Court advised it will issue the scheduling order.

cc: Quentin Rhoades, Esq.
Kevin Twidell, Esq.
Elizabeth Kaleva, Esq.
Elizabeth A. O'Halloran, Esq.

MONTANA DISTRICT COURT
MISSOULA COUNTY

MINUTE ENTRY

Date: 09/29/2021 09:00 AM

Event Type: Preliminary Injunction

Case Number: DV-32-2021-0001031-CR

Presiding Judge: Jason Marks

**Stand Up Montana et al vs Missoula County
Public Schools et al.**

Department: 4

Courtroom: 4

Appearances: Presiding Judge: Jason Marks; Catherine Rebish, Court Reporter; Donna Duffy, Court Clerk.

Counsel for the Plaintiffs, Quentin Rhoades, and counsel for the Defendants, Elizabet Kaleva and Kevin Twidwell, came into court, this being the time set for a hearing on the Plaintiffs' Motion for Preliminary Injunction.

Thereupon, the Court heard oral argument from respective counsel as to their position on the motion. The Court then questioned counsel. The Court advised it will take the matter under advisement and issue an Order.

Thereafter, a discussion was held regarding the current scheduling order and it was agreed that it would be extended by one (1) month. The Court advised it will set a new trial date for five (5) days.

cc: Quentin Rhoades, Esq.
Elizabeth Kaleva, Esq.
Kevin Twidwell, Esq.

1 Jason Marks, District Judge
2 Fourth Judicial District, Dept. 4
3 Missoula County Courthouse
4 200 West Broadway
5 Missoula, MT 59802
6 (406) 258-4774

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 STAND UP MONTANA, *et al.*,
9 Plaintiffs,
10 vs.
11 MISSOULA COUNTY PUBLIC
12 SCHOOLS, *et al.*,
13 Defendants.

Dept. 4

Cause No. DV-21-1031

ORDER RE: MOTION FOR
PRELIMINARY INJUNCTION

14 Plaintiffs' *Motion for Preliminary Injunction* (Doc. No. 12) came on for
15 hearing on September 29. Plaintiffs appeared personally/by Zoom and through their
16 attorney Quentin Rhoades. Defendant Schools appeared through attorneys Elizabeth
17 Kaleva and Kevin Twidwell. The parties did not call witnesses.

18 As required by M.R.Civ.P. Rule 52(a), the Court hereby makes findings of
19 fact and states conclusions of law.

20 Plaintiffs' motion for a preliminary injunction is **DENIED**.

21 **I. FINDINGS OF FACT**

22 1. Plaintiffs are a Montana non-profit corporation and 11 individuals. The
23 individual plaintiffs are parents of minor children seeking injunctive relief on their
24
25
26

1 behalf as parents and on behalf of their minor children enrolled in the named
2 schools.

3
4 2. Plaintiffs' *Complaint* alleges mask mandates for students imposed by
5 Defendant Schools are not scientifically justified or effective and infringe upon
6 parental or student rights to due process, equal protection, right to privacy, human
7 dignity, freedom of expression and create a cause of action under SB 400 effective
8 October 1, 2021.
9

10 3. Defendants are three Missoula County school districts ("Schools").
11 Missoula County Public School ("MCPS") has an enrollment of approximately
12 9,200 students and employs approximately 1,500 staff members. It operates a
13 preschool, nine elementary schools, three middle schools, four high schools, an
14 alternative program and an online academy. Defendant Target Range School District
15 has an enrollment of approximately 555 students from pre-kindergarten through
16 eighth grade and approximately 75 staff members. Defendant Hellgate Elementary
17 has an enrollment of 1,485 students and employs approximately 185 staff members.
18
19
20

21 4. During the 2020-2021 school year, Defendant MCPS operated on a hybrid
22 instruction model that included in-person learning and remote instruction. MCPS
23 required students, staff, volunteers and visitors to wear face coverings. Face
24 coverings were required during summer school.
25

26 5. On August 10, 2021, the Board of MCPS voted to continue the face

1 covering requirement for all its students, staff, volunteers and guests when indoors
2 in all MCPS K-12 facilities and on buses, regardless of vaccination status, for a
3 minimum of six weeks for the 2021-2022 school.
4

5 6. During the 2020-2021 school year, Defendant Target Range operated on a
6 hybrid instruction model, with part-time in-person learning and part-time remote
7 instruction. The District was later able to transition to in-person learning for student
8 five days a week. Students, staff and visitors were required to wear face coverings
9 during the 2020-2021 school year.
10

11 7. On August 16, Target Range's Board of Trustees approved a school re-
12 opening plan for 2021-2022 that included rules regarding face coverings while
13 indoors except while eating, drinking, and during vigorous physical activity.
14

15 8. During the 2020-2021 school year, the Hellgate Elementary school district
16 remained open for in-person instruction five days a week. Students, staff and
17 visitors were required to wear face coverings during the entirety of the school year.
18

19 9. On August 23, 2021, the Hellgate Elementary District Board of Trustees
20 approved a requirement that all students, staff members and visitors be required to
21 wear a face covering while indoors in a district facility and on district buses for six
22 weeks following the start of the school year on September 1.
23

24 10. Plaintiffs filed their complaint challenging the Schools' face covering
25 rules on August 24, 2021. Plaintiffs did not challenge the masking rule in effect
26

1 during the 2020-2021 school year or during summer school.

2 11. The Court takes judicial notice that as of Monday, September 20,
3 Missoula County broke its previous COVID-19 hospitalization record, active case
4 record and incidence rate record for the second week in a row.
5

6 12. The Court takes judicial notice that Key Metrics calculated by the
7 Missoula City-County Health Department shows the 7-day average daily new cases
8 per 100,000 people has risen from 49.00 on September 1st to 87 as of September 28.
9 On July 1, the 7-day average daily new cases per 100,000 was 3.
10

11 <https://www.missoulainfo.com/copy-of-data-dashboard>.
12

13 13. The Court takes judicial notice that on September 24, 2021, the CDC
14 released three studies that found school districts without a universal masking policy
15 in place were more likely to have COVID-19 outbreaks. According to the CDC,
16 nationwide, counties without masking requirements saw the number of pediatric
17 COVID-19 cases increase nearly twice as quickly during the same period.
18

19 14. The Court takes judicial notice that the Missoula City-County Health
20 Department asks individuals with COVID-19 and their close contacts to quarantine.
21

22 15. The Court takes judicial notice that the Schools all purport to offer
23 remote learning options for the 2021-2022 school year.
24

25 **II. CONCLUSIONS OF LAW**

26

1 1. Section 27-19-201 MCA provides when preliminary injunction may be
2 granted:

3 An injunction order may be granted in the following cases:

4 (1) when it appears that the applicant is entitled to the relief demanded and
5 the relief or any part of the relief consists in restraining the commission or
6 continuance of the act complained of, either for a limited period or
perpetually;

7 (2) when it appears that the commission or continuance of some act during
8 the litigation would produce a great or irreparable injury to the applicant;

9 (3) when it appears during the litigation that the adverse party is doing or
10 threatens or is about to do or is procuring or suffering to be done some act in
11 violation of the applicant's rights, respecting the subject of the action, and
tending to render the judgment ineffectual;

12 (4) when it appears that the adverse party, during the pendency of the
13 action, threatens or is about to remove or to dispose of the adverse party's
14 property with intent to defraud the applicant, an injunction order may be
granted to restrain the removal or disposition;

15 (5) when it appears that the applicant has applied for an order under the
16 provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

17 2. District courts have broad discretion to grant preliminary injunctive relief
18 on any one of the five grounds enumerated in § 27-19-201 MCA. The subsections
19 are disjunctive and a court need find just one subsection satisfied in order to issue a
20 preliminary injunction. *BAM Ventures LLC v. Schifferman*, 2019 MT 67, ¶ 14.

21 3. An applicant for a preliminary injunction must make a prima facie showing
22 she will suffer a harm or injury under either the “great or irreparable” injury
23 standard of § 27-19-201(2) or the lesser degree of harm implied within the other
24 subsections of § 27-19-201. *BAM Ventures*, ¶ 16.
25
26

1 **III. RULING**

2 Plaintiffs do not identify which subsection(s) of § 27-19-201 they are
3
4 proceeding under but it appears to the Court that they are applying for relief under §
5 27-19-201(2), that is, “when it appears that the commission or continuation of some
6 act during the litigation would produce a great or irreparable injury to the litigant.”
7
8 The irreparable injury claimed is violation of the right to privacy and right to
9 dignity, forcing a health care choice upon Plaintiffs by requiring their children to
10 wear medical devices on their faces.

11
12 For purposes of a preliminary injunction, the loss of a constitutional right
13 constitutes an irreparable injury. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15. In order
14 to determine whether a constitutional right has been lost, a court must first
15 determine which of the established levels of scrutiny is appropriately applied: strict
16 scrutiny, middle-tier scrutiny or the rational basis. *Montana Cannabis Indust. Ass’n.*
17 *v. State*, 2012 MT 201, ¶ 16 (“*MCIAP*”). Plaintiffs argue strict scrutiny applies
18 because the rule implicates a fundamental right found in the Montana Constitution’s
19 declaration of rights. The Court disagrees.
20
21

22 Plaintiffs’ underlying premise is unsupported by Montana law. Plaintiffs
23 broadly interpret general concepts in Montana right to privacy jurisprudence to
24 frame their objections to the Schools’ face covering rules as constitutional in
25 dimension. Their arguments go well beyond what the Montana Supreme Court has
26

1 recognized as encompassed in the right to privacy and the right to dignity. Further
2 confounding Plaintiffs' analysis is their failure to distinguish between individual
3 health care decisions and public health measures.
4

5 Plaintiffs rely on a myopic reading of *Armstrong v State*, 1999 MT 261, *Wiser*
6 *v. State*, 2006 MT 20 and *MClA I* in support of their thesis that the right to privacy is
7 implicated by the Schools' face covering rules. The Montana Supreme Court has
8 recognized the right to privacy is a fundamental right guaranteed by the Montana
9 Constitution. *Gryczan v. State*, 283 Mont. 433 (1997). In *Armstrong*, the Montana
10 Supreme Court concluded that the right to health care is a fundamental privacy right
11 to the extent that it protects a woman's right to seek and obtain a pre-viability
12 abortion from the qualified health care provider of her choice. In *Wiser*, the Court
13 noted it does not necessarily follow from the existence of the right to privacy that
14 every restriction on medical care impermissibly infringes the right to health care.
15 *Wiser*, ¶ 15. The Court held there is not a fundamental right to obtain health care
16 free from state regulation. Thus, a rule requiring a referral from a dentist for patients
17 seeking treatment from denturists need only be rationally related to a legitimate state
18 interest. *Wiser*, ¶ 20. In *MClA I*, the Montana Supreme Court reversed the district
19 court's preliminary injunction of parts of the Montana Marijuana Act. The Supreme
20 Court concluded that the district court was mistaken in its reliance on *Armstrong*
21 and its conclusion that the challenged provisions implicated plaintiffs' fundamental
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1 constitutional rights triggering strict scrutiny analysis. The Supreme Court
2 distinguished between the right to privacy in *Armstrong*, which rested on a
3 constitutionally protected right to personal autonomy for women seeking abortion
4 with the claimed affirmative right to access a particular drug, which was not
5 recognized constitutionally as protected under the right to privacy. The Supreme
6 Court remanded the matter to the district court with instructions to apply the rational
7 basis test to determine whether sections of the Montana Marijuana Act should be
8 enjoined. Plaintiffs invite this Court to make the same mistake.

9
10
11
12 Plaintiffs fail to establish a basis for their central claim that the right to
13 privacy is implicated by a requirement that students wear face coverings while
14 indoors at school during an outbreak of a communicable disease. Although
15 Plaintiffs equate a face covering rule to a medical treatment or an individual health
16 care decision and characterize a face covering as a “medical device”, their
17 characterizations are misguided. First, Plaintiffs’ repeated assertion that the
18 Montana Legislature has defined face coverings as “medical devices” is untenable.
19 The Montana Legislature amended the criminal trespass statute to prohibit taxpayer
20 funded public places from requiring proof of vaccination or the wearing of masks or
21 other facial coverings, captured under the general description of “medical devices,”
22 as a condition of entering or remaining lawfully upon certain premises. Words and
23 phrases used in the statutes of Montana are construed according to context. § 1-2-
24
25
26

1 107 MCA, *State v. Pinder*, 2015 MT 157, ¶ 18. The context in which “medical
2 devices” is used in 45-6-203 (4) MCA is a criminal statute addressing lawful access
3 to public places for unvaccinated persons and those who eschew personal protective
4 equipment and is wholly unrelated to regulation of medical care or treatments. SB
5 65, signed into law this past session, wherein the Montana Legislature addressed
6 COVID-19 related liability issues and included face shields and face masks along
7 with other items intended to protect the wearer from injury or spread of infection or
8 illness in the definition of “personal protective equipment.” SB 65, Section 1, (5).
9 In this COVID-19 specific legislation, the Montana Legislature specifically
10 distinguished personal protective equipment from medical devices. SB 65. Section
11 1, (8). This distinction falls in line with common sense, as the Schools have argued,
12 in that masks no more treat COVID-19 than helmets treat head injuries.

17 Second, the rights Plaintiffs claim are not rights recognized in the cases they
18 cite. Plaintiffs do not seek access to constitutionally protected individual health care
19 as in *Armstrong*. In *Wiser* and *MCLA I*, the Montana Supreme Court rejected
20 freewheeling claims that the right to privacy identified in *Armstrong* encompassed
21 access to individual medical treatment free from regulation. Thus, despite the broad
22 guarantee of the individual right to medical judgments referenced in *Armstrong* at ¶
23 75, the Montana Supreme Court has recognized rights may be limited by policies
24 aimed at the protection of public health and safety.
25
26

1 Plaintiffs maintain the face covering rule violates students’ right to human
2 dignity because face coverings undermine individuality, interfere with the ability to
3 read and show emotions, hinder interpersonal communication and relations and
4 strips students of their autonomy in deciding the appearance they wish to present.
5 Parents’ rights to human dignity are alleged to be affronted by “arrogation of the
6 parental right to make health care choices for their children.” The Montana Supreme
7 Court recognizes human dignity as fundamental meaning that the right is a
8 significant component of liberty, any infringement of which will trigger the highest
9 level of scrutiny. *Walker v. State*, 2003 MT 134, ¶ 74.

13 *Walker* discusses human dignity in a context vastly different than presented
14 here. In *Walker*, a prison inmate with an untreated serious mental illness was
15 subjected to extreme “behavior modification plans,” including isolation, food
16 restrictions and denial of clothing, bedding and water supply. The Montana Supreme
17 Court read two sections of the Montana Constitution together (Article II, sec. 4,
18 Individual dignity, and sec. 28, Criminal justice policy) to conclude that the
19 behavior modification plans and conditions of confinement constituted an affront to
20 human dignity and constituted cruel and unusual punishment when it exacerbated
21 the inmate’s mental health. Protection of human dignity for inmates was described
22 as including physical security and attention to the basic human needs of adequate
23 medical care, humane rules for visitation, adequate exercise and opportunity for
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1 education. *Walker*, ¶ 82. Plaintiffs rely on a discussion of general principles in
2 *Walker* and include lengthy quotes from a concurring opinion in *Baxter v. State*,
3 2009 MT 499.
4

5 While the Court understands the frustrations of the parents in this case and the
6 social impediments children in school may experience due to masking, masking in
7 school during a pandemic is a far cry from an abuse of human dignity as recognized
8 in Montana jurisprudence. Further, the claim of impairment of parental dignity is
9 premised on the unsound notion that whether or not to wear a face covering is an
10 individual or parental health care decision. The requirement for face coverings in
11 schools is a public health measure implemented to control the spread of a
12 communicable disease as one element of a multi-part strategy. Public health
13 measures are distinguishable from private, individual health care decisions. Public
14 health measures, such as face coverings, are directed at managing conditions which
15 can reasonably be expected to lead to adverse health effects in the community and
16 are not for the purpose of treating individual health conditions. The Constitution
17 itself explicitly links the enjoyment of inalienable rights with recognition of
18 corresponding responsibilities. Art. II, sec. 3.
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24 Plaintiffs fail to establish the fundamental right to privacy and the right to
25 dignity encompasses the claimed affirmative parental right to individually evaluate
26 the necessity for their children to wear face coverings in schools. Plaintiffs further

1 fail to establish children’s rights to privacy and dignity are infringed by the School’s
2 face covering rule. As the rights claimed do not arise to the level of fundamental
3 rights, strict scrutiny review is not appropriate. “Middle tier” scrutiny is applicable
4 when a law or policy affects a right conferred by the Montana Constitution but is not
5 found in the Constitution’s declaration of rights. *Snetsinger v. Mont. Univ. Sys.*,
6 2004 MT 390, ¶ 17. If neither strict scrutiny nor middle tier scrutiny applies, the
7 rational basis test is appropriate. Pursuant to the rational basis test, the statute must
8 be rationally related to a legitimate government interest. *Snetsinger*, ¶ 19. The
9 rational basis test is applicable to determine whether the Schools’ face covering rule
10 should be enjoined. When rational basis scrutiny is applied to the challenged rule,
11 Plaintiffs cannot establish a prima facie case or show that it is at least doubtful
12 whether or not they will suffer irreparable injury before their rights can be fully
13 litigated.

14 Schools have adopted face covering rules as part of their school safety
15 policies to require the use of personal protective equipment, including face
16 coverings, when necessary to protect the safety of students, staff members and
17 visitors from transmission of COVID-19. The face covering rule is subject to review
18 and modification as circumstances change. Schools have a legitimate governmental
19 interest in the safety of students, staff and visitors. The face covering rule is
20 rationally related to safety of persons, many of whom are not eligible for vaccination
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1 due to their age, who must congregate indoors, in close proximity for extended
2 periods of time. Schools have based the face covering rules on guidance and
3 recommendations from numerous reputable sources, including the Montana Medical
4 Association, Center for Disease Control, Missoula City-County Health Department,
5 the American Academy of Pediatrics, the Montana Chapter of the American
6 Academy of Pediatrics, the Montana Governor's Office and the Montana Office of
7 Public Instruction. The Schools' face covering rules are a rational response to the
8 challenge of safely providing in-person education for all students during a
9 pandemic.
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12

13 A preliminary injunction does not resolve the merits of a case but prevents
14 further injury or irreparable harm pending adjudication of the controversy on its
15 merits. If an applicant establishes a prima facie case or shows that it is at least
16 doubtful as to whether the applicant will suffer irreparable harm before an
17 adjudication on the merits, courts are inclined to issue the preliminary injunction. If,
18 however, a preliminary injunction will not preserve the status quo and minimize
19 harm to all parties pending a full trial on the merits, it should not be issued. *Knudson*
20 *v. McDunn*, 271, Mont. 61, 65, quoting *Porter v. K. & S. Partnership*, 192 Mont.,
21 175, 181 (1981). In addition to Plaintiffs' inability to establish a prima facie case or
22 showing that it is at least doubtful as to whether they will suffer irreparable harm by
23 continuation of the Schools' face covering rule, the requested preliminary injunction
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1 would not preserve the status quo and minimize harm to all parties.

2 Status quo is defined as the last actual, peaceable, noncontested condition
3 which preceded the pending controversy. *Davis v. Westphal*, 2017 MT 276, ¶ 24.
4
5 Plaintiffs maintain the status quo is “parental choice,” or no rule, based on a letter
6 from Douglas Reisig to Hellgate Elementary parents dated August 11, 2021. The
7 letter indicated that no face coverings would be required for the 2021/2022 school
8 year. Less than two weeks later, Hellgate Elementary District’s Board of Trustees
9 adopted a requirement for face coverings for the start of the 2021-2022 school year,
10 following a recommendation by Douglas Reisig. Defendants counter that face
11 covering requirements is the status quo as such rules were in place during the 2020-
12 2021 school year and over the summer for each defendant school district.
13
14

15 The pending controversy is whether Schools may mandate universal face
16 covering rules over the objections of individual parents. The requirement of face
17 coverings was imposed by the Schools at the beginning of the 2021-2022 school
18 year for the duration of the school year, maintained over the summer for summer
19 school and imposed for the beginning of the 2021-2022 school year. Plaintiffs did
20 not file suit until August 2021, after nearly a year of an operative face covering
21 requirement in all Schools. Thus, the noncontested condition preceding the pending
22 controversy was a universal face covering rule adopted by the respective boards.
23
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26 Finally, enjoining the universal face covering rule would not minimize harm

1 to all parties. The spread of COVID-19 is not contained in Missoula County and
2 persons of all ages, including unvaccinated children attending school in person, are
3 at risk of acquiring the virus and of spreading it to other children and adults.
4

5 Individuals with the disease and their close contacts are asked to quarantine by the
6 Missoula City-County Health Department. Although Plaintiffs dispute the efficacy
7 of face coverings, the Court is disinclined to strip Schools of the ability to utilize a
8 recognized public health measure to control communicable disease and keep
9 children in school.
10

11
12 During the September 29, 2021 hearing, it was discussed that Plaintiffs have
13 the option of enrolling their children in the remote learning options offered by the
14 Schools. Plaintiffs believe the current school environment is harmful to their
15 children. Plaintiffs argue that the remote learning option is inferior to in person
16 instruction. While the Court doesn't disagree that in person instruction is preferable,
17 there is no indication that remote learning does not meet the requirement of the
18 Schools to provide education to students in their districts.
19
20

21 In sum, when looking at potential harms, the Court is faced with the prospect
22 of increased spread of a contagious disease, a significant harm in and of itself, and
23 the corresponding quarantining of children and school staff if the requested
24 preliminary injunction were to be granted. On the other hand, in denying the
25 requested preliminary injunction the Court sees the harm to the Plaintiffs as their
26

1 children learning remotely if masking is intolerable. Clearly a preliminary injunction
2 in this case would not minimize harm pending trial on the merits.
3

4 DATED this 1st day of October, 2021.

5
6 Jason Marks
7 District Judge

8 cc: Elizabeth O'Halloran, Esq.
9 Elizabeth Kaleva, Esq.
10 Kevin Twidwell, Esq.
11 Quentin Rhoades, Esq.
12
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IN THE SUPREME COURT OF THE
STATE OF MONTANA

Case No. DA _____

STAND UP MONTANA, a Montana non-profit
Corporation; CLINTON DECKER; JESSICA
DECKER; MARTIN NORUNNER; APRIL
MARIE DAVIS; 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.

NOTICE OF APPEAL

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

Quentin M. Rhoades
RHOADES SIEFERT &
ERICKSON PLLC

Elizabeth A. Kaleva
Kevin A. Twidwell
Elizabeth A. O'Halloran

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For Appellees

NOTICE IS HEREBY GIVEN that Stand Up Montana, a Montana non-profit Corporation, Clinton Decker, Jessica Decker, Martin Norunner, April Marie Davis, Morgen Hunt, Gabriel Earle, Erick Prather, Bradford Campbell, Meagan Campbell, Amy Orr and Jared Orr, Plaintiffs in Cause Number DV 21-1031 in the Fourth Judicial District of Missoula County, hereby appeal to the Supreme Court of the State of Montana from the following Order:

Order Re: Motion for Preliminary Injunction dated October 1, 2021; and any final and appealable judgments that may be entered related thereto, and all proceeding that led up to the foregoing.

THE APPELLANT FURTHER CERTIFIES:

1. This Appeal is not subject to the mediation process required by Mont. R. App. P. 7(2)(c);

2. This appeal is not an appeal from an order certified as final under Mont. R. Civ. P. 54(b);

3. A copy of the Notice of Appeal has been contemporaneously filed in the office of the Clerk of the District Court;

4. A copy of this Notice of Appeal will be served by mailing to the Clerk of District Court and to counsel for the Appellees, or to any Appellee appearing *Pro Se*, and to any Third-Party Defendant;

5. That all available transcripts of the proceedings in this cause have not been ordered from the court reporter contemporaneously with the filing of this notice of appeal; and

6. The required filing fee for this Notice of Appeal has been paid through the Montana Courts Electronic Filing system.

DATED this 28th day of October 2021.

Respectfully Submitted,
RHOADES SIEFERT & ERICKSON PLLC

By: /s/ Quentin M. Rhoades
Quentin M. Rhoades
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October 2021, I have filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Missoula County
Clerk of District Court
200 W. Broadway
Missoula, MT 59802

Elizabeth A. Kaleva
Kevin A. Twidwell
Elizabeth A. O'Halloran
Kaleva Law Offices
1911 S. Higgins Ave.
P.O. Box 9312
Missoula, MT 59807

/s/ Quentin M. Rhoades
Quentin M. Rhoades

1 Jason Marks, District Judge
2 Fourth Judicial District, Dept. 4
3 Missoula County Courthouse
4 200 West Broadway
5 Missoula, MT 59802
6 (406) 258-4774

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 STAND UP MONTANA, *et al.*,
9 Plaintiffs,
10 vs.
11 MISSOULA COUNTY PUBLIC
12 SCHOOLS, *et al.*,
13 Defendants.

Dept. 4

Cause No. DV-21-1031

ORDER RE: MOTION FOR
PRELIMINARY INJUNCTION

14 Plaintiffs' *Motion for Preliminary Injunction* (Doc. No. 12) came on for
15 hearing on September 29. Plaintiffs appeared personally/by Zoom and through their
16 attorney Quentin Rhoades. Defendant Schools appeared through attorneys Elizabeth
17 Kaleva and Kevin Twidwell. The parties did not call witnesses.

18 As required by M.R.Civ.P. Rule 52(a), the Court hereby makes findings of
19 fact and states conclusions of law.

20 Plaintiffs' motion for a preliminary injunction is **DENIED**.

21 **I. FINDINGS OF FACT**

22 1. Plaintiffs are a Montana non-profit corporation and 11 individuals. The
23 individual plaintiffs are parents of minor children seeking injunctive relief on their
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1 behalf as parents and on behalf of their minor children enrolled in the named
2 schools.

3
4 2. Plaintiffs' *Complaint* alleges mask mandates for students imposed by
5 Defendant Schools are not scientifically justified or effective and infringe upon
6 parental or student rights to due process, equal protection, right to privacy, human
7 dignity, freedom of expression and create a cause of action under SB 400 effective
8 October 1, 2021.
9

10 3. Defendants are three Missoula County school districts ("Schools").
11 Missoula County Public School ("MCPS") has an enrollment of approximately
12 9,200 students and employs approximately 1,500 staff members. It operates a
13 preschool, nine elementary schools, three middle schools, four high schools, an
14 alternative program and an online academy. Defendant Target Range School District
15 has an enrollment of approximately 555 students from pre-kindergarten through
16 eighth grade and approximately 75 staff members. Defendant Hellgate Elementary
17 has an enrollment of 1,485 students and employs approximately 185 staff members.
18
19

20
21 4. During the 2020-2021 school year, Defendant MCPS operated on a hybrid
22 instruction model that included in-person learning and remote instruction. MCPS
23 required students, staff, volunteers and visitors to wear face coverings. Face
24 coverings were required during summer school.
25

26 5. On August 10, 2021, the Board of MCPS voted to continue the face

1 covering requirement for all its students, staff, volunteers and guests when indoors
2 in all MCPS K-12 facilities and on buses, regardless of vaccination status, for a
3 minimum of six weeks for the 2021-2022 school.
4

5 6. During the 2020-2021 school year, Defendant Target Range operated on a
6 hybrid instruction model, with part-time in-person learning and part-time remote
7 instruction. The District was later able to transition to in-person learning for student
8 five days a week. Students, staff and visitors were required to wear face coverings
9 during the 2020-2021 school year.
10

11 7. On August 16, Target Range's Board of Trustees approved a school re-
12 opening plan for 2021-2022 that included rules regarding face coverings while
13 indoors except while eating, drinking, and during vigorous physical activity.
14

15 8. During the 2020-2021 school year, the Hellgate Elementary school district
16 remained open for in-person instruction five days a week. Students, staff and
17 visitors were required to wear face coverings during the entirety of the school year.
18

19 9. On August 23, 2021, the Hellgate Elementary District Board of Trustees
20 approved a requirement that all students, staff members and visitors be required to
21 wear a face covering while indoors in a district facility and on district buses for six
22 weeks following the start of the school year on September 1.
23

24 10. Plaintiffs filed their complaint challenging the Schools' face covering
25 rules on August 24, 2021. Plaintiffs did not challenge the masking rule in effect
26

1 during the 2020-2021 school year or during summer school.

2 11. The Court takes judicial notice that as of Monday, September 20,
3 Missoula County broke its previous COVID-19 hospitalization record, active case
4 record and incidence rate record for the second week in a row.
5

6 12. The Court takes judicial notice that Key Metrics calculated by the
7 Missoula City-County Health Department shows the 7-day average daily new cases
8 per 100,000 people has risen from 49.00 on September 1st to 87 as of September 28.
9 On July 1, the 7-day average daily new cases per 100,000 was 3.
10

11 <https://www.missoulainfo.com/copy-of-data-dashboard>.
12

13 13. The Court takes judicial notice that on September 24, 2021, the CDC
14 released three studies that found school districts without a universal masking policy
15 in place were more likely to have COVID-19 outbreaks. According to the CDC,
16 nationwide, counties without masking requirements saw the number of pediatric
17 COVID-19 cases increase nearly twice as quickly during the same period.
18

19 14. The Court takes judicial notice that the Missoula City-County Health
20 Department asks individuals with COVID-19 and their close contacts to quarantine.
21

22 15. The Court takes judicial notice that the Schools all purport to offer
23 remote learning options for the 2021-2022 school year.
24

25 **II. CONCLUSIONS OF LAW**

26

1 1. Section 27-19-201 MCA provides when preliminary injunction may be
2 granted:

3 An injunction order may be granted in the following cases:

4 (1) when it appears that the applicant is entitled to the relief demanded and
5 the relief or any part of the relief consists in restraining the commission or
6 continuance of the act complained of, either for a limited period or
perpetually;

7 (2) when it appears that the commission or continuance of some act during
8 the litigation would produce a great or irreparable injury to the applicant;

9 (3) when it appears during the litigation that the adverse party is doing or
10 threatens or is about to do or is procuring or suffering to be done some act in
11 violation of the applicant's rights, respecting the subject of the action, and
tending to render the judgment ineffectual;

12 (4) when it appears that the adverse party, during the pendency of the
13 action, threatens or is about to remove or to dispose of the adverse party's
14 property with intent to defraud the applicant, an injunction order may be
granted to restrain the removal or disposition;

15 (5) when it appears that the applicant has applied for an order under the
16 provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

17 2. District courts have broad discretion to grant preliminary injunctive relief
18 on any one of the five grounds enumerated in § 27-19-201 MCA. The subsections
19 are disjunctive and a court need find just one subsection satisfied in order to issue a
20 preliminary injunction. *BAM Ventures LLC v. Schifferman*, 2019 MT 67, ¶ 14.

21 3. An applicant for a preliminary injunction must make a prima facie showing
22 she will suffer a harm or injury under either the “great or irreparable” injury
23 standard of § 27-19-201(2) or the lesser degree of harm implied within the other
24 subsections of § 27-19-201. *BAM Ventures*, ¶ 16.
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1 **III. RULING**

2 Plaintiffs do not identify which subsection(s) of § 27-19-201 they are
3
4 proceeding under but it appears to the Court that they are applying for relief under §
5 27-19-201(2), that is, “when it appears that the commission or continuation of some
6 act during the litigation would produce a great or irreparable injury to the litigant.”
7
8 The irreparable injury claimed is violation of the right to privacy and right to
9 dignity, forcing a health care choice upon Plaintiffs by requiring their children to
10 wear medical devices on their faces.

11
12 For purposes of a preliminary injunction, the loss of a constitutional right
13 constitutes an irreparable injury. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15. In order
14 to determine whether a constitutional right has been lost, a court must first
15 determine which of the established levels of scrutiny is appropriately applied: strict
16 scrutiny, middle-tier scrutiny or the rational basis. *Montana Cannabis Indust. Ass’n.*
17 *v. State*, 2012 MT 201, ¶ 16 (“*MCIAP*”). Plaintiffs argue strict scrutiny applies
18 because the rule implicates a fundamental right found in the Montana Constitution’s
19 declaration of rights. The Court disagrees.
20
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22 Plaintiffs’ underlying premise is unsupported by Montana law. Plaintiffs
23 broadly interpret general concepts in Montana right to privacy jurisprudence to
24 frame their objections to the Schools’ face covering rules as constitutional in
25 dimension. Their arguments go well beyond what the Montana Supreme Court has
26

1 recognized as encompassed in the right to privacy and the right to dignity. Further
2 confounding Plaintiffs' analysis is their failure to distinguish between individual
3 health care decisions and public health measures.
4

5 Plaintiffs rely on a myopic reading of *Armstrong v State*, 1999 MT 261, *Wiser*
6 *v. State*, 2006 MT 20 and *MClA I* in support of their thesis that the right to privacy is
7 implicated by the Schools' face covering rules. The Montana Supreme Court has
8 recognized the right to privacy is a fundamental right guaranteed by the Montana
9 Constitution. *Gryczan v. State*, 283 Mont. 433 (1997). In *Armstrong*, the Montana
10 Supreme Court concluded that the right to health care is a fundamental privacy right
11 to the extent that it protects a woman's right to seek and obtain a pre-viability
12 abortion from the qualified health care provider of her choice. In *Wiser*, the Court
13 noted it does not necessarily follow from the existence of the right to privacy that
14 every restriction on medical care impermissibly infringes the right to health care.
15 *Wiser*, ¶ 15. The Court held there is not a fundamental right to obtain health care
16 free from state regulation. Thus, a rule requiring a referral from a dentist for patients
17 seeking treatment from denturists need only be rationally related to a legitimate state
18 interest. *Wiser*, ¶ 20. In *MClA I*, the Montana Supreme Court reversed the district
19 court's preliminary injunction of parts of the Montana Marijuana Act. The Supreme
20 Court concluded that the district court was mistaken in its reliance on *Armstrong*
21 and its conclusion that the challenged provisions implicated plaintiffs' fundamental
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1 constitutional rights triggering strict scrutiny analysis. The Supreme Court
2 distinguished between the right to privacy in *Armstrong*, which rested on a
3 constitutionally protected right to personal autonomy for women seeking abortion
4 with the claimed affirmative right to access a particular drug, which was not
5 recognized constitutionally as protected under the right to privacy. The Supreme
6 Court remanded the matter to the district court with instructions to apply the rational
7 basis test to determine whether sections of the Montana Marijuana Act should be
8 enjoined. Plaintiffs invite this Court to make the same mistake.

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11
12 Plaintiffs fail to establish a basis for their central claim that the right to
13 privacy is implicated by a requirement that students wear face coverings while
14 indoors at school during an outbreak of a communicable disease. Although
15 Plaintiffs equate a face covering rule to a medical treatment or an individual health
16 care decision and characterize a face covering as a “medical device”, their
17 characterizations are misguided. First, Plaintiffs’ repeated assertion that the
18 Montana Legislature has defined face coverings as “medical devices” is untenable.
19 The Montana Legislature amended the criminal trespass statute to prohibit taxpayer
20 funded public places from requiring proof of vaccination or the wearing of masks or
21 other facial coverings, captured under the general description of “medical devices,”
22 as a condition of entering or remaining lawfully upon certain premises. Words and
23 phrases used in the statutes of Montana are construed according to context. § 1-2-
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1 107 MCA, *State v. Pinder*, 2015 MT 157, ¶ 18. The context in which “medical
2 devices” is used in 45-6-203 (4) MCA is a criminal statute addressing lawful access
3 to public places for unvaccinated persons and those who eschew personal protective
4 equipment and is wholly unrelated to regulation of medical care or treatments. SB
5 65, signed into law this past session, wherein the Montana Legislature addressed
6 COVID-19 related liability issues and included face shields and face masks along
7 with other items intended to protect the wearer from injury or spread of infection or
8 illness in the definition of “personal protective equipment.” SB 65, Section 1, (5).
9 In this COVID-19 specific legislation, the Montana Legislature specifically
10 distinguished personal protective equipment from medical devices. SB 65. Section
11 1, (8). This distinction falls in line with common sense, as the Schools have argued,
12 in that masks no more treat COVID-19 than helmets treat head injuries.

17 Second, the rights Plaintiffs claim are not rights recognized in the cases they
18 cite. Plaintiffs do not seek access to constitutionally protected individual health care
19 as in *Armstrong*. In *Wiser* and *MCLA I*, the Montana Supreme Court rejected
20 freewheeling claims that the right to privacy identified in *Armstrong* encompassed
21 access to individual medical treatment free from regulation. Thus, despite the broad
22 guarantee of the individual right to medical judgments referenced in *Armstrong* at ¶
23 75, the Montana Supreme Court has recognized rights may be limited by policies
24 aimed at the protection of public health and safety.
25
26

1 Plaintiffs maintain the face covering rule violates students’ right to human
2 dignity because face coverings undermine individuality, interfere with the ability to
3 read and show emotions, hinder interpersonal communication and relations and
4 strips students of their autonomy in deciding the appearance they wish to present.
5 Parents’ rights to human dignity are alleged to be affronted by “arrogation of the
6 parental right to make health care choices for their children.” The Montana Supreme
7 Court recognizes human dignity as fundamental meaning that the right is a
8 significant component of liberty, any infringement of which will trigger the highest
9 level of scrutiny. *Walker v. State*, 2003 MT 134, ¶ 74.

13 *Walker* discusses human dignity in a context vastly different than presented
14 here. In *Walker*, a prison inmate with an untreated serious mental illness was
15 subjected to extreme “behavior modification plans,” including isolation, food
16 restrictions and denial of clothing, bedding and water supply. The Montana Supreme
17 Court read two sections of the Montana Constitution together (Article II, sec. 4,
18 Individual dignity, and sec. 28, Criminal justice policy) to conclude that the
19 behavior modification plans and conditions of confinement constituted an affront to
20 human dignity and constituted cruel and unusual punishment when it exacerbated
21 the inmate’s mental health. Protection of human dignity for inmates was described
22 as including physical security and attention to the basic human needs of adequate
23 medical care, humane rules for visitation, adequate exercise and opportunity for
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1 education. *Walker*, ¶ 82. Plaintiffs rely on a discussion of general principles in
2 *Walker* and include lengthy quotes from a concurring opinion in *Baxter v. State*,
3 2009 MT 499.
4

5 While the Court understands the frustrations of the parents in this case and the
6 social impediments children in school may experience due to masking, masking in
7 school during a pandemic is a far cry from an abuse of human dignity as recognized
8 in Montana jurisprudence. Further, the claim of impairment of parental dignity is
9 premised on the unsound notion that whether or not to wear a face covering is an
10 individual or parental health care decision. The requirement for face coverings in
11 schools is a public health measure implemented to control the spread of a
12 communicable disease as one element of a multi-part strategy. Public health
13 measures are distinguishable from private, individual health care decisions. Public
14 health measures, such as face coverings, are directed at managing conditions which
15 can reasonably be expected to lead to adverse health effects in the community and
16 are not for the purpose of treating individual health conditions. The Constitution
17 itself explicitly links the enjoyment of inalienable rights with recognition of
18 corresponding responsibilities. Art. II, sec. 3.
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24 Plaintiffs fail to establish the fundamental right to privacy and the right to
25 dignity encompasses the claimed affirmative parental right to individually evaluate
26 the necessity for their children to wear face coverings in schools. Plaintiffs further

1 fail to establish children’s rights to privacy and dignity are infringed by the School’s
2 face covering rule. As the rights claimed do not arise to the level of fundamental
3 rights, strict scrutiny review is not appropriate. “Middle tier” scrutiny is applicable
4 when a law or policy affects a right conferred by the Montana Constitution but is not
5 found in the Constitution’s declaration of rights. *Snetsinger v. Mont. Univ. Sys.*,
6 2004 MT 390, ¶ 17. If neither strict scrutiny nor middle tier scrutiny applies, the
7 rational basis test is appropriate. Pursuant to the rational basis test, the statute must
8 be rationally related to a legitimate government interest. *Snetsinger*, ¶ 19. The
9 rational basis test is applicable to determine whether the Schools’ face covering rule
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18 and modification as circumstances change. Schools have a legitimate governmental
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2 periods of time. Schools have based the face covering rules on guidance and
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4 Association, Center for Disease Control, Missoula City-County Health Department,
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16 instruction. While the Court doesn't disagree that in person instruction is preferable,
17 there is no indication that remote learning does not meet the requirement of the
18 Schools to provide education to students in their districts.
19
20

21 In sum, when looking at potential harms, the Court is faced with the prospect
22 of increased spread of a contagious disease, a significant harm in and of itself, and
23 the corresponding quarantining of children and school staff if the requested
24 preliminary injunction were to be granted. On the other hand, in denying the
25 requested preliminary injunction the Court sees the harm to the Plaintiffs as their
26

1 children learning remotely if masking is intolerable. Clearly a preliminary injunction
2 in this case would not minimize harm pending trial on the merits.
3

4 DATED this 1st day of October, 2021.

5
6 Jason Marks
7 District Judge

8 cc: Elizabeth O'Halloran, Esq.
9 Elizabeth Kaleva, Esq.
10 Kevin Twidwell, Esq.
11 Quentin Rhoades, Esq.
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CERTIFICATE OF SERVICE

I, Quentin M. Rhoades, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to Supreme Court to the following on 10-28-2021:

Elizabeth O'HALLORAN (Attorney)

1911 S. Higgins

Missoula MT 59801

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

Service Method: eService

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Electronically signed by Lauren Towsley on behalf of Quentin M. Rhoades

Dated: 10-28-2021

Quentin M. Rhoades
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OF DISTRICT COURT
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Pro Querente

**MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY**

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

Plaintiffs,

vs.

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

Defendants.

Cause No. *DV-21-975B*

Department No. *2*

COMPLAINT

Plaintiffs, Stand Up Montana, Inc., Jasmine Alberino, Timothy Alberino, Victoria Bentley, David Dickey, Wesley Gilbert, Katie Gilbert, Kiersten Glover, Richard Jorgenson, Stephen Pruiett, Lindsey Pruiett, Angela Marshall, Sean Littlejohn, and Kenton Sawdy for their Complaint against Defendants Bozeman School District No. 7, Monforton School District No. 27, and Big Sky School District No. 72 allege as follows.

INTRODUCTION

1. This is an action for injunctive relief brought by Plaintiffs on their behalf and on behalf of their minor children. Plaintiffs, the parents of minor children enrolled in Defendants' schools, seek a temporary restraining order, a preliminary injunction, and a permanent injunction against Defendants' forced masking rules implemented in their schools as a response to COVID-19. Plaintiffs' legal bases spring from the Montana and U.S. Constitutions. Under federal constitutional law, Plaintiffs, as parents of minor children, have a fundamental liberty interest in the care, custody, and control of their children. Under Montana constitutional law, Plaintiffs, as legal guardians of their children, have a right to invoke their children's fundamental constitutional rights. Defendants' mask mandates infringe on the rights of Plaintiffs and their children to privacy, dignity, and free expression without the necessary showing of a compelling government

interest in doing so. See, Art. II, §§ 4, 10, 15, and 34 Mont. Const.

Defendants' mask mandates are therefore unconstitutional and, to prevent irreparable harm, Plaintiffs seek injunctive relief.

PARTIES

2. Plaintiff Stand Up Montana is a registered Montana non-profit corporation in good standing with its principal place of business in Gallatin County, Montana. Its mission is to encourage Montanans, during the COVID-19 restrictions, to “stand up for the constitutionally protected liberties, to provide resources and support to individuals and businesses who have been discriminated against or harassed by unfair rules and regulations, and to support similar initiatives.” It has a membership of hundreds of individuals, including many in Gallatin County who are the parents of children enrolled at Defendants' schools and who object to the mask mandates described herein.

3. Plaintiffs Jasmine Alberino and Timothy Alberino are the parents of a child enrolled at Defendant Bozeman School District No. 7 (BSD7). The object to forced student masking and believe medical choices for their child are for the parents to decide, not the schools. They believe masks should be optional and left to parental choice.

4. Plaintiff Victoria Bentley is the parent of a child enrolled in BSD7. Ms. Bentley has not enrolled her son in Bozeman Public Schools due to the mask mandate. She objects to forced student masking and believes medical choices for her child are for her to decide as a parent, not the schools. She also believes forced masking is a violation of their child's right to human dignity. She believes masks should be optional and left to parental choice.

5. Plaintiff David Dickey is the parent of children enrolled at Monforton School District No. 27 (MSD27). He objects to forced student masking and believes medical choices for children are for the parent to decide, not the schools. He also believes forced masking is a violation of his child's right to human dignity. He believes masks should be optional and left to parental choice.

6. Plaintiffs Wesley Gilbert and Katie Gilbert are the parents of two children enrolled in BSD7. They object to forced student masking and believe medical choices for their child are for the parents to decide, not the schools. They also think forced masking is a violation of their child's right to human dignity. They believe masks should be optional and left to parental choice.

7. Plaintiff Kiersten Glover is the parent of a child enrolled in Big Sky School District No. 72 (BSSD72). She objects to forced student masking and believes medical choices for children are for the parents to decide, not the schools. She also believes forced masking is a violation of her child's right to human dignity. She believes masks should be optional and left to parental choice.

8. Plaintiff Richard Jorgenson is the parent of children enrolled in BSSD72. He believes the masks being used by most students are like "theatrical props" that contribute nothing to public health. He believes that excessive mask-wearing contributes to periodontal disease and other medical issues. He believes fear-mongering the masses to conform to nonscience-based responses is a massive disservice in the development of young adolescent brains. He believes masks should be optional and left to parental choice.

9. Plaintiffs Stephen Pruiett and Lindsey Pruiett are the parents of a child enrolled in BSSD72. They believe in a parent's right to control medical decisions for their children. As a 20+ year paramedic, Plaintiff Stephen Pruiett believes the style and way masks are being worn do not prevent the spread of viruses and should not be mandated. They believe masks should be optional and left to parental choice.

10. Plaintiff Angela Marshall and Plaintiff Sean Littlejohn are the parents of a child enrolled in BSSD72. They believe there is proof now that the masks are a more significant potential health threat to our children than the risk of viral spread. They also think acts impair the learning environment significantly. They do not believe nonsterile masks in a nonsterile environment are efficacious in protecting students and others from COVID-19 infection. They believe masks should be optional and left to parental choice.

11. Plaintiff Kenton Sawdy is the parent of a child enrolled at BSD7 who has an individualized education plan and medical issues that make it impossible for him to wear a mask. He has a medical prescription for not wearing a mask. He objects to forced student masking and believes medical choices for his child are for the parents to decide, not the schools. He also believes forced masking is a violation of his child's right to human dignity. He believes masks should be optional and left to parental choice.

12. Defendant BSD7 is a public school district located in Bozeman, Montana. It consists of eight elementary schools, two middle schools, three high schools, and one online charter school. It is governed by a board of trustees who have authorized the conduct challenged in this action.

13. Defendant MSD27 is a public school district located in Bozeman, Montana. It consists of one elementary school and one middle school. It is governed by a board of trustees who have authorized the conduct challenged in this action.

14. Defendant BSSD72 is a public school district located in Big Sky, Montana. It consists of one elementary school, a middle school, and a high school. It is governed by a board of trustees who have authorized the conduct challenged in this action.

JURISDICTION AND VENUE

15. As a court of general jurisdiction, the Court has jurisdiction over the parties and the subject matter of this civil action for declaratory and injunctive relief.

16. The venue is proper before this Court because Defendants are located in Gallatin County.

17. Plaintiffs' claims for declaratory and injunctive relief are authorized by Title 27, Chapters 8 and 19, Mont. Code Ann., and Rules 57 and 65 of the Montana Rules of Civil Procedure, and the general legal and equitable powers of this Court.

///

GENERAL ALLEGATIONS

The Science of Universal Masking

18. 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

19. Both data and science suggest such a mandate for widespread and universal use is not justified or effective.

20. 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. Since then, further studies have 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 an attack rate of only 0.3% among asymptomatic patients compared to 3.3% for those with mild

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-19_weekly/index.htm (last visited 24 AUG 2021)

symptoms (or ten times less). The rate increases further as symptoms become severe to 5.6% and 6.2% for those with moderate or severe symptoms. In Wuhan, China, an extensive study testing over 10 million people found “there was no evidence of transmission from asymptomatic positive persons.” They found 303 cases, all asymptomatic, and traced 1,174 close contacts.

21. The ineffectiveness of masks was well known before 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.”

22. The evidence before 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 ten randomized control trials (RCTs) studies 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.

23. Support for mask effectiveness is primarily based on laboratory studies. The evidence even in that setting, however, is at best inconclusive. The problem is that cloth and surgical masks allow through particles the size of COVID-19. A 2009 study of small particles involving five different surgical masks concludes that “included particles in the same size range of viruses confirm 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-19, 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 better in the studies than when people wear masks for many hours.

24. Translating results from a lab setting to conclude similar rates of spread reduction requires evidence. Data and science do not support a significant ability of masks to reduce spread in the entire population. Attempts to find data supporting this hypothesis have been notably lacking in scientific rigor. A study of 1083 counties in the U.S. showed a decrease in hospitalizations after mask mandates had to be withdrawn as rates increased shortly after publication.

25. Even if masks filter some percentage of particles, the number of such particles is far greater than needed to cause a severe 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.

26. The WHO, in 2020, changed recommendations about mask use quite suddenly in June or July. They published an “interim guidance” document on Dec. 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 to recommend use “despite the limited evidence of protective efficacy of mask-wearing in community settings.”

27. 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.

28. The CDC’s “scientific” support for mask use has been particularly troubling. Guidance before 2020 in pandemic planning documents was consistent with that of the WHO. Without any additional evidence, the CDC recommended masks and has since attempted to support this policy change. None of their work would pass rigorous scientific peer review. A study involving counties in Kansas suffers numerous flaws, most notably the 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.

29. Further, the study authors select the time frame; examining the same counties over a longer time frame removes the effect. A more extensive study is for mask mandates and their relationship to

hospitalizations using the period Mar. 1 – Oct. 17, 2020, in a very similar fashion to the retracted study mentioned previously. Despite the clear and dramatic increase in hospitalizations almost immediately after the study period, which completely invalidates the study conclusions, the CDC did not retract the study and, in fact, published it in early February 2021.

30. Additional evidence from the CDC includes laboratory studies primarily 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 breaking the larger droplets into smaller particles that they could not measure, which would essentially aerosolize the virus.

31. Additional evidence in the CDC scientific brief is based on simulations or models rather than actual data or flawed observational studies, which are anecdotal. None would rise to the WHO 2019 standard for evidence. Examples include a study in New York that begins 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 responded. Further, some reported getting sick just not testing for COVID-19.

32. Perhaps the most significant 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-19 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.

33. 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 the

case with community use of face masks – studies of effectiveness are minimal 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.

34. A growing body of data and literature published in 2020 supports what was available before COVID-19. 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 concluded “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. It concluded, “evidence is not sufficiently strong to support widespread use of facemasks as a protective measure against COVID-19.”

35. The European CDC, in a similar fashion to the WHO December 2020 update, conducted an extensive review of evidence regarding mask

wear. The WHO review found “limited evidence on the effectiveness...in the community” and yet continued to recommend use.

36. In 2020 two more randomized trials, including a control group, add 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 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.

37. Numerous studies of data during the COVID-19 pandemic confirm the known science before 2020. An extremely extensive Cochrane review of over 60 studies found that face mask use did not reduce cases in the general population or among health care workers. A quasi-experimental study of European data similarly concludes “requiring facemasks or coverings in public was not associated with any additional

independent 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.

38. 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 was conducted pre-COVID-19 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.

39. Empirical evidence overwhelmingly confirms the scientific literature. While observational, the data should not be ignored. Mask effectiveness should not be hidden in what 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 different from those without mandates but worse. For example, comparing similar large counties in Florida, there were 64 cases per 1,000 in mask mandate counties and those without only 40 per 1,000. The results are the same in almost every state where counties with and without mandates to compare. Similar results were found looking

more broadly: for example, at state level, the numbers were 27 per 100,000 with mask mandates and only 17 for no mandates.

40. 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 despite increased mask wear. Comparisons of the disease trajectory for like countries/counties consistently depict remarkably similar trajectories despite various mask mandates and usage levels.

41. 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 lead to increase susceptibility to COVID-19 and other viruses long term. Other risks include foreign particles causing lung damage and microbial infections.

42. Harms for mask wear for children is an increasing concern. While children are at very low risk of infection and tend to spread the virus and 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-19 and a substantial number of harms from mask wear.

43. The second impact of mask mandates is removing the freedom to choose from individuals without compelling scientific 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, ineffective mandates 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.

44. The Montana Department of Health and Human Services (DPHHS) has reached the understanding that randomized control trials

have not clearly demonstrated mask efficacy against respiratory viruses, and observational studies are inconclusive on whether mask use predicts lower infection rates, especially for children. (*See*, Emergency Rule I, attached as Ex. A, ¶ 4.)

45. DPHHS understands that there exists a body of literature, scientific and survey/anecdotal, on the negative health consequences that some individuals, especially some children, experience due to prolonged mask-wearing. (*Id.*)

46. DPHHS has found, similarly, that there is also substantial literature that persons who are forced to act contrary to their religious beliefs or moral convictions may experience moral distress and psychological and emotional harm. (*Id.*, ¶ 5.) This moral distress and the associated impact on an individual's psychological and emotional health could also arise when a person is forced to act contrary to their views of their fundamental rights. (*Id.*)

47. DPHHS has found that mask-wearing has been shown to cause some children to suffer mental and emotional distress and issues. (*Id.*, ¶ 6.) Mask wearing can also cause or aggravate physical conditions in some children, including interference with breathing-related to asthma or other respiratory conditions or infections, or interference with the ability to see

classroom boards, screens, papers and desk surfaces, and surrounding safety conditions, especially for students wearing glasses. (*Id.*) DPHHS has found the scientific literature has identified concerning pediatrics, diseases, or predispositions where masking may present significant risks, including respiratory diseases, cardiopulmonary diseases (asthma, bronchitis, cystic fibrosis, congenital heart disease, emphysema), neuromuscular diseases, and epilepsy. (*Id.*) In addition, DPHHS has found that wearing a mask can cause decreased ability to think and concentrate in some children, with potential implications for their cognitive development. (*Id.*)

Forced Student Masking

48. Defendant, despite the science, has imposed forced student masking, requiring all students 0-19 years of age to wear cloth face coverings or masks when indoors on Defendants' campuses.

49. Defendants' forced student masking imposes restrictions on Plaintiffs' children without considering whether the children are infected or reasonably believed to be infected with a communicable disease.

50. Defendants' forced student masking does not consider or accommodate children's individual needs under particular circumstances such as autism, asthma, dermatological issues, and those identified above.

51. Defendants' forced student masking is scheduled to last until at least the first week of October 2021.

52. Defendants' forced student masking set a precedent and foreshadow an intention to impose a universal vaccine mandate when it becomes available for those aged 0-19.

No Competent Findings

53. Defendant has no express recognition or acknowledgment that forced student masking infringes upon parental or student rights. They have made no express findings to the effect that the mask mandates are (a) supported by any compelling government interests, (b) is narrowly tailored to serve the compelling government interest, and (c) is the least restrictive means.

54. Defendant lacks the expertise or competence to make such findings. They have not retained or relied upon competent professionals in necessary fields, such as public health virology, to make any reliable assessment of the interests at stake or the alternative means in pursuing and serving such interests.

55. Given the science of cloth face coverings and masks (see, Ex. A), the connection between masks and public health is so tenuous that Defendants would not have been able to satisfy the strictures of the

compelling government interest test if they had chosen to apply it—which they did not.

COUNT I

(Substantive Due Process)

56. Plaintiffs restate the foregoing.

57. Both as parents and on behalf of their children, Plaintiffs have a liberty interest, protected by the U.S. and Montana Constitutions, in the right to refuse an unwanted medical intervention such as cloth face coverings or masks. The right to bodily integrity and to refuse such unwanted medical treatments is deeply rooted in the historical traditions of the United States. The right to refuse medical treatment stems from the common law and bodily integrity and dignity rights.

58. Defendants' forced student masking consists of compulsory medical intervention and constitutes a substantial interference with and violation of Plaintiffs' and their children's liberty interests.

59. Defendants' violation of Plaintiffs' and their children's liberty interests is causing and will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

60. Enforcement of Defendants' forced student masking would cause irreparable harm by threatening Plaintiffs with substantial penalties for not complying with mask mandate restrictions.

COUNT II
(Equal Protection)

61. Plaintiffs restate the forgoing.

62. Defendants force student masking exclusively for students at school. When none is imposed on the general population, it violates the students' rights to equal protection because the state's objective is to eradicate COVID-19 from the population as a whole. While Defendant has imposed mandates on students, there are constitutional limits to what a legislative majority may impose on any minority while leaving itself free of such constraints.

63. Children are at no greater risk from COVID-19 than the general population and do not benefit in any particular way from the mask mandate compulsion. Exempting the general adult population, which is demonstrably at far greater risk, from the universal mask mandate violates equal protection. Children may not be the subject of discrimination in the public's response to disease from which they are at negligible risk.

64. Defendants' violation of Plaintiffs' children's right to equal protection is causing and will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

65. Enforcement of Defendants' forced student masking would cause irreparable harm by threatening Plaintiffs' children with substantial penalties for not complying with mask mandate restrictions.

COUNT III

(Privacy)

66. Plaintiffs restate the foregoing.

67. Montana has a history of trampling on individual rights. For example, Montana passed sedition laws before and during WWI that were the strongest in the nation. That history served to focus the 1972 Montana Constitutional Convention on the vigilant protection of individual rights from the tyrannical government impulses, especially when animated by popular sentiment in a time of perceived emergency.³

68. Privacy in medical decision-making is one of the fundamental individual rights ensconced in the Montana Constitution's Declaration of

³ FEATURE: BOOK: SOME HEAVY LEGAL READING TO USHER IN 2006: RELIVING OUR STATE'S SHAMEFUL SEDITION ACT, 31 Montana Lawyer 8.

Rights by the 1972 framers of the Montana Constitution. The U.S. Constitution also protects privacy in medical decisions.

69. Defendants' forced student masking compels uninfected and unexposed students to wear face masks on Defendants' campuses at all times when indoors. If students not infected with a communicable disease, or reasonably believed to be infected, choose through their parents to exercise their right to make their own private health care choices by declining to wear a face covering, Defendant bars them from Defendants' indoor spaces.

70. Defendants' forced student masking denies the right of individual privacy guaranteed by Art. II, § 10, Mont. Const. and Amend. IX, U.S. Const. The right to personal privacy protects medical care choices. The right of privacy broadly guarantees individuals the right to make medical judgments affecting their bodily integrity and health, free from government interference. The right to privacy is implicated when a law infringes upon a person's ability to obtain or reject a lawful medical treatment.

71. Defendants' violation of Plaintiffs' and their children's privacy rights in making their own medical choices is causing. It will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

72. Enforcement of Defendants' forced student masking would cause irreparable harm by threatening the Plaintiffs' children with substantial penalties for not complying with mask mandate restrictions.

COUNT IV

(SB 400)

73. Plaintiffs restate the foregoing.

74. Senate Bill 400 approved by the Montana Legislature in 2021 will take effect on Oct. 1, 2021. Defendants' forced student masking is scheduled to last beyond Oct. 1, 2021.

75. Under SB400, Defendant may not interfere with the fundamental right of Plaintiffs to direct the health care and mental health of their children, unless Defendant has demonstrated that the interference (a) furthers a compelling governmental interest; (b) is narrowly tailored and is (c) consists of the least means least restrictive to Plaintiffs' rights means in furthering of the compelling governmental interest.

76. Defendant's forced student masking interferes with Plaintiffs' right to direct their children's health care and mental health.

77. Defendant has not demonstrated, or attempted to demonstrate, that the interference (a) furthers a compelling governmental interest; and (b) is narrowly tailored and is (c) the least restrictive means available for

the furthering of the compelling governmental interest.

78. Defendants' violation of Plaintiffs' rights to direct their children's health care and mental health is causing. It will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

79. Enforcement of Defendants' forced student masking would cause irreparable harm by threatening Plaintiffs and their children with substantial penalties for not complying with mask mandate restrictions.

COUNT V

(Human Dignity)

80. Plaintiffs restate the foregoing.

81. Human dignity is a fundamental right ensconced expressly in the Montana Constitution's Declaration of Rights.

82. The right of human dignity is the only right in Montana's Constitution that is "inviolable." It is the sole right in Article II carrying the absolute prohibition of "inviolability." No individual may be stripped of human dignity. No private or governmental entity has the right or the power to do so. Human dignity cannot be violated—no exceptions.

83. In the Western ethical tradition, especially after the Religious Reformation of the 16th and 17th centuries, dignity has typically been

associated with the normative ideal of individual persons as intrinsically valuable, as having inherent worth as individuals, at least in part because of their capacity for independent, autonomous, rational, and responsible action. Under this conception, dignity is directly violated by degrading or demeaning a person.

84. Similarly, dignity is indirectly violated by denying a person the opportunity to direct or control his own life in such a way that his worth is questioned or dishonored. For example, paternalistic treatment could indirectly undermine dignity—treating adults like children incapable of making autonomous choices for themselves or by trivializing what choices they make about how to live their lives.

85. Respect for the dignity of each individual demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their consciences and convictions.

86. Defendants' forced student masking interferes with Gallatin County students' ability to communicate with one another by means of facial expression.

87. The human face is the most distinguishing visible characteristic reflecting a person's individuality. The human face is what makes the individual most easily and readily recognizable. The human face is highly expressive, able to convey countless emotions without saying a word. And unlike some forms of nonverbal communication, facial expressions are universal. The facial expressions for happiness, sadness, anger, surprise, fear, and disgust are the same across cultures. Science has long recognized that people signal their feelings and emotions to each other by subtle movements, gestures, and facial expressions and that people's ability (or inability) to accurately "send" and "receive" these nonverbal messages must have important implications for their social and emotional lives.

88. Defendants' forced student masking demeans student human dignity, undermines their individuality, interferes with their ability to read and show emotions, and hinders interpersonal communication and relations. It also strips them of their autonomy in deciding the appearance they wish to present to the public. It is, therefore, a violation of the Montana constitutional right to human dignity.

89. Defendants' violation of Plaintiffs' and their children's right to human dignity is causing and will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

90. Enforcement of Defendants' forced student masking would cause irreparable harm by threatening Plaintiffs' children with substantial penalties for not complying with mask mandate restrictions.

COUNT VI

(Freedom of Expression)

91. Plaintiffs restate the foregoing.

92. Freedom of expression is a fundamental right ensconced expressly in the Montana Constitution's Declaration of Rights.

93. Given (a) the material lack of scientific basis for Defendants' forced student masking and (b) the response's lack of effectiveness both based on scientific studies and its demonstrated failure to curb the pandemic, compliance with Defendants' forced student masking is fraught with substantive meaning.

94. Wearing a mask constitutes to many an outward sign of trust in, loyalty to, or submission to the honesty, wisdom, and power of government. Wearing a mask functions for others as a virtue signal and an outward demonstration of their own social and moral superiority over those who fail to comply. For others, refusing to wear a mask is an external signal of mistrust in government and defiance to unsupportable demands of

compliance for its own sake. Wearing a mask or not wearing a mask is, for some, a demonstration of partisan political affiliation.

95. Defendants' forced student masking infringes upon Plaintiffs' and their children's freedom to express their political and moral points of view in violation of the fundamental constitutional right to freedom of expression.

96. Defendants' violation of Plaintiffs' and their children's right to freedom of expression is causing and will continue to cause them to suffer irreparable harm for which there is no adequate remedy at law.

97. Enforcement of Defendants' forced student masking would cause irreparable harm by threatening Plaintiffs' children with substantial penalties for not complying with mask mandate restrictions.

REQUEST FOR RELIEF

Accordingly, Plaintiffs request:

1. A declaration that Defendants' forced student masking against students is unconstitutional;
2. Injunctive relief in Plaintiffs' favor and against Defendant imposing a permanent injunction against enforcement of Defendants' forced student masking;

3. An award of attorney fees, expert witness fees, other costs of suit; and

4. Such other and further relief as may be appropriate in the circumstances.

DATED this 13th day of September 2021.

Respectfully Submitted,
RHOADES, SIEFERT & ERICKSON PLLC

By: 

Quentin M. Rhoades
Pro Querente

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of)	NOTICE OF ADOPTION OF
Temporary Emergency Rule I to allow)	TEMPORARY EMERGENCY RULE
students and/or their parents or)	
guardians the ability to opt-out of)	
school health-related mandates for)	
health, religious, moral, or other)	
fundamental rights reasons)	

TO: All Concerned Persons

1. The Department of Public Health and Human Services (department) is adopting the following temporary emergency rule as part of the State’s response to the current COVID-19 global pandemic. The current COVID-19 global pandemic has placed great burdens on the State, and some of the responses to the pandemic, including mask mandates, have also imposed additional burdens on citizens, including on their health and well-being. While the department encourages citizens to receive the COVID-19 vaccine in consultation with their health care provider, this choice, which could mitigate not only the need to wear a mask, but also, potentially, the need for school-based mask mandates, is not yet available to the majority of students because of their age. The rule directs that, if schools or school districts impose a health-related mandate on students, such as a mask mandate, they should consider, and be able to demonstrate they considered, parental concerns in adopting the mandate, and should provide the ability for students, and/or parents or guardians on behalf of their children, to choose to opt-out based on physical, mental, emotional, or psychosocial health concerns, as well as on the basis of religious belief, moral conviction, or other fundamental right, the impairment of which may negatively impact such students’ physical, mental, emotional, or psychosocial health.

2. The Centers for Disease Control and Prevention (CDC) recognizes categories of people as exempt from the requirement to wear a mask, including children under age two; persons with disabilities who cannot wear a mask, or cannot safely wear a mask, for reasons related to the disability; and persons for whom wearing a mask would create a risk to workplace health, safety, or job duties (see “Guidance for Wearing Masks”, “Who should or should not wear a mask” at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>, last updated April 19, 2021). Similarly, mask wearing can interfere with the learning and general well-being of school-aged children, related to their age and development; their disabilities, and physical and mental health attributes; and classroom health, safety, and productivity. As those best suited and entitled to assess individual needs for the physical, mental, and developmental well-being of their minor children, parents or guardians, in consultation with their children’s health care provider as appropriate, should be afforded the ability to opt-out of mask requirements on behalf of their children.

Montana Administrative Register 37-960

EXHIBIT A
SDR 214

3. The department is charged with providing consultation on conditions and issues of public health importance for schools, to school and local public health personnel, and to the superintendent of public instruction (50-1-202(1)(l), MCA). The department is also charged with adopting and enforcing rules regarding public health requirements for schools, including any matters pertinent to the health and physical well-being of pupils, teachers, and others (50-1-202(1)(p)(v), 50-1-206, MCA). To this end, for example, the department recommends students be evaluated by a health care provider periodically and as necessary to identify health problems with the potential for interfering with learning, including assessment of students' health and developmental status, vision, hearing, and mental health (ARM 37.111.825(7)). In furtherance of this obligation, and for the reasons set forth herein, the department has determined that schools and school districts that impose such health-related mandates as mandatory mask wearing should provide the ability for students through their parents or guardians to choose to opt-out of mandated mask wear in school.

4. The scientific literature is not conclusive on the extent of the impact of masking on reducing the spread of viral infections. The department understands that randomized control trials have not clearly demonstrated mask efficacy against respiratory viruses, and observational studies are inconclusive on whether mask use predicts lower infection rates, especially with respect to children.¹ The department understands, however, that there is a body of literature, scientific as well as survey/anecdotal, on the negative health consequences that some individuals, especially some children, experience as a result of prolonged mask wearing.²

¹ See, e.g., Guerra, D. and Guerra, D., *Mask mandate and use efficacy for COVID-19 containment in US States*, MedRX, Aug. 7, 2021, <https://www.medrxiv.org/content/10.1101/2021.05.18.21257385v2> ("Randomized control trials have not clearly demonstrated mask efficacy against respiratory viruses, and observational studies conflict on whether mask use predicts lower infection rates."). Compare CDC, *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, last updated May 7, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html>, last visited Aug. 30, 2021 (mask wearing reduces new infections, citing studies) with David Zweig, *The Science of Masking Kids at School Remains Uncertain*, New York Magazine, Aug. 20, 2021, <https://nymag.com/intelligencer/2021/08/the-science-of-masking-kids-at-school-remains-uncertain.html> (author reviewed the 17 studies cited in CDC's K-12 guidance of evidence that masks on students are effective, noting that none looked at student mask use in isolation from other mitigation measures or against a control, with some studies demonstrating that lack of masking correlated with low transmission and noting issue with presentation of one study published in CDC's MMWR). See also Xiao, J., Shiu, E., Gao, H., Wong, J. Y., Fong, M. W., Ryu, S., Cowling, B. J. (2020). *Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures*. CDC, *Emerging Infectious Diseases*, 26(5), 967-975, <https://doi.org/10.3201/eid2605.190994> (meta-analysis found that although mechanistic studies support potential effect of hand hygiene or face masks, evidence from 14 randomized controlled trials of such measures did not support a substantial effect on transmission of laboratory-confirmed influenza); Guerra, D. and Guerra, D. (not observing "association between mask mandates or use and reduced COVID-19 spread in US states").

² See, e.g., Kisielinski, K. et al., *Is a Mask That Covers the Mouth and Nose Free From Undesirable Side Effects in Everyday Use and Free of Potential Hazards?*, *Int. J. Environ. Res. Public Health* 2021, 18, 4344, <https://doi.org/10.3390/ijerph18084344> (scientific review of multiple studies revealed relevant adverse events over more than ten medical disciplines, including internal medicine, psychology, psychiatry, and pediatrics, finding statistically significant correlation in the quantitative

5. Similarly, there is also substantial literature that persons who are forced to act contrary to their religious beliefs or moral convictions may experience moral distress, and psychological and emotional harm.³ This moral distress and the associated impact on an individual's psychological and emotional health could also arise when a person is forced to act contrary to his or her views of his or her fundamental rights.⁴

6. Mask wearing has been shown to cause some children to suffer mental and emotional distress and issues.⁵ Mask wearing can also cause or aggravate physical conditions in some children, including interference with breathing related to asthma or other respiratory conditions or infections, or interference with the ability to see classroom boards, screens, papers and desk surfaces, and surrounding safety conditions, especially for students wearing glasses. The scientific literature has identified, with respect to pediatrics, diseases, or predispositions where masking may present significant risks, including respiratory diseases, cardiopulmonary diseases (asthma, bronchitis, cystic fibrosis, congenital heart disease, emphysema), neuromuscular diseases, and epilepsy.⁶ In addition, mask wearing can cause

analysis between the negative effects of blood-oxygen depletion and fatigue in mask wearers, and identifying what the authors called Mask-Induced Exhaustion Syndrome with symptoms including feeling of fatigue or exhaustion, decreased ability to concentrate, and decreased ability to think). *But* see CDC, Science Brief ("[r]esearch supports that mask wearing has no significant adverse health effects for wearers," citing studies mainly conducted with healthy research subjects).

³ See, e.g., Christy A. Rentmeester, *Moral Damage to Health Care Professionals and Trainees: Legalism and Other Consequences for Patients and Colleagues*, *Journal of Medicine and Philosophy*, 33: 27-43, 2008, p.37 ("moral distress is a sense of complicity in doing wrong. This sense of complicity does not come from uncertainty about what is right but from the experience that one's power to resist participation in doing wrong is severely restricted by one's work environment and from the experience that resisting participation in doing wrong is severely restricted by one's work environment and from the experience that resisting participation in doing wrong exposes one to harm."); Borhani et al., *The relationship between moral distress, professional stress, and intent to stay in the nursing profession*, *J. Med. Ethics Hist. Med.* 2014; 7:3.

⁴ Cf. Kisielinski, K. et al. (masks impair the wearer's field of vision and inhibit other habitual actions, which can be perceived "as a permanent disturbance, obstruction, and restriction"; "[w]earing masks, thus, entails a feeling of deprivation of freedom and loss of autonomy and self-determination, which can lead to suppressed anger and subconscious constant distraction, especially as the wearing of masks is mostly dictated and ordered by others").

⁵ *Id.* (noting a survey which showed masks can cause anxiety and stress reactions in children, an increase in psychosomatic and stress-related illnesses and depressive self-experience, reduced participation, social withdrawal, and lowered health-related selfcare); see also Carla Peeters, September 9, 2020, *Rapid response: Psychological, biological, and immunological risks for children and pupils makes long-term wearing of mouth masks difficult to maintain*, *BMJ*, <https://www.bmj.com/content/370/bmj.m3021/rr-6>.

⁶ Kisielinski, K. et al. These conditions tend to be ones with respect to which individuals would be excluded from research studies. See, e.g., Lubrano, R., Bloise, S., Testa, A., et al. *Assessment of Respiratory Function in Infants and Young Children Wearing Face Masks During the COVID-19 Pandemic*. *JAMA Netw Open*. Mar 2 2021;4(3):e210414. doi:10.1001/jamanetworkopen.2021.0414, (cited in CDC, Science Brief at note 64) (noting the exclusion from study of infants and young children with lung or cardiac disease, neuromuscular disorders and those with medications that could be associated with changes in the parameters examined).

decreased ability to think and to concentrate in some children, with potential implications for their cognitive development.⁷

7. Accordingly, personal choice in the form of an exemption from or exception to a mask mandate policy can serve to protect and further the physical, mental, and emotional health of students who may be negatively impacted by a masking requirement. Safety recommendations and choices in response to the COVID-19 global pandemic are invaluable, but mandates can place more detrimental stress or have other adverse health impacts on some students and families, unless they have the ability to opt-out as necessary. This is especially the case where the scientific evidence supporting the original public health intervention is inconclusive. With respect to the documentation necessary to support such exception or exemption from a mandatory health measure such as mandatory mask wearing, the department suggests that the type and quantum of documentation outlined in House Bill 334, with respect to exemptions from school vaccination requirements, may serve as an appropriate model.

8. For the foregoing reasons, the department adopts this emergency rule. Certain Montana schools and school districts have adopted and, with the beginning of the school year, will be enforcing mask mandates on the basis of public health, without considering the negative implications that such measures could have on the physical, mental, emotional, or psychosocial health of some students. Promulgation of this emergency rule is necessary because no other administrative act can be taken to avert this imminent peril to the public health, safety, and well-being of Montana youth, who are now returning or beginning to return to the classroom for the new school year. This rule will remain in effect no longer than 120 days after the date of adoption.

9. EMERGENCY RULE I is necessary to provide essential health, well-being, fundamental rights, and a safe and effective learning environment for Montana youth. Emergency Rule I protects Montana students returning to school who may experience adverse effects from mandatory mask wear by directing schools and school districts that they should consider, and be able to demonstrate consideration of, parental concerns when adopting a mask mandate, and should provide those students, or their parents or guardians, on their behalf, with the ability to opt-out of wearing a mask, as necessary.

10. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you require an accommodation, contact Heidi Clark at the Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

⁷ See, e.g., Kisielinski, K. et al.; see also Guerra, D. and Guerra, D. (noting some risks of mask wearing, including that by obscuring nonverbal communication, masks interfere with social learning in children, and research that masks decrease cognitive precision).

11. The emergency rule is effective immediately, August 31, 2021.

12. The text of the emergency rule provides as follows:

EMERGENCY RULE I ABILITY TO OPT-OUT OF SCHOOL HEALTH-RELATED MANDATES (1) In order to provide for the health, well-being, rights, and educational needs of students, schools and school districts should consider, and be able to demonstrate consideration of, parental concerns when adopting a mask mandate, and should provide students and/or their parents or guardians, on their behalf, with the ability to opt-out of health-related mandates, to include wearing a mask or face covering, for reasons including:

- (a) physical health;
- (b) mental health;
- (c) emotional health;
- (d) psychosocial health;
- (e) developmental needs; or
- (f) religious belief, moral conviction, or other fundamental right the impairment of which could negatively impact the physical, mental, emotional, or psychosocial health of students.

AUTH: 2-4-303, 50-1-202, 50-1-206, MCA

IMP: 50-1-202, 50-1-206, MCA

13. The rationale for the temporary emergency rule is set forth in paragraphs 1 through 9.

14. It is presently unknown whether a standard rulemaking procedure will be undertaken prior to the expiration of this temporary emergency rule. The necessity and efficacy of this emergency rule will be continuously evaluated as the effort to combat the COVID-19 global pandemic in Montana continues and develops.

15. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices, and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 10 or may be made by completing a request form at any rules hearing held by the department.

16. The bill sponsor contact requirements of 2-4-302, MCA, do not apply to this rulemaking. Special notice, pursuant to 2-4-303, MCA, was made to each member of the Children, Families, Health, and Human Services; and Education Interim Committees and to each member of the committees' staff, using electronic mail on August 31, 2021.

/s/ Robert Lishman
Robert Lishman
Rule Reviewer

/s/ Adam Meier
Adam Meier, Director
Public Health and Human Services

Certified to the Secretary of State August 31, 2021.

GALLATIN COUNTY CLERK
OF DISTRICT COURT
SANDY ERHARDT

2021 SEP 21 09:14:20

FILED

BY: NJB DEPUTY

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * *

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

Plaintiffs,)

vs.)

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

Defendants.)

Cause No. DV-21-975B

**ORDER SETTING HEARING ON
REQUEST FOR PRELIMINARY
INJUNCTION**

On September 21, 2021, Plaintiffs filed a Motion for Temporary Restraining Order and for a Hearing to Show Cause why a Preliminary Injunction Should not be Granted.

A temporary restraining order may be granted without written or oral notice to the adverse party or the party's attorney only if:

- (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or the party's attorney could be heard in opposition; and

(2) the applicant or the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give notice and the reasons supporting the applicant's claim that notice should not be required.

§ 27-19-315, MCA.

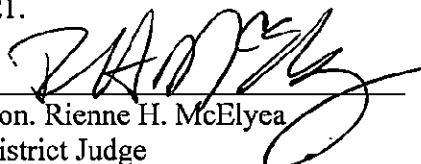
The Court finds that Plaintiffs do not set forth facts that clearly demonstrate they will suffer immediate and irreparable injury if a temporary restraining order is not issued prior to allowing Defendants an adequate opportunity to respond to the request for preliminary injunction.

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Temporary Restraining Order is **DENIED**.
2. A hearing on Plaintiffs' request for a preliminary injunction shall be held on **October 5, 2021 at 1:30 p.m.** for a period not to exceed 3 hours.
3. The hearing will be made available to the public via Zoom:

<https://mt-gov.zoom.us/j/88623108273?pwd=RmFDTldScEhEM2VlbHBUYnB0Wnpldz09>

Dated this 21 day of September 2021.



Hon. Rienne H. McElyea
District Judge

c: Quentin M. Rhoades
Elizabeth A. Kaleva / Kevin A. Twidwell

mailed 9/22/21

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Attorneys for Defendants

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

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

Plaintiffs,

v.

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

Defendants.

Cause No. DV-21-975

DEFENDANT SCHOOL DISTRICTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Montana school boards have expansive constitutional and statutory authority to adopt rules to promote and protect the health and safety of their students. In the face of ever-increasing threats to in-person learning due to COVID-19 infections, the three Bozeman-area School District Defendants adopted universal mask requirements after considering parental comments and medical science, including recommendations by national, state and local health authorities who agree that K-12 masking requirements mitigate the spread of this deadly pandemic and help keep schools open.

Far from violating Plaintiffs' Constitutional rights¹, the reasonable, uniformly applied face covering requirements allow all citizen students access to educational services under the Montana Constitution, whether those students are healthy, immunocompromised, or reside with healthy families or families with one or more immunocompromised members. Courts around the country have rejected similar constitutional challenges to mask requirements, and the trend in this evolving area of law is instead to enjoin states from enforcing statutory bans on school mask mandates based on data used by organizations such as the Centers for Disease Control and the American Academy of Pediatrics.²

¹ Plaintiff Stand Up Montana has filed the same constitutional claims in Missoula District Court with separate individual plaintiffs. A preliminary injunction hearing was heard on Sept. 29, 2021. *See* DV-32-2021-0001031.

² *Arc of Iowa v. Reynolds*, Cas No. 4:21-cv-00264, 2021 U.S. App. LEXIS 25349 (S.D. Iowa Sept. 13, 2021)(“ The Court agrees with Plaintiffs that Iowa Code section 280.31 substantially

The science behind those mask recommendations is sound and accepted. *Arc of Iowa v. Reynolds*, 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.”) Further, the School Districts’ decisions have been bolstered by timely and recent CDC studies that concluded that pediatric Covid-19 cases rose 3.5 times faster in counties without school mask requirements than those with universal school masking.³ The Gallatin City County Health Department made similar findings and recently shared data demonstrating that area school districts without mask requirements have experienced more positive COVID-19 cases compared to districts with mask requirements.⁴ The Monforton School District experienced this first-hand this year. The District started the school year with an optional masking policy but quickly made masks mandatory after COVID-19 infections caused the schools to temporarily halt in-person instruction only days after school started.

increases Plaintiffs' children's risk of contracting SARS-CoV-2 by prohibiting school districts from instituting mask mandates for students, staff, teachers, and visitors, which in turn substantially increases Plaintiffs' children's risk of severe illness or death.”); *Arizona School Boards Ass. v. State of Arizona*, Superior Court of Maricopa County, CV 2021012741 Sept. 22, 2021)(finding anti-mask statute unconstitutional); *Disability Rights South Carolina v. Henry McMaster et al.*, No. 3:21-CV-02728 (D.S.c. Sept. 28, 2021) (enjoining South Carolina’s mask mandate ban, noting that several prominent health organizations (CDC and AAP), are calling on lawmakers to give school districts the option to implement universal masking in schools.)

³ https://www.cdc.gov/mmwr/volumes/70/wr/mm7039e1.htm?s_cid=mm7039e1_w

⁴ <https://www.youtube.com/watch?v=FyK4AdyZo9g> (starting at minute 8:31)

With that background, a preliminary injunction is appropriate only if Plaintiffs can demonstrate that they have a likelihood of success; that they will suffer irreparable harm if students and others are required to continue to cover their mouths and noses at the public schools; and after a weighing of the equities involved, deciding whether to enjoin the use of face coverings in schools is in the public interest. Underlying these factors is the fact that preliminary injunctions are proper only if they will preserve the status quo pending a decision on the merits of the claims. The Court should deny the Plaintiffs' motion for a preliminary injunction for the following reasons:

First, addressing the status quo prong, Plaintiffs' request that the Court enjoin the face covering requirements does not preserve the status quo – it alters the status quo. Here, BSD7 and Big Sky School District required students, staff, volunteers and visitors to wear face coverings during the 2020-2021 school year, and the rules adopted for the 2021-2022 school year continue that requirement for the same individuals. As such, the status quo is to allow the School Districts to maintain the face covering requirements. Monforton School District started the school year with a masks-optional approach but quickly re-instituted the mask requirement after a COVID-19 outbreak. Even if the status quo requirement does not apply to Monforton, a preliminary injunction against that district should be denied for the other reasons in this brief.

Second, in deciding to issue a preliminary injunction, the Court must decide whether enjoining the face covering rules is in the best interest of the public by balancing of the equities involved in this case. Here, the School Districts have Constitutional and statutory authority that recognize the local control of elected trustees to supervise their schools and to adopt health and safety rules for students, staff and members of the public who enter school facilities. The rules were adopted to minimize the spread of COVID-19 and to allow the School Districts to maintain in-person instruction for this school year. Eliminating the ability to mandate masks would significantly disrupt School District operations and put in-person instruction at risk. The three School Districts implemented narrowly tailored rules that will be constantly reviewed and altered, if necessary, based on COVID-19 data and parental comment. Therefore, the equities and public interest weigh heavily against enjoining the face covering rules.

Finally, Plaintiffs cannot make a prima facie showing that they will likely succeed on the merits of their constitutional claims and that they will suffer any injury, let alone irreparable injury. Despite Plaintiffs' arguments, there is no constitutional right to attend classes or to enter school premises without wearing a face covering when School Districts adopt rules to mitigate the spread of a communicable disease. Courts have uniformly found that face covering rules are constitutional and have rejected claims that masks infringe upon an individual's right in making their healthcare decisions. This is because requiring face coverings

does not constitute medical treatment. Further, Plaintiffs cannot show the rules are causing them irreparable harm because if they do not want to abide by school policies and rules, they can do their studies through the School Districts' remote learning programs, which are simply different modalities of instruction. The preliminary injunction motion should be denied.

FACTUAL BACKGROUND

I. COVID-19

The Court should take judicial notice that the number of COVID-19 cases and hospitalizations in Gallatin County have risen significantly in the past few months and Gallatin County health officials recommend, based on CDC guidance, that everyone wear a face mask while in public indoor settings, regardless of vaccination status. *See* <https://www.healthygallatin.org/coronavirus-covid-19/>.

II. SCHOOL DISTRICT FACE COVERING RULES

a. School Districts Are Empowered to Adopt Rules Such as Face Covering Requirements.

Montana is unique in that the Montana 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 (2017) 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).

The School Districts' right of local control has been recognized by Montana's governor, Greg Gianforte. The Governor's order rescinding the statewide mask mandate provided school districts the flexibility to consider local pandemic flares, such as the one Gallatin County is undergoing now:

SCHOOLS Access to school is essential to the developmental, social, mental, and educational needs of school-age children. Schools should make reasonable efforts to follow school guidelines and best practices recommended by the CDC and the Montana Office of Public Instruction.

Directive Implementing Executive Order 2-2021.

Further, in a letter to school districts the governor and the superintendent of schools simply urged school districts to consider public comment and data from the Department of Public Health and Human Services and local health departments in making masking decisions. *See* Letter from Greg Gianforte, Governor, State of Montana and Elsie Arntzen, Superintendent of Public Instr., State of Montana, to Montana Dist. Superintendents and Trustees, (Aug. 6, 2021). *See* Exhibit 1. Montana’s school districts are diverse in size and population make-up, and the ability of Trustees to make decisions on what is best for their individual districts explains how rules can vary from district to district. Even the “emergency rule” issued by DPHHS and the governor’s office simply informs School Districts that they should consider parental comment when considering mask requirements. *See* Exhibit 2.

Here, the School Districts considered wide ranging public comment and data from DPHHS, the Gallatin County Health Department and a myriad of local and national health care providers and health care organizations, as well as input from parents and students, in deciding to continue their face covering rules in their schools this year.

b. Bozeman School District Face Covering Rules

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 eighth 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. Last year, students, staff, volunteers and visitors were required to wear face coverings in district facilities Aff. Casey Bertram ¶ 3 (Sept. 27, 2021).

In 2020, BDS7 established a Covid advisory task force that monitored health data, CDC guidelines, Gallatin County health data and specific BSD7 COVID 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 of the Board of Trustees approved masking Policy No. 1905 on August 23, 2021. Aff. Bertram ¶¶ 7-11.

The rule allows the superintendent to establish or lift mask requirements based on multi-week trends in associated grade band COVID-19 transmission using the “high” rate of transmission as defined by the CDC. Aff. Bertram ¶12. The policy continues to require face coverings for all students, staff and visitors. Aff. Bertram at ¶12. The policy provides exemptions for masks 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.

Aff. Bertram at ¶ 12.

In making the recommendations to the Trustees, the task force considered and provided the following to the Trustees:

- Data collected and maintained by BSD7, including but not limited to COVID-19 transmission data;
- Data collected and maintained by the Gallatin County Health Department regarding community COVID-19 transmission as well as state-wide COVID-19 transmission through the Montana Department of Public Health and Human Services;
- Guidance issued by the CDC regarding masking for K-12 schools that includes the following:

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.⁵

Guidance issued by the American Academy of Pediatrics (“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;”⁶

- Recommendation by the Montana Chapter of the American Academy of Pediatrics for universal masking for students and staff members dated July 26, 2021;
- Letter from Governor Greg Gianforte issued on July 28, 2021;
- 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.” <https://sites.ed.gov/roadmap/landmark1/>;
- Letter from Governor Gianforte and Montana Superintendent of Public Instruction Elsie Arntzen on August 6, 2021;
- Guidance received from Gallatin City-County Health Department Health Officer Lori Christenson and local pediatrician, Dr. Kristen Day:
 - Local health experts stress prioritizing in-person instructional opportunities for students and layering mitigation strategies to support that effort.
 - Although conflicting opinions exist, the prevailing research supports masks as a COVID mitigation strategy.

⁵ <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

⁶ <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 Delta variant is currently the predominant variant in Montana, and also has shown to be more transmissible than previous variants, even in vaccinated individuals. Fully vaccinated individuals with Delta variant breakthrough infections can spread the virus to others.
- There isn't enough research to say without a doubt that the Delta variant is more harmful to children. There is a concerning uptick in cases and hospitalizations of children in the Southern United States, which is larger than any previous points during the pandemic.
- Local and national data show current COVID-related hospitalizations are predominantly unvaccinated persons.

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. Aff. Bertram ¶17. BSD7 continues to offer remote learning option for students and continues to monitor community and district COVID metrics and will make changes to the policy if and when they are needed. Aff. Bertram ¶¶ 17-20.

c. Big Sky School District Face Covering Rules.

For the 2020-2021 school year, Big Sky operated on a hybrid instruction model that included placing students in cohorts, attending 50 percent of the school week in person and receiving synchronous 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. Aff. Dustin Shipman ¶3 (Sept. 27, 2021). The District

required students, staff, visitors to wear face coverings for the 2020-2021 school year. 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 a revised Policy 1905 at that meeting. Aff. Shipman ¶ ¶7-9.

Under Policy 1905, all staff members, volunteers, visitors, and students aged five (5) and older are required to wear a disposable or reusable mask that covers the nose and mouth to protect colleagues and peers while present in any school building. Masking is not required when an individual is:

- 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 mask.

Aff. Shipman ¶ 10.

Policy 1905 also incorporates the requirement that students must wear face coverings on buses. The Centers for Disease Control (CDC) has also issued an order requiring face coverings on school buses.⁷ Aff. Shipman ¶ 11.

In making the recommendation to the Trustees, the Superintendent considered the recommendations from the CDC which stated: “Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority.” It also stated: “Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.”⁸ Aff. Shipman ¶12.

Further, the superintendent also considered the recommendation from the Gallatin City-County Health Department made to school districts within the county to follow CDC guidance regarding masking. Aff. Shipman ¶13.

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

⁷ <https://www.federalregister.gov/documents/2021/02/03/2021-02340/requirement-for-persons-to-wear-masks-while-on-conveyances-and-at-transportation-hubs>.

⁸ <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

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 preferred that teaching modality. Aff. Darren L. Strauch ¶ 4-6 (Sept. 29, 2021). It also used a cohort model for learning which limited interaction of students between classes and grades. 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. Aff. Strauch ¶ 7. Along those lines, upon the recommendation of the Superintendent, the Board of Trustees voted to transition to an optional face covering policy for staff, students and visitors after hearing public comment that favored optional face covering. Aff. Strauch ¶¶ 8-9.

The school year began on August 26, 2021, and the Superintendent observed that about 20-25 percent of the middle school students wore face coverings on the first day of school but this decreased to less than 10 percent within two days. Aff. Strauch ¶ 12. He observed a similar trend for the elementary school students. Aff. Strauch ¶ 12.

A few days later on September 1, 2021, the District decided to move all sixth and seventh grade students, one classroom of second grade students, and one classroom of fifth grade student to remote learning, temporarily shutting down in-person learning for these students. The students in fifth, sixth, and seventh grades engaged in remote learning until Sept 13, 2021 and the second grade student returned to in person instruction on Sept. 6, 2021. Aff. Strauch ¶ 13.

The district made the decision because seven individuals (students and staff) in the middle school tested positive for COVID-19. In addition, several additional students left during the school day exhibiting COVID-19 symptoms. Aff. Strauch ¶ 14.

The District lacked adequate staffing to continue in-person instruction. In total nearly 150 sixth and seventh grade students were impacted by the need to shut down the in-person instruction for the two-week period. Thirty students in fifth grade were impacted by remote learning and 20 second grade student could not attend in-person instruction for several days. Aff. Strauch ¶ 16.

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. He made the recommendation for these reasons:

- a face covering mandate would provide an added layer to mitigate the risks of COVID-19 for students and staff members;

- The Gallatin City-County Health Department and CDC recommended the use of face coverings;
- Additionally, by requiring face coverings, the Gallatin City-County Health Department and CDC advised that contact tracing amongst students could be reduced to a radius of those other individuals within three feet instead of the six feet recommended where no face coverings were worn.

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

- He also was concerned about the lack of available support staffing that would enable the District to provide in-person instruction if the teacher was quarantined or isolated without additional mitigation strategies;
- Local data on COVID-19 transmission issued by the Gallatin City-County Health Department. <https://www.healthygallatin.org/coronavirus-covid-19/>. This data includes the 7-day rolling average of cases as well as local hospital capacity. The District also reviewed regular media reports regarding the impacts of COVID-19 on school districts throughout Montana;
- The surveillance data from the Gallatin City-County Health Department on September 3, 2021, and September 10, 2021, indicated that the District's

middle school ranked second in Gallatin County for the numbers of positive cases behind only Montana State University.⁹

- Gallatin County also had from a “substantial” transmission rate to “high” transmission from the time the optional masking rule was adopted on August 17, 2021, to September 2021. The seven-day average of positive cases had increased in that same period from moderate to high as well.

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. Aff. Strauch ¶ 20. The Board adopted the requirement that all staff, volunteers, visitors, and school-aged students wear a face covering, mask, or face shield while present in any school building, regardless of vaccination status. Face coverings are also required for any outdoor school activity with fifty (50) or more people where physical distancing is not possible or is not observed. Students, staff, volunteers, and visitors are not required to wear face coverings when:

- consuming food or drink;
- engaged in strenuous physical activity;

⁹ <https://www.healthygallatin.org/about-us/press-releases/>

- 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, mask, or face shield due to a medical or developmental condition.

Aff. Strauch ¶21.

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

IV. The School Districts Considered a Wide Range of Recommendations in Continuing their Face Covering Rules

As is evident from above, in deciding to continue a mask requirement under their reopening plans, all of the Districts separately and independently considered mask scientific recommendations from the CDC, American Academy of Pediatrics, and Gallatin City/County Health Department.¹⁰ The CDC's guidance, which has

¹⁰ The Superintendent Affidavits each list additional factors and guidance they considered in deciding upon the face covering rules to adopt.

been advocated by the United States Department of Education and Governor Gianforte for school districts to use to guide safe operations¹¹, has stated:

Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority . . . Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.

K-12 Schools, Key Takeaways, Center for Disease Control and Prevention (August 2021),<https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>. The CDC has been recognized as a federal agency “empowered to conduct studies, evaluations, tests, and emergency programs in order to prevent the spread of disease and to improve the public welfare.” *Mazur v. Merck & Co.*, 964 F.2d 1348, 1368 (3d Cir. 1992).

Just last week, the CDC issued a statement titled “Studies Show More COVID-19 Cases in Areas Without School Masking Policies” that summarized three studies that compared COVID-19 transmission rates between schools that had mask policies and those that do not.¹² In an Arizona study, researchers found that schools without mask policies in two of Arizona’s most populated counties were 3.5 times more likely to have COVID-19 outbreaks compared with schools

¹¹ <https://www2.ed.gov/documents/coronavirus/reopening.pdf>

¹² <https://www.cdc.gov/media/releases/2021/p0924-school-masking.html>

that required universal masking on day one. *Id.* A second study, found that the average change in pediatric COVID-19 case rates was lower among counties with school mask requirements compared with those without the requirements. *Id.*

These studies continue to demonstrate the importance and effectiveness of CDC's [Guidance for COVID-19 Prevention in K-12 Schools](#) to help districts ensure safer in-person learning and stop the spread of COVID-19. Promoting vaccination of eligible persons, mask wearing, and screening testing are all proven methods to continue to work towards the end of the COVID-19 pandemic.

Id.

This dovetails with a statement from the Gallatin City County Health Department last week that local districts without mask requirements have experienced about three times the number of positive COVID-19 cases compared to those with mask requirements. ¹³

These findings are in line with the American Academy of Pediatrics (AAP), which is an organization representing 67,000 pediatricians¹⁴, similarly recommended the universal use of face coverings for students over two years of age and all school staff (unless medical or developmental conditions prohibit use).

The AAP based its recommendation on the following:

- a significant portion of the student population is not eligible for vaccination

¹³ <https://www.youtube.com/watch?v=FyK4AdyZo9g>

¹⁴ <https://www.aap.org/en/about-the-aap/>

- protection of unvaccinated students from COVID-19 and to reduce transmission
- lack of a system to monitor vaccine status among students, teachers and staff
- potential difficulty in monitoring or enforcing mask policies for those who are not vaccinated; in the absence of schools being able to conduct this monitoring, universal masking is the best and most effective strategy to create consistent messages, expectations, enforcement, and compliance without the added burden of needing to monitor vaccination status
- possibility of low vaccination uptake within the surrounding school community
- continued concerns for variants that are more easily spread among children, adolescents, and adults.¹⁵

The AAP also noted “an added benefit of universal masking is protection of students and staff against other respiratory illnesses that would take time away from school.” *Id.* Of note, the AAP, as well as the CDC, have been referenced by courts as reliable sources. *See, e.g., In re Morris*, 189 Wash. App. 484, 493, 355 P.3d 355, 360 (2015), as corrected (Sept. 3, 2015) (prosecution use of position papers from AAP and CDC assisted in satisfying evidentiary standard in criminal matter); *ex rel. Memisovski v. Maram*, No. 92 C 1982, 2004 WL 1878332, at *51 (N.D. Ill. Aug. 23, 2004) (approving Illinois’ adoption of the AAP’s immunization and well-child screening schedule as meeting the federal standard requiring a schedule to that “meets reasonable standards of medical and dental practice”).

¹⁵ COVID-19 Guidance for Safe Schools, Purpose and Key Principles, (July 18, 2021) <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/>.

Further, the Montana Medical Association, which represents 1,400 Montana physicians, sent a letter to School Districts this year urging them to implement masking for grades K-12 as part of a layered mitigation strategy to prevent the spread of COVID-19:

Children represent 15 percent of new COVID-19 cases in the US and hospitalizations of children due to COVID-19 are currently at an all-time high; many will struggle with long-term health consequences. We have reviewed the evidence on school mitigation measures, including universal masking, and conclude that they were important and effective in preventing SARS-CoV-2 spread in the last school year. In the setting of the Delta variant, its virulence, communicability, and effect on children, **we strongly recommend that all Montana school districts implement universal masking for grades K-12.**

See Exhibit 3.

Far from ignoring science as Plaintiffs suggest, the School Districts considered information and recommendations from the leading health authorities in the nation and in Montana when deciding to continue school operations with face coverings for this school year. Further, recent studies support the use of masks in schools substantially mitigates the spread of COVID-19.

V. Preliminary Injunction Standards

The requirements for the issuance of a preliminary injunction are well known. A plaintiff seeking such relief 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, 172 L. Ed. 2d 249 (2008); Mont. Code Ann. § 27-19-201. Additionally, “injunctive 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, 264, 405 P.3d 73, 84 (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 (Mont. 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 (Mont. 1995).

ANALYSIS

I. A Preliminary Injunction is Improper Unless it Preserves the Status Quo. Here the Status Quo is to Continue Face Covering Rules.

In their filings, Plaintiffs simply ignore the fact that the School Districts had face covering rules during the 2020-21 school year and those rules are now in effect for the 2021-2022 school year. The law is settled that a preliminary injunction is not appropriate if it does not preserve the status quo. *Porter*, 192 Mont. at 183, 627 P.2d at 840; Driscoll, ¶ 14.

Here, given that the School Districts had face covering rules last year and are continuing to require face coverings this year, the rules are the status quo and a preliminary injunction to declare the rules null and void is inappropriate.¹⁶

Although Monforton briefly had a masks-optional policy at the start of the school year, it quickly moved to a mask mandate because of COVID-19 infections. Even if the status quo doctrine does not apply to Monforton, the preliminary injunction motion against it should be denied for reasons set forth herein.

¹⁶ This Court recently found COVID-19 emergency measures are the status quo for the purpose of preliminary injunctions. In *Gallatin City-County Board of Health v. Rocking R Bar*, the Court granted a preliminary injunction to the local health board to enforce state and local rules on when certain businesses were required to close based on the status quo of the existing rules. *Finding of Fact, Conclusion of Law, and Or.*, No. DV-20-1278B (Mont. 18th Jud. Dist Ct. December 18, 2020).

II. Granting a Preliminary Injunction Would Pose a Significant Disruption to the School Districts' Ability to Provide In-Person Instruction.

One purpose of a preliminary injunction is to “minimize the harm to all parties pending final resolution on the merits.” *Driscoll*, ¶14. “The court has a duty to balance the equities and minimize potential damage when considering an application for a preliminary injunction.” *Four Rivers Seed Co. v. Circle K Farms*, 2000 MT 360, ¶ 12, 303 Mont. 342, 345, 16 P.3d 342, 344 (citing *Porter*, 192 Mont. at 180, 627 P.2d at 839); *see also Winter*, 555 U.S. at 24 (“In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”). Further, plaintiffs seeking a preliminary injunction must clearly demonstrate how the injunction requested serves the public interest. *Winter*, 555 U.S. at 20.

One U.S. District Court recently struck down the Iowa statute that prohibited school districts from adopting mask requirements.

It is in the public interest to inhibit the spread of COVID-19 and the devastation it is wreaking in Iowa, both among school-aged children and their families, particularly for the safety of disabled children. Moreover, there is little harm to Defendants in enjoining [the Iowa law] and permitting the individual public school districts to return to the way in which they were operating prior to its passage by leaving a universal mask mandate to their discretion

Arc of Iowa v. Reynolds, 2021 U.S. Dist. Lexis 172685, *28.

Here, the equities and the public interest prong weigh in favor of allowing the face covering rules to remain in effect until the merits can be decided. As noted above, the School Districts decided to adopt face covering rules to slow the

spread of COVID-19 and to allow them to offer in-person instruction to their students.

A. Enjoining the Face Covering Rules Will Greatly Disrupt School District Functions and Jeopardizes In-Person Instruction.

Under the face covering rules, the School Districts will be constantly analyzing local COVID-19 data and plan to make adjustments to the rules based on that data. Importantly, Superintendents from the Districts agree that providing in-person learning to their students is their goal for this year and that eliminating a face covering requirement at this time would cause a significant disruption to the Districts and their goal of in-person instruction.

At BSD7:

Based upon my training and experience, it is my professional opinion that masking is an important mitigation strategy, when layered with cleaning and disinfecting, handwashing, and ventilation, to provide the best opportunities for uninterrupted in-person instruction for the 2021-22 school year. While part of its “toolbox” of mitigation measures, BSD7 cannot control or require quarantines, testing, and vaccinations as these are issues of personal or parental choice. As such, these measures play a lesser role in BSD7’s ability to mitigate the risks of COVID-19. There are limited opportunities for social distancing due to the size of student enrollment and classroom space.

Based upon my training and experience, it is my professional opinion that not having a masking requirement would be disruptive to school operations because of the likelihood of increased COVID-19 transmission. This would in turn increase the numbers of students needing to be quarantined or isolated. The increased transmission rates would stress BSD7’s staffing capacity.

Based upon my training and experience, it is my professional opinion that masking is a critical mitigation measure to help ensure five-days of in-person instruction for BSD7's students.

See Aff. Bertram ¶¶ 23-25.

At Big Sky School District:

Based upon my training and experience, it is my professional opinion that COVID-19 can have a significant impact on the safety, health, and welfare of students and staff member.

Based upon my training and experience, it is my professional opinion that school operations would be disrupted if there was no masking requirement in the District. I believe that there would be an increased number of students infected with COVID-19, which would require quarantining and isolation. This could lead to significant disruption of the District's ability to provide in-person learning. I believe that the District's goal of providing in-person instruction to students five days per week would be jeopardized without a requirement for face coverings.

Based upon my training and experience, it is my professional opinion that implementation of Policy 1905 setting forth the masking requirement decreases the possibility of disruption to school operations and is necessary to support the District's intention to provide in-person instruction to students five days per week.

Aff. Shipman ¶¶ 16-18

At Monforton:

Based upon my training and experience, it is my professional opinion that COVID-19 has had a substantial impact on students. The District made concerted efforts to return to in-

person instruction for the 2020-21 school year because it is more beneficial and impactful for students. Due to the District's implementation of mitigation strategies and community support, there was limited spread of COVID-19 within the school community during the 2020-21 school year. However, the Delta variant of COVID-19 has been identified as being more infectious and transmissible.

<https://www.nytimes.com/2021/08/27/health/delta-variant-hospitalization-risk.html>.

The District is striving to maintain a safe environment for all of its students. While the District cannot eliminate or end COVID-19, it can implement mitigation strategies, including masking, to keep students safer while at school.

Based upon my training and experience, it is my professional opinion there was a substantial disruption of the District's operations when it did not have a face covering mandate in effect at the start of the 2021-22 school year and students in four grades were unable to access in-person instruction for several days due to the transmission of COVID-19 within the schools.

Based upon my training and experience, since adopting the face covering requirement, the educational process has been more consistent, and students have been able to remain in the classroom with less disruption. District administrators have been able to limit those impacted by contact tracing because they are looking at a smaller radius (only those located within three feet of the infected student). There has also been less of an impact on teachers being exposed.

Based upon my training and experience, having a face covering requirement at this time is a necessary mitigation strategy to support the District's plan of providing full-time, in-person instruction to all students.

Aff. Strauch ¶¶ 28-32.

As demonstrated herein, the School Districts have the right to adopt face covering rules to protect the health and safety of its students, staff, volunteers and visitors. Given the COVID-19 levels in Gallatin County, the rules they adopted are narrow and are substantially related to their duties and goals of safely educating their students in person. Enjoining the face covering rules would cause a substantial hardship to the School Districts. The students who do not want to wear a mask may attend school through on-line learning. The equities of the keeping the mask requirements outweigh any minor inconvenience the Plaintiffs assert in this case.

III. Plaintiffs Cannot Demonstrate that they likely will prevail on the Merits of their Constitutional claims or Demonstrate Irreparable Harm.

Although proof of a constitutional violation may sometimes constitute harm when considered at a preliminary injunction stage, here the Plaintiffs have not shown that a constitutional violation has, or will, occur because continuing face masking rules do not violate Plaintiffs' right of privacy to make their own healthcare decisions. *See Armstrong v. State*, 1999 MT 261, ¶ 75, 296 Mont. 361, 390, 989 P.2d 364, 384. Also, plaintiffs have not met their burden to show face coverings harm their human dignity.

A. Plaintiffs' Privacy Rights Are Not Violated.

Plaintiffs offer no support for the argument that wearing a face covering constitutes a deprivation of their right to privacy by taking away their ability to

reject medical treatment. Instead, in the emerging case law surrounding face covering requirements, courts have specifically and repeatedly held that requiring masks does not constitute medical treatment. *E.g.*, *Cangelosi v. Sizzling Caesars LLC*, No. 20-2301, 2021 U.S. Dist. LEXIS 16131, at *5, 2021 WL 291263 (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, 2021 WL 843175 (S.D. Cal. Mar. 4, 2021) (requiring an individual to wear a mask “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 mask qualifies as ‘medical treatment’”); *Machovec v. Palm Beach Cty.*, 310 So. 3d 941, 946 (Fla. 4th DCA 2021), review denied, No. SC21-254, 2021 WL 2774748 (Fla. July 2, 2021) (Requiring facial coverings in public settings is akin to the State’s prohibiting individuals from smoking in enclosed indoor workplaces...and mask mandate did not implicate the constitutional right to refuse medical treatment.)

Plaintiffs argue that face coverings are “medical devices” under the recently enacted changes to Montana’s criminal trespass law. Mont. Code Ann. § 45-6-203(2021). But they ignore the fact that the recently enacted Montana COVID-19

liability law defines face coverings as personal protective equipment, not medical device. Senate Bill 65 states in pertinent part¹⁷

(5) “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 actual medical treatment. Medical “treatment” is defined as “management in the application of medicines, surgery, etc.” Treatment, Dictionary. Com, <https://www.dictionary.com/browse/treatment?s=t>. (last visited Aug. 27, 2021). 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. Requiring people to cover their nose and mouth to prevent them from unknowingly infecting others and protect them from being infected themselves is not “medical treatment” under any reasonable construction of that term.

Plaintiffs rely on the Montana Supreme Court decision in *Armstrong* for their argument, when in fact, that case supports the School Districts’ decision to continue requiring face coverings this school year. In *Armstrong*, the Montana Supreme 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

¹⁷ <https://leg.mt.gov/bills/2021/billpdf/SB0065.pdf>

provider free from government interference.” 1999 MT 261, ¶ 14, 296 Mont. 361, 367, 989 P.2d 364, 370 (declaring unconstitutional statutes prohibiting a physician assistant-certified from performing a pre-viability abortion). But the Court there held that this right was not inviolate as exceptions to the rule exist. *Id.* at ¶ 75. One of those exceptions is the need to protect the public (here students, staff and visitors) from a deadly disease. *Weems v. State*, 2019 MT 98, ¶ 19, 395 Mont. 350, 359, 440 P.3d 4, 10-11 (“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. (The individual’s “right to seek health is circumscribed by the State's police power to protect the public’s health and welfare.” *Mont. Cannabis Indus. Ass'n*, 2012 MT 201, ¶ 22). So, even under the authorities that Plaintiffs cite, the law does not preclude the use of such face coverings.

Here, Plaintiffs have not made a threshold showing that requiring students and others in the schools to wear a face covering violates their right to make their own healthcare decisions. Given this failure, Plaintiffs do not have a likelihood of success on their claims, and if they cannot meet this burden, they have not met the requirement that they show they have been irreparably harmed.

B. Plaintiffs' Human Dignity Rights Are Not Violated.

Plaintiffs' claim the face covering rules violate their right of "human dignity" in that requiring masks prohibits individuals from seeing each other's facial expressions and takes away their right to control their own medical treatment. Plaintiffs have provided no case law that supports this claim. That is because no court has found that face coverings degrade individuals or detract from their worth as human beings. Consequently, Plaintiffs cannot prove a violation of their right to human dignity.

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 the 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.

Here, the face covering rules simply require students and others in the schools to take reasonable measures to protect themselves and their classmates and staff from the spread of COVID-19 by wearing face coverings. Plaintiffs’ suggestion that the rules violate this right because they interfere with a student’s ability to read facial expressions or to make health care decisions for themselves does not rise to the level of a deprivation of any Constitutional right, and we have found no case law that has found as much. Even if it did, such an imposition is minimal compared to the interests the School Districts have in stemming the spread of a communicable disease. As U.S. Chief Justice Roberts recently stated in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), the Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” *Id.* at 1613. When officials “undertake to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad”... and should not be subject to second-guessing by the judiciary that lacks the background, competence, and expertise to assess public health.... *Id.* at 1613–14.

IV. The Face Covering Rules Pass Muster Under any Level of Constitutional Analysis.

School District Trustees are required to effect policies for the operation of schools in conjunction with their responsibilities to all citizens under the Constitution. For instance, in *State, ex rel., Bartmess v. Bd. of Trustees of Sch.*

Dist. No. 1, 223 Mont. 269, 726 P.2d 801 (1986) the right to participation in extracurricular activities was deemed a right deserving of Constitutional protection and subjected to the middle tier analysis. Cases in other jurisdictions that have construed claims that mask mandates are unconstitutional have analyzed mask requirements under the rational basis review. *Machovec. v. Palm Beach County*; *W.S. v Ragsdale*, 2021 WL 2024687 (N.D. Ga. 2021).

Plaintiffs here argue that the right to privacy is a fundamental right and therefore the proper analysis is whether the face covering rules serve a compelling state interest. Even if that is true, face covering rules meet that level of scrutiny. In their brief in support of their motion, Plaintiffs recognize that “the compelling state interest at stake could be construed as the control of a pandemic,” and this is clear from U.S. Supreme Court jurisprudence. *See Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (“Stemming the spread of COVID-19 is unquestionably a compelling interest”).

Regardless of whatever level of scrutiny that is applied, the face covering rules survive because, despite Plaintiffs’ arguments, the face covering rules are narrowly tailored to serve an important, legitimate or compelling interest in mitigating the transmission of COVID-19. As seen above, the rules are narrowly tailored to apply equally to anyone on school premises and are narrowly tailored to provide various exceptions to masking, including mask breaks, exceptions for outdoor activity, and exceptions where social distancing can be maintained. These

rules are certainly narrower than a rule that closed the schools, required all students to attend online schooling or mandated face coverings at all times without exception. Additionally, the rules require the School Districts to continually evaluate data, parental input and health care recommendations on the use of face coverings, and those rules will be relaxed if and when the data support doing so. This alone demonstrates that the rules are narrowly tailored.

The face covering requirement promotes a healthy workplace for school district employees and visitors and reduces the risk of closure to all students due to staff absences or quarantine requirements. The countervailing right to educational services is enhanced for all students, regardless of health status. Plaintiffs' application for injunctive relief compromises the established rights of others, by carving out an exception from reasonable rules requiring face coverings while on school property, essentially defeating the generally accepted, reasonably implemented, preventative protections to all students and all staff, not just those who prefer to refrain from wearing a face covering for the limited period of time they or their children on school property.

Additionally, the schools are offering alternate online access to the educational program for students who refuse to wear a mask or cannot do so for other reasons. This undercuts the argument that the right to participate has been restricted from the outset. Refusal to wear a mask is not an inherent trait or

condition upon which eligibility is determined, but a reasonable rule governing whether participation in instruction is in-person or virtual.

As a final note on narrow tailoring, Plaintiffs allege that the School Districts should target students more vulnerable to COVID-19 and subject them to additional restrictions while allowing the remaining students to dispel with the mask requirements. This is not a realistic approach and does not take into account the School Districts' obligations to provide services to students with disabilities under the Americans with Disabilities Act, 42 U.S.C § 12101 *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* Such an approach is unworkable, could be construed as discriminatory and would result in many more students being denied the ability to attend school in person in the Fall.

CONCLUSION

As demonstrated above, the School Districts have broad authority to regulate the conduct of students while attending school and to impose reasonable rules while in attendance for the protection of the student and others in the schools. This authority is generally supported unless a constitutional right is violated. Here, regardless of whether the Governor or the local health department rescinds or relaxes mask requirements generally, a strong rationale for the face covering requirements is easily documented for student safety purposes and to ensure that there is sufficient staff to operate the schools. Much like a dress code

requirement, the face covering requirement is premised on accepted standards governing student and staff safety, which can be supported by the need to optimize conditions which limit transmission of the COVID-19 virus to students, staff and visitors to school.

The Plaintiffs have not made the necessary showing that the narrowly tailored face covering rules violate their privacy rights to direct their own healthcare decisions or that wearing a mask takes away their human dignity. Further and importantly, the balance of equities does not favor Plaintiffs, would not preserve the status quo of continued face covering at schools and could endanger the ability of the School Districts to offer in-person instruction. The motion for preliminary injunction should therefore be denied.

DATED this 29th day of September, 2021.

Kaleva Law Offices
Attorneys for Defendants



Kevin A. Twidwell

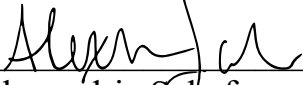
Certificate of Service

I hereby certify that I served a copy of the foregoing via e-mail, to the following:

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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

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

Plaintiffs,

vs.

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

Defendants.

Cause No. DV-21-975

AFFIDAVIT OF CASEY
BERTRAM

STATE OF MONTANA)
 :SS.
County of Gallatin)

Casey Bertram, being first duly sworn, states as follows:

1. I am the Interim Superintendent of Bozeman School District No 7 (“BSD7”). I served as a principal for 13 years. I served as a deputy superintendent and shared the duties as interim superintendent for BSD7 for the 2020-21 school year. I was hired by BSD7’s Board of Trustees as the Interim Superintendent for the 2021-22 school year. I hold a Class Three Administrative License with principal and superintendent endorsements in Montana.
2. BSD7 has an enrollment of 7,291 students and employs approximately 870 staff members. BSD7 has 8 elementary schools, 2 middle schools, and 2 high schools. It also operates a prekindergarten program for special education students as well as transitional or running start kindergarten programs for four-year old students. BSD7 operates a K-8 Charter School, a 9-12 Charter Program, an elementary day treatment program, and a high school day treatment program.
3. BSD7 started the 2020-21 school year with all students in a hybrid model where it provided part-time in-person learning and part-time offsite learning. It offered students in prekindergarten through fifth grade five days of in-person learning using a cohort model starting November 2, 2020. Students in grades six through eight moved to five days of in-person instruction on February 1, 2021.

High school students moved to a schedule of four days of in-person learning and one day of offsite learning on January 27, 2021.

4. BSD7 offered a remote learning option to any enrolled student in kindergarten through 12th grade throughout the 2020-21 school year.

5. Students, staff members, and visitors were required to wear face coverings in district facilities during the 2020-21 school year. In January 2021, the Board of Trustees approved a masking policy that expired in June 2021 when its declaration of emergency ended.

6. In December 2020, BSD7 established a COVID advisory task force. This group was created to align existing CDC guidelines, Gallatin County health data, and BSD7 COVID data in decision making. This task force was comprised of a trustee, administrators (including myself), teachers, other staff members, a representative of its certified employee bargaining unit, a representative of the Gallatin City-County Health Department, and a local pediatrician. The task force identified masking as a COVID-19 mitigation strategy for the 2020-21 school year.

7. The task force reconvened on July 8, 2021, to consider recommendations for the 2021-22 school year. The membership of the task force expanded to include a parent representative, along with a trustee, administrators (including myself), teachers, other staff members, a representative of the certified employee bargaining unit, two representatives from the Gallatin City-County Health Department, and a

local pediatrician. The task force considered multiple issues, including masking, mitigation strategies, and the impact of COVID on staffing to provide recommendations to the Board of Trustees. After its first meeting in July 2021, the task force recommended face coverings as optional but encouraged.

8. BSD7's Board of Trustees discussed the task force's recommendations at its meeting on July 12, 2021. Information about masking and other back-to-school matters was shared with the community on July 14, 2021. At that time, COVID-19 transmission rates were in the low to moderate range in the community.

9. However, due to new and updated guidance being issued after the July meetings and rising community COVID-19 transmission, the task force reconvened on August 11, 2021.

10. At its meeting on August 11, 2021, the task force reached consensus that it would recommend the requirement for face coverings in district facilities and indoor settings to BSD7's Board of Trustees based upon grade band transmission data (e.g., new cases per 100,000 over a 7-day period). The task force recommended that face coverings be required if transmission data at a grade band met or exceeded the Centers for Disease Control's ("CDC") the "substantial" or "high" threshold depending on status – students, staff members, or visitors.

11. I recommended that BSD7's Board of Trustees adopt an updated declaration of emergency and masking policy to largely reflect the task force's

recommendations at its August 16, 2021 meeting. I did recommend that the policy reflect decisions be made on the basis of the CDC's "high" threshold for COVID-19 transmission for all situations instead of a "substantial" threshold. A majority of the Board of Trustees approved my recommendation and a masking policy – Policy 1905 – at its August 23, 2021 meeting.

12. Pursuant to Policy 1905, attached here as Exhibit A, as Superintendent, I am authorized "to establish or lift mask requirements for grade bands (elementary, middle school, and high school as defined in District Policy 2105) and based upon multi-week trends in associated grade band COVID-19 transmission data. The Superintendent shall use the "high" rate of transmission as defined by the Centers for Disease Control (CDC) as the guiding decision metric when establishing or lifting mask requirements for grade bands." Face coverings are required to be disposable or reusable and cover the nose and mouth. Students, staff members, and visitors are exempted from wearing face coverings when:

- Consuming food or drink;
- Engaging in strenuous physical activity;
- Communicating with someone who is hearing impaired;
- Identifying themselves;
- Receiving medical attention; or
- Precluded from safely using a face covering due to a medical or developmental condition.

Students and staff members may also remove their face coverings if giving a speech, lecture, class presentation, course lesson, or performance if there is at least six feet of distance from the gathering, class, or audience.

13. I made the recommendation for the masking policy because based upon available data and guidance, masking is an important COVID-19 mitigation strategy that supports BSD7's primary goal of maximizing in-person learning for students five days a week during the 2021-22 school year.

14. The task force, of which I was a member, considered information from a variety of sources. This information included the following:

- Data collected and maintained by BSD7, including but not limited to COVID-19 transmission data.
- Data collected and maintained by the Gallatin City-County Health Department regarding community COVID-19 transmission as well as state-wide COVID-19 transmission through the Montana Department of Public Health and Human Services.
- Guidance issued by the CDC regarding masking for K-12 schools. This guidance included the following:

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.

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

- Guidance issued by the American Academy of Pediatrics (“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.” <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/>.
- Recommendation by the Montana Chapter of the American Academy of Pediatrics for universal masking for students and staff members dated July 26, 2021.
- Media statement from Governor Greg Gianforte issued on July 28, 2021.
- 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.” <https://sites.ed.gov/roadmap/landmark1/>.

- Letter from Governor Gianforte and Montana Superintendent of Public Instruction Elsie Arntzen on August 6, 2021.
- Guidance received from the Gallatin City-County Health Department Health Officer Lori Christenson and pediatrician at Bozeman Health and Gallatin City-County Health Department Medical Director Dr. Kristen Day:
 - Local health experts stress prioritizing in-person instructional opportunities for students and layering mitigation strategies to support that effort.
 - Although conflicting opinions exist, the prevailing research supports masks as a COVID mitigation strategy.
 - The Delta variant is currently the predominant variant in Montana, and also has shown to be more transmissible than previous variants, even in vaccinated individuals. Fully vaccinated individuals with Delta variant breakthrough infections can spread the virus to others.
 - There isn't enough research to say without a doubt that the Delta variant is more harmful to children. There is a concerning uptick in cases and hospitalizations of children in the Southern United States, which is larger than any previous points during the pandemic.
 - Local and national data show current COVID-related hospitalizations are predominantly unvaccinated persons.

15. I also shared this information for the Board's consideration in making its decision at its meeting on August 16, 2021.

16. Additionally, the task force and Board of Trustees considered other COVID-19 mitigation strategies:

- Cleaning and Disinfecting. Regular cleaning and disinfecting with the plan for more aggressive protocols if transmission rates increased.

- Handwashing. Students in pre-kindergarten through fifth grades will sanitize or wash their hands at transitions during the school day; handwashing/sanitizing is strongly encouraged for all students throughout the school day.
- Social Distancing. When feasible, social distancing will be practiced. However, with all students present for in-person learning five days per week, social distancing is not possible in most cases and impossible in some cases.
- Ventilation. BSD7 upgraded its filters and manages its HVAC system to maximize fresh air intake.
- Testing. Voluntary rapid testing for symptomatic staff and students (with parental consent).

17. The Board of Trustees received hundreds of emails and heard hours of public comment, which included parent input, at its meeting on August 16, 2021, when it initially considered my recommendation to adopt a masking policy under Policy 1905. The Board of Trustees received more emails and heard additional comment from the public, including parents, before making its final determination to adopt Policy 1905 at its August 23, 2021, meeting.

18. BSD7 has and continues to consider accommodations for students with disabilities, which may include medical conditions, with respect to face coverings.

19. BSD7 offers a remote learning option for students in kindergarten through 8th grade through the Bozeman Online Charter School. Remote learning is available for high school students via the Bozeman Online High School.

20. BSD7 continues to monitor community and district COVID metrics. Each week, BSD7 sends out a communication to parents regarding these data and trends. Pursuant to the authority in Policy 1905, I use this data to determine whether masking should be continued in each grade band. At this time, due to the high rates of transmission, masking remains required in district facilities and indoor settings.

21. Based upon my training and experience, it is my professional opinion that COVID-19 has had significant impacts on BSD7 and its ability to provide consistent in-person instruction in a safe environment for staff members and students.

22. The task force has prioritized in-person instruction focusing on the following essential considerations: student and adult mental health; student achievement and growth; impacts of student and staff quarantines; food security, child abuse and neglect data; help center youth data; childcare concerns; and school clusters of associated COVID cases. The guidance offered by the CDC and AAP acknowledged the importance of in-person instruction consistent with these considerations.

23. Based upon my training and experience, it is my professional opinion that masking is an important mitigation strategy, when layered with cleaning and disinfecting, handwashing, and ventilation, to provide the best opportunities for uninterrupted in-person instruction for the 2021-22 school year. While part of its “toolbox” of mitigation measures, BSD7 cannot control or require quarantines, testing, and vaccinations as these are issues of personal or parental choice. As such, these measures play a lesser role in BSD7’s ability to mitigate the risks of COVID-19. There are limited opportunities for social distancing due to the size of student enrollment and classroom space.

24. Based upon my training and experience, it is my professional opinion that not having a masking requirement would be disruptive to school operations because of the likelihood of increased COVID-19 transmission. This would in turn increase the numbers of students needing to be quarantined or isolated. The increased transmission rates would stress BSD7’s staffing capacity.

25. Based upon my training and experience, it is my professional opinion that masking is a critical mitigation measure to help ensure five-days of in-person instruction for BSD7’s students.

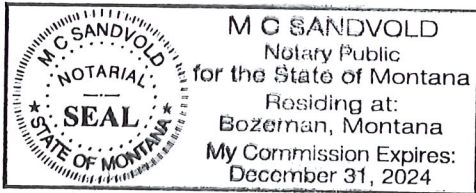
Dated this 27 day of September, 2021.



Casey Bertram

STATE OF MONTANA)
 :SS.
County of Gallatin)

SUBSCRIBE AND SWORN TO before me this 27 day of September, 2021, by Casey Bertram.



Notary Public

Bozeman Public Schools

Emergency Policy

Policy 1905

This policy applies during a COVID-19 state of emergency declared by the Board of Trustees or other local, state or federal agency, official, or legislative body. This policy is adopted, implemented, and enforced in accordance with the supervisory authority vested with the Board of Trustees in accordance with Article 10, section 8 of the Montana Constitution. The Board of Trustees directs the Superintendent to develop and implement procedures to enforce this policy.

Mask requirements for all staff, volunteers, visitors, and school-aged students are based upon community and district COVID-19 transmission data. HB 702, as approved during the recent legislative session, prohibits the District from basing masking requirements on COVID-19 vaccination status.

Beginning August 24, 2021, given that trends in the number of active COVID-19 cases in Gallatin County leading up to the start of the school year show a "high" rate of transmission as defined by the Centers for Disease Control (CDC), the Board of Trustees directs the Superintendent to implement a requirement for face coverings to be worn in all district buildings and indoor-spaces.

For the duration of the COVID-19 emergency declaration, the Board of Trustees authorizes the Superintendent to establish or lift mask requirements for grade bands (elementary, middle school, and high school as defined in District Policy 2105) and based upon multi-week trends in associated grade band COVID-19 transmission data. The Superintendent shall use the "high" rate of transmission as defined by the Centers for Disease Control (CDC) as the guiding decision metric when establishing or lifting mask requirements for grade bands. The Superintendent will also have discretion to establish masking requirements if sudden and substantial increases in COVID-19 transmission are seen at a particular grade band. Enforcement of any masking requirement will not be based on an individual's COVID-19 vaccination status. Volunteer and visitor mask requirements would mirror the requirement in the grade band/s of the building where they are volunteering/visiting.

The Superintendent is authorized to establish or remove mask requirements at District buildings without students at his discretion.

In the event it is determined face coverings are required, the Superintendent shall announce the face covering requirement to students, parents, staff, and visitors for the immediate successive school week by 5:00 pm on Friday of the previous week. If masks are required, signs will be installed to inform students, parents, staff, and visitors of mask requirements while present in the identified District buildings.

Face covering means disposable or reusable masks that cover the nose and mouth. The School District will provide disposable masks to students, volunteers, and staff, if needed. If a student or staff wears a reusable mask, the School District expects that the masks be washed on a regular basis to ensure maximum protection.

When a masking requirement is in place, students, staff, volunteers, and visitors are not required to wear a mask under this provision when:

1. consuming food or drink;
2. engaged in strenuous physical activity;
3. communicating with someone who is hearing impaired;
4. identifying themselves;
5. receiving medical attention; or

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6. precluded from safely using a face covering due to a medical or developmental condition. The superintendent, building principal, or their designee shall request documentation from a care provider when considering an exception to this provision for medical or developmental reasons. The School District will comply with all applicable disability and discrimination laws when implementing this provision.

When a masking requirement is in place and students and members of the public are not present, staff may remove their masks if they are at their individual workstation and six feet of distance is strictly maintained between individuals. In some circumstances, staff may lower face covering while teaching, presenting, speaking or providing directions as long as they can maintain appropriate distance (6ft) from others. This decision will be left to the discretion of the individual staff member. To be determined by Staff, there will be opportunities for students for routine “mask breaks” throughout the day, if appropriate distancing can be maintained.

All points of entry to any school building or facility open to the public shall have a clearly visible sign posted stating the mask requirement.

Allegations of harassment of any person wearing a mask or those with recognized exemptions to the face covering requirement will be promptly investigated in accordance with District policy. Failure or refusal to wear a mask by a staff member or student not subject to an exception noted above may result in redirection or discipline in accordance with District policy and codes of conduct, as applicable.

Face coverings are required for drivers and riders on district route and activities busses in accordance with Federal regulations regardless of school mask requirements and flexibilities described above.

Legal Reference:	Article X, section 8	Montana Constitution
	Section 20-3-324, MCA	Powers and Duties

Policy History:

Adopted on: 1/25/2021

Revised on: 8/23/2021

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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

STAND UP MONTANA, a Montana non-profit corporation; JASMINE ALBERINO, TIMOTHY ALBERINO, VICTORIA BENTLEY, DAVID DICKEY, WESLEY GILBERT, KATIE GILBERT, KIERSTEN GLOER, RICHARD JORGENSON, STEPHEN PRUIETT, LINDSEY PRUIETT, ANGELA MARSHALL, SEAN LITTLEJHOHN and KENTON SAWDY,

Plaintiffs,

vs.

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

Defendants.

Cause No. DV-21-975

AFFIDAVIT OF DUSTIN SHIPMAN

STATE OF MONTANA)
 :SS.
County of Gallatin)

Dustin Shipman, being first duly sworn, states as follows:

1. I am the Superintendent of Big Sky School District No. 72 (“the District”). I served as Superintendent and principal for the District for five years. I have worked as a superintendent for public school years for nine years. For the 2021-22 school year, I was hired to only be the Superintendent for the District. I hold a

Class Three Administrative License in Montana.

2. The District has an enrollment of 410 students in grades kindergarten through 12th grade. The District has 60 employees. The District operates an elementary school, middle school, and a high school.

3. The District began the 2020-21 school year with students in a hybrid instruction model. Students were placed in cohorts, attending 50% of the school week in person and receiving synchronous instruction online 50% of the remaining week. Student cohorts rotated on a daily basis. By the end of the school year, the District was open for in-person instruction for students five days a week. The District also offered a 100% remote option for students to participate in synchronous instruction with classmates virtually.

4. Students, staff members, and visitors were required to wear face coverings during the 2020-21 school year.

5. The District's Board of Trustees adopted a policy on masking and other safety measures – Policy 1905 – in August 2020.
6. For the 2021-22 school year, the District intends to offer full-time in-person instruction to all students five days a week in accordance with its adopted school calendar.
7. Consistent with the District's desire to offer a regular schedule of in-person instruction for students, I recommended to the District's Board of Trustees on August 24, 2021, that the Board revise Policy 1905 that included the adoption of a requirement for face coverings for students, staff members, and visitors while indoors at a district facility.
8. I made this recommendation because face coverings are a mitigation strategy that can stop or slow the spread of COVID-19 transmission in school settings.
9. During its August 24th meeting, the Board of Trustees considered public comment, which included comment made during the meeting as well as comments provided via email prior to the meeting, and discussed the recommendation to require face coverings under Policy 1905. A majority of the Board of Trustees voted to approve the revised Policy 1905, which is attached hereto as Exhibit A.
10. Pursuant to Policy 1905, all staff members, volunteers, visitors, and students aged five (5) and older are required to wear a disposable or reusable mask that

covers the nose and mouth to protect colleagues and peers while present in any school building. Masking is not required when an individual is:

- 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 mask.
-

11. Policy 1905 also incorporates the requirement that students must wear face coverings on buses. The Centers for Disease Control (CDC) has also issued an order requiring face coverings on school buses.

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

12. In making my recommendation regarding Policy 1905, I considered recommendations from the CDC. The CDC has stated: “Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority.” It also stated: “Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.” <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

13. I also considered the recommendation from the Gallatin City-County Health Department made to school districts within the county to follow CDC guidance regarding masking.

14. The District has been and continues to monitor COVID-19 transmission rates in Gallatin County. <https://www.healthygallatin.org/coronavirus-covid-19/>. The data indicates that transmission of COVID-19 within Gallatin County is increasing.

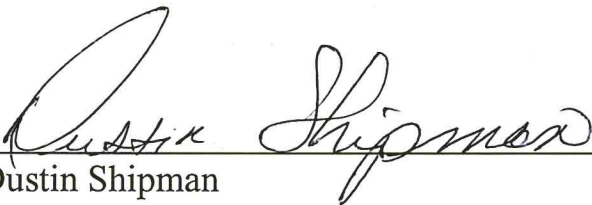
15. The District has and continues to consider accommodations for students with disabilities, which may include medical conditions, with respect to face coverings.

16. Based upon my training and experience, it is my professional opinion that COVID-19 can have a significant impact on the safety, health, and welfare of students and staff member.

17. Based upon my training and experience, it is my professional opinion that school operations would be disrupted if there was no masking requirement in the District. I believe that there would be an increased number of students infected with COVID-19, which would require quarantining and isolation. This could lead to significant disruption of the District's ability to provide in-person learning. I believe that the District's goal of providing in-person instruction to students five days per week would be jeopardized without a requirement for face coverings.

18. Based upon my training and experience, it is my professional opinion that implementation of Policy 1905 setting forth the masking requirement decreases the possibility of disruption to school operations and is necessary to support the District's intention to provide in-person instruction to students five days per week.

Dated this 27th day of September, 2021.



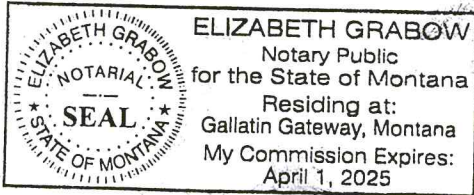
Dustin Shipman

STATE OF MONTANA)
 :ss.
County of Gallatin)

SUBSCRIBE AND SWORN TO before me this ____ day of September, 2021, by Dustin Shipman.



Notary Public



1 **Big Sky School District**

2
3 **COVID-19 Emergency Measures**

1905

4
5 Student, Staff, and Community Health and Safety

6
7 The School District has adopted the protocols outlined in this policy during the term of the
8 declared public health emergency to ensure the safe and healthy delivery of education services
9 provided to students on school property in accordance with Policy 1906, and a safe workplace
10 when staff are present on school property in accordance with Policy 1909, and the safety, health
11 and well-being of parents and community members. The supervising teacher, principal,
12 superintendent or designated personnel are authorized to implement the protocols in coordination
13 with state and local health officials.

14
15 Symptoms of Illness

16
17 Students and staff who are ill, feeling ill, diagnosed as ill, or otherwise demonstrating symptoms
18 of illness must not come to school or work. Students who have a fever or are exhibiting other
19 signs of illness must be isolated in a designated area until such time as parents or caregiver may
20 arrive at the school to retrieve the ill student. All surfaces and areas should be thoroughly
21 cleaned and disinfected once the student has vacated the area by staff utilizing safety measures in
22 accordance with state and/or local health standards as applicable. Students may engage in
23 alternative delivery of education services during the period of illness or be permitted to make up
24 work in accordance with District Policy 1906. Staff members will be provided access to leave in
25 accordance with District Policy 1911 or the applicable Master Contract or Memorandum of
26 Understanding.

27
28 Parents, guardians, or caregivers of students who are ill, feeling ill, diagnosed as ill, or otherwise
29 demonstrating symptoms of illness must not be present at the school for any reason including but
30 not limited events or gatherings or to drop off or pick up students excepted as provided by this
31 policy. To avoid exposing others to illness, parents or caregivers who are ill must make
32 arrangements with others to transport students to school or events, if at all practicable. If not
33 practicable, parents, guardians or caregivers must not leave their vehicle during pickup or drop
34 off and must arrange with District staff to supervise students in accordance with physical
35 distancing guidelines in this Policy.

36
37
38 Physical Distancing

39
40
41 Students, staff, volunteers, and visitors will, whenever possible, maintain a six-foot distance
42 between themselves and their colleagues and peers throughout the school day inside any school
43 building, on school provided transportation, and on school property before and after school.
44 Staff members will arrange classrooms and restructure courses, transportation services, and food
45 service to meet this standard.

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4 Recess will continue as scheduled in accordance with physical distancing guidance without the
5 use of playground equipment. Any other use of school playgrounds is strictly prohibited.
6

7 Drop off and pick up of students will be completed in a manner that limits direct contact between
8 parents and staff members and adheres to social distancing expectations around the exterior of
9 the school building while on school property.
10

11
12
13 Face Coverings as Personal Protective Equipment
14

15 In accordance with directives from the State of Montana, if the number of active COVID-19
16 cases in the county in which the School District is located is four (4) or more, the School District
17 requires all staff, volunteers, visitors, and students aged five (5) and over to wear disposable or
18 reusable masks that cover the nose and mouth or face shields to protect colleagues and peers
19

20 while present in any school building. In accordance with directives from the State of Montana, if
21 the number of active COVID-19 cases in the county in which the School District is located is
22 four (4) or more, the School District also requires all staff, volunteers, visitors, and students aged
23 five (5) and over to wear disposable or reusable masks that cover the nose and mouth or face
24 shields to protect colleagues and peers while present at any outdoor school activity with fifty
25 (50) or more people where physical distancing is not possible or is not observed. The School
26 District will provide masks or shields to students, volunteers, and staff. If a student or staff wears
27 a reusable mask or face shield, the School District expects that the masks be washed on a regular
28 basis to ensure maximum protection. The School District will assist students or staff members
29 who request help washing or replacing a mask.
30

31 Students, staff, volunteers, and visitors are not required to wear a mask under this provision
32 when consuming food or drink, engaged in physical activity, communicating with someone who
33 is hearing impaired, giving a speech to a gathering separated by distance, identifying themselves,
34 receiving medical attention, or have a medical or developmental condition precluding use of a
35 mask. The superintendent, building principal, or their designee who may request documentation
36 from a care provider when considering an exception to this provision for medical or
37 developmental reasons. The School District will honor all applicable disability and
38 discrimination laws when implementing this provision by providing alternative services to those
39 requesting accommodation.
40

41 All points of entry to any school building or facility open to the public shall have a clearly visible
42 sign posted stating: "Mask or face covering use required for ages 5 and older." The School
43 District authorizes the administration to report any violations of this provision to the county
44 attorney.
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4 Allegations of harassment of any person wearing face coverings or those with recognized
5 exemptions to the face covering requirement will be promptly investigated in accordance with
6 District policy. A student, staff member, or visitor who, after an investigation, is found to
7 engaged in behavior that violates District policy is subject to redirection or discipline. Failure or
8 refusal to wear a face covering by a staff member or student not subject to an exception noted
9 above may result in redirection or discipline in accordance with District policy and codes of
10 conduct, as applicable.

11 12 13 Cleaning and Disinfecting

14
15 School district personnel will routinely both clean by removing germs, dirt and impurities and
16 disinfect by using chemicals to kill germs on all surfaces and objects in any school building and
17 on school property that are frequently touched. This process shall include cleaning
18 objects/surfaces not ordinarily cleaned daily.

19
20 Personnel will clean with the cleaners typically used and will use all cleaning products according
21 to the directions on the label. Personnel will disinfect with common EPA-registered household
22 disinfectants. A list of products that are EPA-approved for use against the virus that causes
23 COVID-19 is available from the supervising teacher or administrator. Personnel will follow the
24 manufacturer's instructions for all cleaning and disinfection products.

25
26 The District will provide EPA-registered disposable wipes to teachers, staff, and secondary
27 students so that commonly used surfaces (e.g., keyboards, desks, remote controls) can be wiped
28 down before use. Supervising teacher or administrators are required to ensure adequate supplies
29 to support cleaning and disinfection practices.

30 31 32 Student Arrival

33
34 Hand hygiene stations will be available at the entrance of any school building, so that children
35 can clean their hands before they enter. If a sink with soap and water is not available, the School
36 District will provide hand sanitizer with at least 60% alcohol. Hand sanitizer will be kept out of
37 elementary students' reach and student use will be supervised by staff.

38
39 A District employee will greet children outside the school as they arrive to ensure orderly
40 compliance with the provisions of this policy.

41 42 43 Temperature Screening

44
45 Designated School District staff are authorized to test the temperature of students with an
46 approved non-contact or touchless temperature reader. Students who have a fever or are

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4 exhibiting other signs of illness must be isolated in a designated area until such time as parents or
5 caregiver may arrive at the school to retrieve the ill student. All surfaces and areas should be
6 thoroughly cleaned and disinfected once the student has vacated the area by staff utilizing safety
7 measures in accordance with state and/or local health standards as applicable.
8
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10 When administering a temperature check on a possibly ill student, designated staff members will
11 utilize available physical barriers and personal protective equipment to eliminate or minimize
12 exposures due to close contact to a child who has symptoms during screening
13
14

15 Healthy Hand Hygiene Behavior

16
17 All students, staff, and others present in the any school building will engage in hand hygiene at
18 the following times, which include but are not limited to:

- 19 • Arrival to the facility and after breaks
- 20 • Before and after preparing, eating, or handling food or drinks
- 21 • Before and after administering medication or screening temperature
- 22 • After coming in contact with bodily fluid
- 23 • After recess
- 24 • After handling garbage
- 25 • After assisting students with handwashing
- 26 • After use of the restroom

27
28 Hand hygiene includes but is not limited to washing hands with soap and water for at least 20
29 seconds. If hands are not visibly dirty, alcohol-based hand sanitizers with at least 60% alcohol
30 can be used if soap and water are not readily available.
31

32 Staff members will supervise children when they use hand sanitizer and soap to prevent
33 ingestion.
34

35 Staff members will place grade level appropriate posters describing handwashing steps near
36 sinks.
37
38

39 Vulnerable Individuals

40
41 Vulnerable individuals (defined by the Centers for Disease Control at the time of this policy's
42 adoption as those age 65 or older or those with serious underlying health conditions, including
43 high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune
44 system is compromised such as by chemotherapy for cancer and other conditions requiring such
45 therapy) are authorized to talk to their healthcare provider to assess their risk and to determine if
46 they should telework during the period of declared public health emergency.

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4 Employees who have documented high risk designation from a medical provider are entitled to
5 reasonable accommodation within the meaning of that term in accordance with the Americans
6 with Disabilities Act and Section 504 as outlined in District Policy 5002. These accommodations
7 may include but are not limited to teleworking in accordance with a work plan developed in
8 coordination with and authorized by the supervising teacher, administrator or other designated
9 supervisor. Such employees may also be eligible for available leave in accordance with the
10 applicable policy or master agreement provision.
11

12 13 Food Preparation and Meal Service

14
15 Facilities must comply with all applicable federal, state, and local regulations and guidance
16 related to safe preparation of food.
17

18 Sinks used for food preparation must not be used for any other purposes.
19

20 Staff and students will wash their hands in accordance with this policy.
21
22

23 Transportation Services

24
25 The Board of Trustees authorizes the transportation of eligible transportees to and from the
26 school facility in a manner consistent with the protocols established in this policy. The
27 transportation director and school bus drivers will clean and disinfect each seat on each bus after
28 each use.
29

30 31 Public Awareness

32
33 The School District will communicate with parents, citizens, and other necessary stakeholders
34 about the protocols established in this policy and the steps taken to implement the protocols
35 through all available and reasonable means.
36

37 38 Confidentiality

39
40 This policy in no way limits or adjusts the School District's obligations to honor staff and student
41 privacy rights. All applicable district policies and handbook provision governing confidentiality
42 of student and staff medical information remain in full effect.
43

44 45 Transfer of Funds for Safety Purposes

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5 The Board of Trustees may transfer state or local revenue from any budgeted or non-budgeted
6 fund, other than the debt service fund or retirement fund, to its building reserve fund in an
7 amount not to exceed the school district's estimated costs of improvements to school and student
8 safety and security to implement this policy in accordance with District Policy 1006FE.
9

10
11 Legal Reference: Governor Directive implementing Executive Orders 2-2020 and 3-2020 –
12 Face Coverings - August 12, 2020.

13
14 Cross Reference: Policy 1901 – School District Policy and Procedures
15 Policy 1906 - Student Services and Instructional Delivery
16
17 Policy 1907 – Transportation Services
18 Policy 1006FE – Transfer of Funds for Safety Purposes
19 Policy 3410 – Student examination and screenings
20 Policy 3417 – Communicable Diseases
21 Policy 3431 – Emergency Treatment
22 Policy 1911 - Personnel Use of Leave
23 Policy 1910 – Human Resources and Personnel
24 Policy 4120 - Public Relations
25 Policy 5002 – Accommodating Individuals with Disabilities
26 Policy 5130 – Staff Health
27 Policy 5230 - Prevention of Disease Transmission
28 Policy 6110 – Superintendent Authority
29 Policy 6122 - Delegation of Authority
30

31
32 Policy History:
33 Adopted on: 8/20/2020
34 Reviewed on:
35 Revised on:
36 Terminated on:

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Attorneys for Defendants

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

STAND UP MONTANA, a Montana non-profit corporation; JASMINE ALBERINO, TIMOTHY ALBERINO, VICTORIA BENTLEY, DAVID DICKEY, WESLEY GILBERT, KATIE GILBERT, KIERSTEN GLOER, RICHARD JORGENSON, STEPHEN PRUIETT, LINDSEY PRUIETT, ANGELA MARSHALL, SEAN LITTLEJHOHN and KENTON SAWDY,

Plaintiffs,

vs.

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

Defendants.

Cause No. DV-21-975

AFFIDAVIT OF DARREN L. STRAUCH

STATE OF MONTANA)
 :SS.
County of Gallatin)

Darren L. Strauch, being first duly sworn, states as follows:

1. I am the Superintendent of Monforton School District No. 27 (“the District”).

I am in my sixteenth year of being a superintendent. I recently began my tenth year as superintendent for the District. I hold a Class Three Administrative License with a superintendent endorsement in Montana.

2. The District has an enrollment of 677 students in grades kindergarten through 8th grade. The District has approximately 80 full-time and part-time employees. The District operates an elementary school and a middle school.

3. District students are separated into two buildings on the campus – the elementary building houses kindergarten through grade four classes and the middle school building houses grades five through eight.

4. During the 2020-2021 school year, the District remained open for in-person instruction five days a week during the school year as was planned in the District’s calendar. The District also offered a remote learning option for students. These decisions were made after District administrators held listening sessions for staff members and parents before the start of the 2020-21 school year. The District also sent out two surveys to community members and staff members to gather feedback during the 2020-21 school year.

5. Students, staff members, and visitors were required to wear face coverings in district facilities during the 2020-21 school year.

6. During the 2020-21 school year, in addition to masking, the District used a cohort model for learning which limited interaction of students between classes and grades. Students ate lunch in their classrooms, and there was a combination of digital and live presentation of lessons. Students had limited opportunity to participate in physical education, art, music, and other elective courses.

7. For the 2021-22 school year, the District has adopted a re-opening plan for full-time, in-person instruction for District students five days per week. The District intended to operate school as “normal” as possible that allows for increased student interaction. Elementary students are able to access “specials” (i.e., physical education, music, art), and middle school students have access to elective courses.

8. On June 22, 2021, the District’s Board of Trustees voted to transition to optional face coverings for staff members, students, and visitors.

9. On August 10, 2021, the Board of Trustees discussed options for face coverings for the 2021-22 school year. It heard public comment which favored optional face coverings by those in attendance as well as reviewed information provided by District administrators and observations from the previous school year. The Board of Trustees approved my recommendation on August 17, 2021,

that face coverings would be optional in district facilities for students, staff members, and visitors.

10. In making this recommendation, District administrators reviewed Gallatin City-County Health Department surveillance reports and considered input from community members and staff members as well as neighboring district re-opening plans. District administrators also reviewed recommendations from the Centers for Disease Control (CDC), Montana Medical Association, American Academy of Pediatrics (AAP), and American Medical Association. Recommendations from Governor Greg Gianforte and State Superintendent of Public Instruction Elsie Arntzen and potential impacts of legislation enacted during the 2021 Montana Legislative Session were considered by administrators.

11. The 2021-22 school year started on August 26, 2021.

12. I observed approximately 20-25% of middle school students wore face coverings on the first day of school; however, this decreased to less than 10% within two days. Similarly, I observed there was a decrease amongst students in the elementary school in wearing face coverings after school started. At the start of school, I observed approximately a quarter of elementary students wore masks. Within two days, that decreased to approximately 20% of elementary students.

13. On September 1, 2021, only days after school started, District administration made the decision to move all sixth and seventh grade students, one classroom of

second grade students, and one classroom of fifth grade students to remote learning, temporarily shutting down in-person learning for these students. The students in fifth, sixth, and seventh grades engaged in remote learning until September 13, 2021; the second-grade students returned to in-person instruction on September 6, 2021.

14. The District made this decision because it was informed there were seven individuals (students and staff members) in the middle school who had tested positive for COVID-19. There were several additional students who left during the school day due to exhibiting COVID-19 symptoms.

15. The District also lacked adequate staffing to ensure continued in-person instruction for these students due to the need for quarantining and isolation. The District does not have available support staff, including substitutes and paraprofessionals, who can supervise classrooms even if the teacher is able to provide instruction to students virtually from home.

16. In total, nearly 150 sixth and seventh grade students were impacted by the need to shut down in-person instruction for the two-week period. There were nearly 30 students in fifth grade who were impacted by remote learning for the two-week period, and there were almost 20 second grade students who could not attend in-person instruction for several days.

17. Based upon the impact of these closures on staff members and students and the District's goal of providing in-person instruction to students five days per week, I recommended the Board of Trustees convene an emergency board meeting to consider re-instituting a face covering mandate for students, staff members, and visitors in district facilities.

18. I made the recommendation to the Board of Trustees to re-institute a requirement for face coverings in district facilities at a meeting on September 7, 2021.

19. I made this recommendation because a face covering mandate would provide an added layer to mitigate the risks of COVID-19 for students and staff members. The Gallatin City-County Health Department and CDC recommended the use of face coverings. Additionally, by requiring face coverings, the Gallatin City-County Health Department and CDC advised that contact tracing amongst students could be reduced to a radius of those other individuals within three feet instead of the six feet recommended where no face coverings were worn.

<https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>. I also was concerned about the lack of available support staffing that would enable the District to provide in-person instruction if the teacher was quarantined or isolated without additional mitigation strategies.

20. At its September 7, 2021 meeting, I recommended that the Board adopt the option in Policy 1905 that would require face coverings in district facilities. The Board considered public comment. Instead, after a motion to continue with optional face coverings failed, a majority of the Board of Trustees approved a face covering requirement at its September 7, 2021.

21. The Board adopted the requirement that all staff, volunteers, visitors, and school-aged students wear a face covering, mask, or face shield while present in any school building, regardless of vaccination status. Face coverings are also required for any outdoor school activity with fifty (50) or more people where physical distancing is not possible or is not observed. Students, staff, volunteers, and visitors are 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, mask, or face shield due to a medical or developmental condition.

Staff members are permitted to remove their face coverings if students and members of the public are not present, they are at their individual workstation, and social distancing of at least six feet is maintained with other staff members.

22. The District considered local data on COVID-19 transmission issued by the Gallatin City-County Health Department. <https://www.healthygallatin.org/coronavirus-covid-19/>. This data includes the 7-day rolling average of cases as well as local hospital capacity. The District also reviewed regular media reports regarding the impacts of COVID-19 on school districts throughout Montana.

23. The surveillance data from the Gallatin City-County Health Department on September 3, 2021, and September 10, 2021, indicated that the District's middle school ranked second in Gallatin County for the numbers of positive cases behind only Montana State University. <https://www.healthygallatin.org/about-us/press-releases/>. Gallatin County also moved from a "substantial" transmission rate to "high" transmission from the time the optional masking rule was adopted on June 22, 2021, to September 2021. The seven-day average of positive cases had increased in that same time period from moderate to high as well.

24. By requiring the use of face coverings, the District has been able to avoid the use of cohorts, which limits the ability of students to interact with one another and

allows students and staff members to have a varied and more “normal” school experience. It also has reduced the number of teachers being required to quarantine or isolate away from their classrooms.

25. The District has and continues to consider accommodations for students with disabilities, which may include medical conditions, with respect to face coverings.

26. On September 14, 2021, the Board of Trustees upheld the mandatory face covering option in Policy 1905. The Board of Trustees will be considering metrics for reconsidering its masking policy at its October 12, 2021, meeting.

27. District administrators continue to monitor local COVID-19 data published by the Gallatin City-County Health Department, which includes the seven-day rolling average of transmission, local hospital capacity, and a weekly surveillance report that tracks community and school-related data within Gallatin County. At this time, the community rate of transmission of COVID-19 remains high in Gallatin County.

28. Based upon my training and experience, it is my professional opinion that COVID-19 has had a substantial impact on students. The District made concerted efforts to return to in-person instruction for the 2020-21 school year because it is more beneficial and impactful for students. Due to the District’s implementation of mitigation strategies and community support, there was limited spread of COVID-19 within the school community during the 2020-21 school year.

However, the Delta variant of COVID-19 has been identified as being more infectious and transmissible. <https://www.nytimes.com/2021/08/27/health/delta-variant-hospitalization-risk.html>.

29. The District is striving to maintain a safe environment for all of its students. While the District cannot eliminate or end COVID-19, it can implement mitigation strategies, including masking, to keep students safer while at school.

30. Based upon my training and experience, it is my professional opinion there was a substantial disruption of the District's operations when it did not have a face covering mandate in effect at the start of the 2021-22 school year and students in four grades were unable to access in-person instruction for several days due to the transmission of COVID-19 within the schools.

31. Based upon my training and experience, since adopting the face covering requirement, the educational process has been more consistent, and students have been able to remain in the classroom with less disruption. District administrators have been able to limit those impacted by contact tracing because they are looking at a smaller radius (only those located within three feet of the infected student). There has also been less of an impact on teachers being exposed.

32. Based upon my training and experience, having a face covering requirement at this time is a necessary mitigation strategy to support the District's plan of providing full-time, in-person instruction to all students.

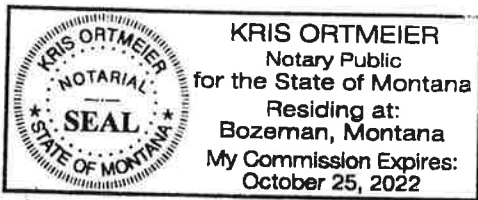
Dated this 29th day of September, 2021.

Darren L. Strauch

Darren L. Strauch

STATE OF MONTANA)
 :SS.
County of Gallatin)

SUBSCRIBE AND SWORN TO before me this 29th day of September, 2021, by Darren L. Strauch.



Kris Ortmeier

Notary Public

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Quentin M. Rhoades
State Bar No. 3969
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430 Ryman Street
Missoula, Montana 59802
Telephone: (406) 721-9700
Telefax: (406) 728-5838
qmr@montanalawyer.com

Pro Querente

**MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY**

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

Plaintiffs,

vs.

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

Defendants.

Cause No. DV-21-975B

Department No. 2
Hon. Rienne H. McElyea

***NOTICE OF SUPPLEMENTAL
AUTHORITY AND
TESTIMONY***

Plaintiffs, Stand Up Montana, Inc., Jasmine Alberino, Timothy Alberino, Victoria Bentley, David Dickey, Wesley Gilbert, Katie Gilbert, Kiersten Glover, Richard Jorgenson, Stephen Pruiett, Lindsey Pruiett, Angela Marshall, Sean Littlejohn, and Kenton Sawdy (the Parents) hereby give notice of the filing of the following:

1. In response to the Defendant's notice of supplemental authority, including a court order which references a CDC press release of September 24, 2021, the Parents submit the attached Declaration of Rodney X. Sturdivant, Ph.D., dated September 27, 2021.

2. In addition, the Parents submit the following:

A. Mont. Code Ann. § 40-6-XXX, which came into effect on Friday, October 1, 2021. It provides an independent basis for entry of a preliminary injunction.

B. Affidavit of Dr. Kevin Scott Hahn, D.D.S., dated September 28, 2021, documenting dental complications caused by masking children.

C. Affidavit of ASHA Certified Speech Language Pathologist Maija Cutler Hahn, M.S., CCP-SLP, dated September 28, 2021, attesting to the developmental, hygiene, and other educational barriers caused for students by forced masking.

DATED this 4th day of October 2021.

Respectfully Submitted,
RHOADES, SIEFERT & ERICKSON PLLC

By: /s/Quentin M. Rhoades
Quentin M. Rhoades
Pro Querente

GALLATIN COUNTY CLERK
OF DISTRICT COURT
SANDY ERHARDT

2021 OCT 20 AM 10:37

FILED

BY EL DEPUTY

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

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

Plaintiffs,

v.

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

Defendants.

Cause No. DV-21-975B

FINDINGS OF FACT AND
CONCLUSIONS OF LAW and
ORDER

On October 5, 2021, the Court held a hearing on Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs appeared by their counsel Quentin Rhoades, and Defendants were represented by Elizabeth Kaleva and Kevin Twidwell. The parties did not call any witnesses but provided oral argument on the legal issues in this matter. The Court has considered those arguments as well as the briefing and affidavits submitted by the parties and makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Plaintiffs include Stand Up Montana, a non-profit corporation, and 15 individual parents of minor students who attend Defendant School Districts.
2. Defendants are three Gallatin County School Districts, namely Bozeman School District No. 7 (BSD7), Big Sky School District No. 72, and Monforton School District No. 27 (“School Districts”).
3. Plaintiffs’ Complaint alleges mask mandates for students imposed by Defendants are not scientifically justified or effective and infringe upon parental and/or student rights to due process, equal protection, privacy, human dignity, freedom of expression, and create a cause of action under SB 400.
4. Defendants contend their policies are supported by scientific research and are not in violation of Plaintiffs’ constitutional rights.
5. BSD7 began the 2020-2021 school year in a hybrid model with all students attending in-person classes part-time and attending remotely part-time. Pre-kindergarten through fifth grade students moved to full-time in-person learning on November 2, 2020. Sixth grade through eighth grade students moved to full-time in-person learning on February 1, 2021. Highschool students remained in a modified hybrid schedule with four days of in-person learning and one day of remote learning beginning January 27, 2021.
6. BSD7 required masks for students, staff, and visitors in district facilities for the 2020-2021 school year. The masking policy expired in June 2021 when BSD7’s declaration of emergency ended.

7. In December 2020, BSD7 established a Covid advisory task force that monitored health data, CDC guidelines, Gallatin County health data and specific BSD7 COVID 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, the Board of Trustees approved masking Policy No. 1905 on August 23, 2021.

8. The rule allows the superintendent to establish or lift mask requirements based on multi-week trends in associated grade band COVID-19 transmission using the “high” rate of transmission as defined by the CDC. The policy continues to require face coverings for all students, staff and visitors. The policy provides exemptions for masks when:

- a. Consuming food or drink;
- b. Engaging in strenuous physical activity;
- c. Communicating with someone who is hearing impaired;
- d. Identifying themselves;
- e. Receiving medical attention;
- f. Precluded from safely using a face covering due to a medical or developmental condition;
- g. Giving a speech or class presentation or course lesson; and
- h. Conducting a performance if there is at least six feet of distance from the gathering, class or audience.

9. In making the recommendations to the BSD7 Trustees, the task force considered and provided the following to the Trustees:

- a. Data collected and maintained by BSD7, including but not limited to COVID-19 transmission data;
- b. Data collected and maintained by the Gallatin County Health Department regarding community COVID-19 transmission as well as state-wide COVID-19 transmission through the Montana Department of Public Health and Human Services;
- c. Guidance issued by the CDC regarding masking for K-12 schools;

- d. Guidance issued by the American Academy of Pediatrics (AAP);
 - e. Recommendation by the Montana Chapter of the American Academy of Pediatrics for universal masking for students and staff members dated July 26, 2021;
 - f. Letter from Governor Greg Gianforte issued on July 28, 2021;
 - g. 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.”¹;
 - h. Letter from Governor Gianforte and Montana Superintendent of Public Instruction Elsie Arntzen on August 6, 2021;
 - i. Guidance received from Gallatin City-County Health Department Health Officer Lori Christenson and local pediatrician, Dr. Kristen Day:
10. The BSD7 Trustees and Superintendent received and considered hours of public comment and received hundreds of emails regarding the mask policy.
11. The Big Sky School District began the 2020-2021 school year in a hybrid model with all students attending in-person classes part-time and attending remotely part-time. By the end of the 2020-2021 school year, all students in the district were able to attend in-person classes full-time.
12. The Big Sky School District required all students, staff, and visitor to wear masks in its facilities for the 2020-2021 school year.
13. For the 2021-2022 school year, the Superintendent of the Big Sky School District 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 comments made during the meeting as well as comments provided by email prior to the meeting. The Board adopted a revised Policy 1905 at that meeting.
14. Under the Big Sky Policy, all staff members, volunteers, visitors, and students aged five (5) and older are required to wear a disposable or reusable mask that covers the nose and mouth

¹ <https://sites.ed.gov/roadmap/landmark1/>

to protect colleagues and peers while present in any school building. Masking is not required when an individual is:

- a. Consuming food or drink;
- b. Engaged in physical activity;
- c. Communicating with someone who is hearing impaired;
- d. Receiving medical attention; or
- e. Has a medical or developmental condition precluding use of a mask.

15. In making the recommendation to the Trustees, the Superintendent considered the 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 masking.

16. The Monforton School District was open for full-time, in-person instruction for the entire 2020-2021 school year.

17. Students, staff, and visitors were required to wear masks for the 2020-2021 school year.

18. For the 2021-2022 school year, the Monforton School District adopted a re-opening plan for full-time, in-person instruction five days per week. The Board of Trustees voted to transition to an optional face covering policy for staff, students, and visitors after hearing public comment that favored optional face covering.

19. The school year began on August 26, 2021, and the Superintendent observed that about 20-25 percent of the middle school students wore face coverings on the first day of school, but this decreased to less than 10 percent within two days. He observed a similar trend for the elementary school students.

20. Seven individuals (students and staff) in the middle school tested positive for COVID-19. In addition, several additional students left during the school day exhibiting COVID-19 symptoms.

21. On September 1, 2021, the District decided to move all sixth and seventh grade students, one classroom of second grade students, and one classroom of fifth grade students to remote learning, temporarily shutting down in-person learning for these students. The second grade students returned to in person instruction on Sept. 6, 2021. The students in fifth, sixth, and seventh grades engaged in remote learning until Sept 13, 2021.

22. The District lacked adequate staffing to continue in-person instruction. In total, nearly 150 sixth and seventh grade students were impacted by the need to shut down the in-person instruction for the two-week period. Thirty students in fifth grade were impacted by remote learning and 20 second grade students could not attend in-person instruction for several days.

23. 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. In making the recommendation to the Trustees, the Superintendent considered:

- a. A face covering mandate would provide an added layer to mitigate the risks of COVID-19 for students and staff members;
- b. The Gallatin City-County Health Department and CDC recommended the use of face coverings;
- c. By requiring face coverings, the Gallatin City-County Health Department and CDC advised that contact tracing among students could be reduced to a radius of those other individuals within three feet instead of the six feet recommended where no face coverings were worn².
- d. Concern about the lack of available support staffing that would enable the District to provide in-person instruction if the teacher was quarantined or isolated without additional mitigation strategies;
- e. Local data on COVID-19 transmission issued by the Gallatin City-County Health Department. The District also reviewed regular media reports regarding the impacts of COVID-19 on school districts throughout Montana;
- f. The surveillance data from the Gallatin City-County Health Department on September 3, 2021 and September 10, 2021, indicated that the District's middle

² <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

school ranked second in Gallatin County for the numbers of positive cases behind only Montana State University.³

- g. Gallatin County had also moved from “substantial” transmission to “high” transmission from the time the optional masking rule was adopted on August 17, 2021, to September 2021. The seven-day average of positive cases had increased in that same period from moderate to high as well.

24. The Monforton Board of Trustees adopted a face covering requirement at its September 7, 2021, meeting after hearing from the public.

25. The Board adopted the requirement that all staff, volunteers, visitors, and school-aged students wear a face covering, mask, or face shield while present in any school building, regardless of vaccination status. Face coverings are also required for any outdoor school activity with fifty (50) or more people where physical distancing is not possible or is not observed.

Students, staff, volunteers, and visitors are not required to wear face coverings when:

- a. Consuming food or drink;
- b. Engaged in strenuous physical activity;
- c. 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;
- d. Communicating with someone who is hearing impaired;
- e. Identifying themselves;
- f. Receiving medical attention; or
- g. Precluded from safely using a face covering, mask, or face shield due to a medical or developmental condition.

26. Under the Monforton policy, staff members are permitted to remove their face coverings if students and members of the public are not present, they are at their individual workstation, and social distancing of at least six feet is maintained with other staff members.

27. The School Districts relied on CDC’s guidance which provides:

Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority . . . Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor

³ <https://www.healthygallatin.org/about-us/press-releases/>

masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.⁴

28. The School Districts relied on the AAP which recommends, “[a]ll students older than 2 years and all school staff should wear face masks at school (unless medical or developmental conditions prohibit use).” The AAP 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;”⁵

29. The Court takes judicial notice that the number of COVID-19 cases and hospitalizations in Gallatin County have risen significantly in the past few months and Gallatin County health officials recommend that everyone wear a face mask while in public indoor settings, regardless of vaccination status⁶.

30. The Court takes judicial notice that in late September the CDC issued a statement titled “Studies Show More COVID-19 Cases in Areas Without School Masking Policies” that summarized three studies that compared COVID-19 transmission rates between schools that had mask policies and those that do not.⁷ “These studies found that school districts without a universal masking policy in place were more likely to have COVID-19 outbreaks. Nationwide, counties without masking requirements saw the number of pediatric COVID-19 cases increase nearly twice as quickly during this same period.” *Id.*

These studies continue to demonstrate the importance and effectiveness of CDC’s Guidance for COVID-19 Prevention in K-12 Schools to help districts ensure safer in-person learning and stop the spread of COVID-19. Promoting vaccination of eligible persons, mask wearing, and screening testing are all proven methods to continue to work towards the end of the COVID-19 pandemic.

⁴ K-12 Schools, Key Takeaways, Center for Disease Control and Prevention (August 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

⁵ <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/>.

⁶ <https://www.healthygallatin.org/coronavirus-covid-19/>

⁷ <https://www.cdc.gov/media/releases/2021/p0924-school-masking.html>

Id.

31. The Court takes judicial notice that in late September the Gallatin City County Health Department reported that local school districts without mask requirements have experienced many more positive COVID-19 cases compared to those with mask requirements. ⁸

32. The Court takes judicial notice that on October 1, 2021, the Hon. Jason Marks, District Judge, Fourth Judicial District, issued an order denying a preliminary injunction motion in which Plaintiff Stand Up Montana and parents in Missoula brought the same claims as are present in this current action.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter.
2. Section 27-19-201, MCA, provides:

An injunction order may be granted in the following cases:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
- (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;
- (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

⁸ <https://www.youtube.com/watch?v=FyK4AdvZo9g> (at 8:30)

3. Preliminary injunctions may be issued by this Court when a party establishes any one of the five subsections set forth in § 27-19-201, MCA. Findings which satisfy only one subsection are sufficient to support a preliminary injunction. *Sweet Grass Farms, Ltd. v. Board of County Com'rs of Sweet Grass County*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825.

4. It appears Plaintiffs are seeking a preliminary injunction pursuant to subsections (1) and (2) of § 27-19-201, MCA.

5. An applicant for a preliminary injunction must make a prima facie showing they will suffer a harm or injury under either the “great or irreparable” injury standard of § 27-19-201(2), MCA, or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA. *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, 437 P.3d 142.

6. “For purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386.

7. “[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*, ¶ 14. 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). “Status quo” has been defined as “the last actual, peaceable, noncontested condition which preceded the pending controversy.” *Sweet Grass Farms*, ¶ 28 (quotation and citations omitted).

A. Right to Privacy

8. Plaintiffs rely on the Montana Supreme Court decision in *Armstrong* in support of their argument that mandatory masking policies infringe on their right of privacy by taking away their ability to reject medical treatment. In *Armstrong*, the Montana Supreme 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.” 1999 MT 261, ¶ 14, 296 Mont. 361, 367, 989 P.2d 364, 370 (declaring unconstitutional statutes prohibiting a physician assistant-certified from performing a pre-viability abortion).

9. For *Armstrong* to be applicable and to find that Plaintiffs’ privacy rights have been implicated by the School Districts masking policies, it must first be determined whether masking is a medical treatment. The Court finds it is not.

10. Plaintiffs offer no persuasive support for the argument that wearing a face covering constitutes a deprivation of their right to privacy by taking away their ability to reject medical treatment. Instead, in the emerging case law surrounding face covering requirements, courts have specifically and repeatedly held that requiring masks does not constitute medical treatment. *E.g.*, *Cangelosi v. Sizzling Caesars LLC*, No. 20-2301, 2021 U.S. Dist. LEXIS 16131, at *5, 2021 WL 291263 (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, 2021 WL 843175 (S.D. Cal. Mar. 4, 2021) (requiring an individual to wear a mask “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 mask qualifies as ‘medical treatment’”); *Machovec v.*

Palm Beach Cty., 310 So. 3d 941, (Fla. 4th DCA 2021) (Requiring facial coverings in public settings is akin to the State’s prohibiting individuals from smoking in enclosed indoor workplaces...and mask mandate did not implicate the constitutional right to refuse medical treatment.).

11. Plaintiffs argue that face coverings are “medical devices” under the recently enacted changes to Montana’s criminal trespass law. § 45-6-203 (2021), MCA. However, the recently enacted Montana COVID-19 liability law defines face coverings as personal protective equipment, not a medical device. Senate Bill 65 states in pertinent part⁹, “(5) ‘Personal protective equipment’ includes protective clothing...face masks...” The definition in the COVID-19 specific statute controls here. Face coverings are personal protective equipment, not medical devices.

12. The cases Plaintiffs rely upon, including *Armstrong*, address individual health care decisions in circumstances not present here. In this case, the face covering rules were adopted as a public health measure as part of a multi-layered approach – which also includes social distancing, frequent hand washing, cleaning and disinfecting surfaces, and well-ventilated spaces¹⁰– to mitigate the spread of COVID-19 and to maintain in-person instruction.

13. Plaintiffs have not made a prima facie case that their privacy rights are being violated.

B. Human Dignity

14. 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.

⁹ <https://leg.mt.gov/bills/2021/billpdf/SB0065.pdf>

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

15. Plaintiffs contend their constitutional right to human dignity is violated by the imposition of the School Districts' mask mandates.

16. Plaintiffs cite *Walker* in support of their position. In *Walker*, an inmate at the Montana State Prison was housed in a cell with blood, feces, and vomit, and was served food through the same port that toilet cleaning supplies were provided. He was stripped naked and given only a small blanket for warmth, denied prescribed medication and hot food. *See Id.* ¶¶ 77-79. The School Districts' masking policies do not rise to a constitutional affront to their human dignity.

17. Plaintiffs have not made a prima facie case that their human dignity rights are implicated by the face covering rules.

C. Senate Bill 400

18. Senate Bill 400 (SB 400), which went into effect on October 1, 2021, provides 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.

19. Plaintiffs contend that the School Districts' masking policies interfere with their right to direct their children's education, health care, and mental health.

20. As SB 400 is a new law and the language is incredibly broad, the Court reviewed the law's legislative history to provide guidance as to its intent. Based on the legislative history of SB 400, the purpose of SB 400 was to create a cause of action for parents who may be involved with the Department of Public Health and Human Services, Child Protective Services Division. In introducing SB 400 to the Senate Judiciary Committee, Senator Theresa Manzella, the bill's primary sponsor, stated the purpose of the bill 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, 67th Leg. (April 1, 2021 at 9:54:33). Plaintiffs’ action here is not the type of action originally contemplated by the legislature in enacting SB 400.

21. Montana is unique in that the Montana 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.

22. The school boards’ right of local control is set forth in § 20-9-309(2)(h), MCA, which requires the provision of a basic system of free quality public schools:

[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.

23. School boards have many duties, including health related requirements for its students as set forth in § 20-3-324, MCA, and Admin. R. Mont. 10.55.701(2)(s) (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. § 20-5-201(1)(a), MCA.

24. The Montana Constitution provides the School Districts with the authority to determine what health and safety measures are appropriate in their schools. As U.S. Chief Justice Roberts recently stated in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), the Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the states “to guard and protect.” *Id.* at 1613. When officials “undertake to act in areas fraught with medical and scientific uncertainties,” their latitude “must be

especially broad”... and should not be subject to second-guessing by the judiciary that lacks the background, competence, and expertise to assess public health. *Id.* at 1613–14.

25. SB 400 does not abrogate the School Districts’ constitutional and statutory authority.

26. Even if SB 400’s heightened strict scrutiny test applies to school face covering rules, the School Districts’ face covering rules satisfy that standard. Plaintiffs concede that controlling a pandemic and maintaining in-person schooling are compelling governmental interests. Thus, the only dispute is whether the School Districts’ masking policies are narrowly tailored to this interest. The Court finds they are.

27. Students, staff, and visitors to the School Districts’ facilities are required to wear masks while indoors. However, there are a number of exceptions where masks are not required to be worn, including for those who have a medical or developmental reason which precludes them from safely wearing masks. Further, the School Districts are continuing to monitor the Covid-19 metrics within Gallatin County and their respective districts, and their policies are subject to review and amendment based on changes in the metrics. As far as mitigating the risk of spreading Covid-19, wearing masks creates minimal interference to children’s education compared to fully remote learning or even a hybrid education model of learning. While Plaintiffs challenge the science and efficacy of requiring students to mask, Plaintiffs’ position is not uncontested. In drafting and implementing the face covering policies, the School Districts considered the recommendations of the CDC, the AAP, and the Gallatin City/County Health Department. The School Districts’ policies are narrowly tailored, based on the recommendations of the CDC, the AAP, and the Gallatin City/County Health Department, to further the compelling state interest of controlling the spread of Covid-19 of keeping students in school.

D. Science/Irreparable Harm/Status Quo

28. Plaintiffs argue that the opinion of their statistician that masks do not work is unrebutted in the record and the Court is constrained to find that students are being harmed by the mask mandates because there is no nexus to the rule and the efficacy of masking.

29. The School Districts have demonstrated through the affidavits of the Superintendents that their decisions to implement face covering rules were based on recommendations from numerous reputable sources, including the Montana Medical Association, the CDC, the American Academy of Pediatrics, the Montana Chapter of the American Academy of Pediatrics. Further, the School Districts have presented recent CDC studies that concluded that pediatric Covid-19 cases rose 3.5 times faster in counties without school mask requirements than those with universal school masking. The Gallatin City County Health Department made similar findings and recently shared data demonstrating that area school districts without mask requirements have experienced more positive COVID-19 cases compared to districts with mask requirements. The Monforton School District experienced this first-hand. The District started the school year with an optional masking policy but quickly made masks mandatory after COVID-19 infections caused the schools to temporarily halt in-person instruction only days after school started.

30. While the loss of a constitutional right constitutes an irreparable harm, Plaintiffs have failed to demonstrate that they are likely to prevail on their constitutional challenges. Thus, as there is no finding of a constitutional violation, the alleged constitutional violations cannot form the basis of Plaintiffs' alleged irreparable harm.

31. As the Court has determined that Plaintiffs have failed to establish that they are likely to succeed on the merits of their constitutional challenges or that they will suffer irreparable harm if

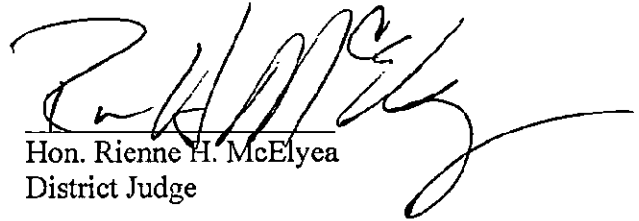
the masking policies remain in effect, the Court finds the status quo is continuing to allow the School Districts to set their policies, including masking policies.

ORDER

The Court finds that Plaintiffs have not met their burden of making a prima facie case of any constitutional violation or demonstrated a likelihood of irreparable harm in the absence of preliminary relief.

Plaintiffs' Motion for Preliminary Injunction is **DENIED**.

DATED this 20 day of October 2021.



Hon. Rienne H. McElyea
District Judge

c: Quentin M. Rhoades
Elizabeth A. Kaleva
Kevin A. Twidwell
Elizabeth A. O'Halloran

} emailed
10/20/21

IN THE SUPREME COURT OF THE
STATE OF MONTANA

Case No. DA _____

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

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

NOTICE OF APPEAL

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

Quentin M. Rhoades
RHOADES SIEFERT &
ERICKSON PLLC
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Missoula, Montana 59802

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For Appellants

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bohalloran@kalevalaw.com
For Appellees

NOTICE IS HEREBY GIVEN that Stand Up Montana, a Montana non-profit corporation; Jasmine Alberino, Timothy Alberino, Victoria Bentley, David Dickey, Wesley Gilbert, Katie Gilbert, Kiersten Glover, Richard Jorgenson, Stephen Pruiett, Lindsey Pruiett, Angela Marshall, Sean Littlejohn, and Kenton Sawdy, Plaintiffs in Cause Number DV 21-975 in the Eighteenth Judicial District of Gallatin County, hereby appeal to the Supreme Court of the State of Montana from the following Order:

Findings of Fact and Conclusions of Law and Order dated October 20, 2021; and any final and appealable judgments that may be entered related thereto, and all proceeding that led up to the foregoing.

THE APPELLANT FURTHER CERTIFIES:

1. This Appeal is not subject to the mediation process required by Mont. R. App. P. 7(2)(c);

2. This appeal is not an appeal from an order certified as final under Mont. R. Civ. P. 54(b);

3. A copy of the Notice of Appeal has been contemporaneously filed in the office of the Clerk of the District Court;

4. A copy of this Notice of Appeal will be served by mailing to the Clerk of District Court and to counsel for the Appellees, or to any Appellee appearing *Pro Se*, and to any Third-Party Defendant;

5. That all available transcripts of the proceedings in this cause have not been ordered from the court reporter contemporaneously with the filing of this notice of appeal; and

6. The required filing fee for this Notice of Appeal has been paid through the Montana Courts Electronic Filing system.

DATED this 28th day of October 2021.

Respectfully Submitted,
RHOADES SIEFERT & ERICKSON PLLC

By: /s/ Quentin M. Rhoades
Quentin M. Rhoades
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October 2021, I have filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Gallatin County
Clerk of District Court
615 S. 16th Ave.
Bozeman, MT 59715

Elizabeth A. Kaleva
Kevin A. Twidwell
Elizabeth A. O'Halloran
Kaleva Law Offices
1911 S. Higgins Ave.
P.O. Box 9312
Missoula, MT 59807

/s/ Quentin M. Rhoades
Quentin M. Rhoades

GALLATIN COUNTY CLERK
OF DISTRICT COURT
SANDY ERHARDT

2021 OCT 20 AM 10:37

FILED

BY EL DEPUTY

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

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

Plaintiffs,

v.

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

Defendants.

Cause No. DV-21-975B

FINDINGS OF FACT AND
CONCLUSIONS OF LAW and
ORDER

On October 5, 2021, the Court held a hearing on Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs appeared by their counsel Quentin Rhoades, and Defendants were represented by Elizabeth Kaleva and Kevin Twidwell. The parties did not call any witnesses but provided oral argument on the legal issues in this matter. The Court has considered those arguments as well as the briefing and affidavits submitted by the parties and makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Plaintiffs include Stand Up Montana, a non-profit corporation, and 15 individual parents of minor students who attend Defendant School Districts.
2. Defendants are three Gallatin County School Districts, namely Bozeman School District No. 7 (BSD7), Big Sky School District No. 72, and Monforton School District No. 27 (“School Districts”).
3. Plaintiffs’ Complaint alleges mask mandates for students imposed by Defendants are not scientifically justified or effective and infringe upon parental and/or student rights to due process, equal protection, privacy, human dignity, freedom of expression, and create a cause of action under SB 400.
4. Defendants contend their policies are supported by scientific research and are not in violation of Plaintiffs’ constitutional rights.
5. BSD7 began the 2020-2021 school year in a hybrid model with all students attending in-person classes part-time and attending remotely part-time. Pre-kindergarten through fifth grade students moved to full-time in-person learning on November 2, 2020. Sixth grade through eighth grade students moved to full-time in-person learning on February 1, 2021. Highschool students remained in a modified hybrid schedule with four days of in-person learning and one day of remote learning beginning January 27, 2021.
6. BSD7 required masks for students, staff, and visitors in district facilities for the 2020-2021 school year. The masking policy expired in June 2021 when BSD7’s declaration of emergency ended.

7. In December 2020, BSD7 established a Covid advisory task force that monitored health data, CDC guidelines, Gallatin County health data and specific BSD7 COVID 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, the Board of Trustees approved masking Policy No. 1905 on August 23, 2021.

8. The rule allows the superintendent to establish or lift mask requirements based on multi-week trends in associated grade band COVID-19 transmission using the “high” rate of transmission as defined by the CDC. The policy continues to require face coverings for all students, staff and visitors. The policy provides exemptions for masks when:

- a. Consuming food or drink;
- b. Engaging in strenuous physical activity;
- c. Communicating with someone who is hearing impaired;
- d. Identifying themselves;
- e. Receiving medical attention;
- f. Precluded from safely using a face covering due to a medical or developmental condition;
- g. Giving a speech or class presentation or course lesson; and
- h. Conducting a performance if there is at least six feet of distance from the gathering, class or audience.

9. In making the recommendations to the BSD7 Trustees, the task force considered and provided the following to the Trustees:

- a. Data collected and maintained by BSD7, including but not limited to COVID-19 transmission data;
- b. Data collected and maintained by the Gallatin County Health Department regarding community COVID-19 transmission as well as state-wide COVID-19 transmission through the Montana Department of Public Health and Human Services;
- c. Guidance issued by the CDC regarding masking for K-12 schools;

- d. Guidance issued by the American Academy of Pediatrics (AAP);
 - e. Recommendation by the Montana Chapter of the American Academy of Pediatrics for universal masking for students and staff members dated July 26, 2021;
 - f. Letter from Governor Greg Gianforte issued on July 28, 2021;
 - g. 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.”¹;
 - h. Letter from Governor Gianforte and Montana Superintendent of Public Instruction Elsie Arntzen on August 6, 2021;
 - i. Guidance received from Gallatin City-County Health Department Health Officer Lori Christenson and local pediatrician, Dr. Kristen Day:
10. The BSD7 Trustees and Superintendent received and considered hours of public comment and received hundreds of emails regarding the mask policy.
11. The Big Sky School District began the 2020-2021 school year in a hybrid model with all students attending in-person classes part-time and attending remotely part-time. By the end of the 2020-2021 school year, all students in the district were able to attend in-person classes full-time.
12. The Big Sky School District required all students, staff, and visitor to wear masks in its facilities for the 2020-2021 school year.
13. For the 2021-2022 school year, the Superintendent of the Big Sky School District 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 comments made during the meeting as well as comments provided by email prior to the meeting. The Board adopted a revised Policy 1905 at that meeting.
14. Under the Big Sky Policy, all staff members, volunteers, visitors, and students aged five (5) and older are required to wear a disposable or reusable mask that covers the nose and mouth

¹ <https://sites.ed.gov/roadmap/landmark1/>

to protect colleagues and peers while present in any school building. Masking is not required when an individual is:

- a. Consuming food or drink;
- b. Engaged in physical activity;
- c. Communicating with someone who is hearing impaired;
- d. Receiving medical attention; or
- e. Has a medical or developmental condition precluding use of a mask.

15. In making the recommendation to the Trustees, the Superintendent considered the 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 masking.

16. The Monforton School District was open for full-time, in-person instruction for the entire 2020-2021 school year.

17. Students, staff, and visitors were required to wear masks for the 2020-2021 school year.

18. For the 2021-2022 school year, the Monforton School District adopted a re-opening plan for full-time, in-person instruction five days per week. The Board of Trustees voted to transition to an optional face covering policy for staff, students, and visitors after hearing public comment that favored optional face covering.

19. The school year began on August 26, 2021, and the Superintendent observed that about 20-25 percent of the middle school students wore face coverings on the first day of school, but this decreased to less than 10 percent within two days. He observed a similar trend for the elementary school students.

20. Seven individuals (students and staff) in the middle school tested positive for COVID-19. In addition, several additional students left during the school day exhibiting COVID-19 symptoms.

21. On September 1, 2021, the District decided to move all sixth and seventh grade students, one classroom of second grade students, and one classroom of fifth grade students to remote learning, temporarily shutting down in-person learning for these students. The second grade students returned to in person instruction on Sept. 6, 2021. The students in fifth, sixth, and seventh grades engaged in remote learning until Sept 13, 2021.

22. The District lacked adequate staffing to continue in-person instruction. In total, nearly 150 sixth and seventh grade students were impacted by the need to shut down the in-person instruction for the two-week period. Thirty students in fifth grade were impacted by remote learning and 20 second grade students could not attend in-person instruction for several days.

23. 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. In making the recommendation to the Trustees, the Superintendent considered:

- a. A face covering mandate would provide an added layer to mitigate the risks of COVID-19 for students and staff members;
- b. The Gallatin City-County Health Department and CDC recommended the use of face coverings;
- c. By requiring face coverings, the Gallatin City-County Health Department and CDC advised that contact tracing among students could be reduced to a radius of those other individuals within three feet instead of the six feet recommended where no face coverings were worn².
- d. Concern about the lack of available support staffing that would enable the District to provide in-person instruction if the teacher was quarantined or isolated without additional mitigation strategies;
- e. Local data on COVID-19 transmission issued by the Gallatin City-County Health Department. The District also reviewed regular media reports regarding the impacts of COVID-19 on school districts throughout Montana;
- f. The surveillance data from the Gallatin City-County Health Department on September 3, 2021 and September 10, 2021, indicated that the District's middle

² <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

school ranked second in Gallatin County for the numbers of positive cases behind only Montana State University.³

- g. Gallatin County had also moved from “substantial” transmission to “high” transmission from the time the optional masking rule was adopted on August 17, 2021, to September 2021. The seven-day average of positive cases had increased in that same period from moderate to high as well.

24. The Monforton Board of Trustees adopted a face covering requirement at its September 7, 2021, meeting after hearing from the public.

25. The Board adopted the requirement that all staff, volunteers, visitors, and school-aged students wear a face covering, mask, or face shield while present in any school building, regardless of vaccination status. Face coverings are also required for any outdoor school activity with fifty (50) or more people where physical distancing is not possible or is not observed.

Students, staff, volunteers, and visitors are not required to wear face coverings when:

- a. Consuming food or drink;
- b. Engaged in strenuous physical activity;
- c. 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;
- d. Communicating with someone who is hearing impaired;
- e. Identifying themselves;
- f. Receiving medical attention; or
- g. Precluded from safely using a face covering, mask, or face shield due to a medical or developmental condition.

26. Under the Monforton policy, staff members are permitted to remove their face coverings if students and members of the public are not present, they are at their individual workstation, and social distancing of at least six feet is maintained with other staff members.

27. The School Districts relied on CDC’s guidance which provides:

Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority . . . Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor

³ <https://www.healthygallatin.org/about-us/press-releases/>

masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.⁴

28. The School Districts relied on the AAP which recommends, “[a]ll students older than 2 years and all school staff should wear face masks at school (unless medical or developmental conditions prohibit use).” The AAP 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;”⁵

29. The Court takes judicial notice that the number of COVID-19 cases and hospitalizations in Gallatin County have risen significantly in the past few months and Gallatin County health officials recommend that everyone wear a face mask while in public indoor settings, regardless of vaccination status⁶.

30. The Court takes judicial notice that in late September the CDC issued a statement titled “Studies Show More COVID-19 Cases in Areas Without School Masking Policies” that summarized three studies that compared COVID-19 transmission rates between schools that had mask policies and those that do not.⁷ “These studies found that school districts without a universal masking policy in place were more likely to have COVID-19 outbreaks. Nationwide, counties without masking requirements saw the number of pediatric COVID-19 cases increase nearly twice as quickly during this same period.” *Id.*

These studies continue to demonstrate the importance and effectiveness of CDC’s Guidance for COVID-19 Prevention in K-12 Schools to help districts ensure safer in-person learning and stop the spread of COVID-19. Promoting vaccination of eligible persons, mask wearing, and screening testing are all proven methods to continue to work towards the end of the COVID-19 pandemic.

⁴ K-12 Schools, Key Takeaways, Center for Disease Control and Prevention (August 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

⁵ <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/>.

⁶ <https://www.healthygallatin.org/coronavirus-covid-19/>

⁷ <https://www.cdc.gov/media/releases/2021/p0924-school-masking.html>

Id.

31. The Court takes judicial notice that in late September the Gallatin City County Health Department reported that local school districts without mask requirements have experienced many more positive COVID-19 cases compared to those with mask requirements. ⁸

32. The Court takes judicial notice that on October 1, 2021, the Hon. Jason Marks, District Judge, Fourth Judicial District, issued an order denying a preliminary injunction motion in which Plaintiff Stand Up Montana and parents in Missoula brought the same claims as are present in this current action.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter.
2. Section 27-19-201, MCA, provides:

An injunction order may be granted in the following cases:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
- (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;
- (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

⁸ <https://www.youtube.com/watch?v=FyK4AdvZo9g> (at 8:30)

3. Preliminary injunctions may be issued by this Court when a party establishes any one of the five subsections set forth in § 27-19-201, MCA. Findings which satisfy only one subsection are sufficient to support a preliminary injunction. *Sweet Grass Farms, Ltd. v. Board of County Com'rs of Sweet Grass County*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825.

4. It appears Plaintiffs are seeking a preliminary injunction pursuant to subsections (1) and (2) of § 27-19-201, MCA.

5. An applicant for a preliminary injunction must make a prima facie showing they will suffer a harm or injury under either the “great or irreparable” injury standard of § 27-19-201(2), MCA, or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA. *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, 437 P.3d 142.

6. “For purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386.

7. “[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*, ¶ 14. 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). “Status quo” has been defined as “the last actual, peaceable, noncontested condition which preceded the pending controversy.” *Sweet Grass Farms*, ¶ 28 (quotation and citations omitted).

A. Right to Privacy

8. Plaintiffs rely on the Montana Supreme Court decision in *Armstrong* in support of their argument that mandatory masking policies infringe on their right of privacy by taking away their ability to reject medical treatment. In *Armstrong*, the Montana Supreme 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.” 1999 MT 261, ¶ 14, 296 Mont. 361, 367, 989 P.2d 364, 370 (declaring unconstitutional statutes prohibiting a physician assistant-certified from performing a pre-viability abortion).

9. For *Armstrong* to be applicable and to find that Plaintiffs’ privacy rights have been implicated by the School Districts masking policies, it must first be determined whether masking is a medical treatment. The Court finds it is not.

10. Plaintiffs offer no persuasive support for the argument that wearing a face covering constitutes a deprivation of their right to privacy by taking away their ability to reject medical treatment. Instead, in the emerging case law surrounding face covering requirements, courts have specifically and repeatedly held that requiring masks does not constitute medical treatment. *E.g.*, *Cangelosi v. Sizzling Caesars LLC*, No. 20-2301, 2021 U.S. Dist. LEXIS 16131, at *5, 2021 WL 291263 (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, 2021 WL 843175 (S.D. Cal. Mar. 4, 2021) (requiring an individual to wear a mask “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 mask qualifies as ‘medical treatment’”); *Machovec v.*

Palm Beach Cty., 310 So. 3d 941, (Fla. 4th DCA 2021) (Requiring facial coverings in public settings is akin to the State’s prohibiting individuals from smoking in enclosed indoor workplaces...and mask mandate did not implicate the constitutional right to refuse medical treatment.).

11. Plaintiffs argue that face coverings are “medical devices” under the recently enacted changes to Montana’s criminal trespass law. § 45-6-203 (2021), MCA. However, the recently enacted Montana COVID-19 liability law defines face coverings as personal protective equipment, not a medical device. Senate Bill 65 states in pertinent part⁹, “(5) ‘Personal protective equipment’ includes protective clothing...face masks...” The definition in the COVID-19 specific statute controls here. Face coverings are personal protective equipment, not medical devices.

12. The cases Plaintiffs rely upon, including *Armstrong*, address individual health care decisions in circumstances not present here. In this case, the face covering rules were adopted as a public health measure as part of a multi-layered approach – which also includes social distancing, frequent hand washing, cleaning and disinfecting surfaces, and well-ventilated spaces¹⁰– to mitigate the spread of COVID-19 and to maintain in-person instruction.

13. Plaintiffs have not made a prima facie case that their privacy rights are being violated.

B. Human Dignity

14. 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.

⁹ <https://leg.mt.gov/bills/2021/billpdf/SB0065.pdf>

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

15. Plaintiffs contend their constitutional right to human dignity is violated by the imposition of the School Districts' mask mandates.

16. Plaintiffs cite *Walker* in support of their position. In *Walker*, an inmate at the Montana State Prison was housed in a cell with blood, feces, and vomit, and was served food through the same port that toilet cleaning supplies were provided. He was stripped naked and given only a small blanket for warmth, denied prescribed medication and hot food. *See Id.* ¶¶ 77-79. The School Districts' masking policies do not rise to a constitutional affront to their human dignity.

17. Plaintiffs have not made a prima facie case that their human dignity rights are implicated by the face covering rules.

C. Senate Bill 400

18. Senate Bill 400 (SB 400), which went into effect on October 1, 2021, provides 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.

19. Plaintiffs contend that the School Districts' masking policies interfere with their right to direct their children's education, health care, and mental health.

20. As SB 400 is a new law and the language is incredibly broad, the Court reviewed the law's legislative history to provide guidance as to its intent. Based on the legislative history of SB 400, the purpose of SB 400 was to create a cause of action for parents who may be involved with the Department of Public Health and Human Services, Child Protective Services Division. In introducing SB 400 to the Senate Judiciary Committee, Senator Theresa Manzella, the bill's primary sponsor, stated the purpose of the bill 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, 67th Leg. (April 1, 2021 at 9:54:33). Plaintiffs’ action here is
not the type of action originally contemplated by the legislature in enacting SB 400.

21. Montana is unique in that the Montana 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.

22. The school boards’ right of local control is set forth in § 20-9-309(2)(h), MCA, which
requires the provision of a basic system of free quality public schools:

[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.

23. School boards have many duties, including health related requirements for its students as
set forth in § 20-3-324, MCA, and Admin. R. Mont. 10.55.701(2)(s) (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. § 20-5-
201(1)(a), MCA.

24. The Montana Constitution provides the School Districts with the authority to determine
what health and safety measures are appropriate in their schools. As U.S. Chief Justice Roberts
recently stated in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), the
Constitution principally entrusts “[t]he safety and the health of the people” to the politically
accountable officials of the states “to guard and protect.” *Id.* at 1613. When officials “undertake
to act in areas fraught with medical and scientific uncertainties,” their latitude “must be

especially broad”... and should not be subject to second-guessing by the judiciary that lacks the background, competence, and expertise to assess public health. *Id.* at 1613–14.

25. SB 400 does not abrogate the School Districts’ constitutional and statutory authority.

26. Even if SB 400’s heightened strict scrutiny test applies to school face covering rules, the School Districts’ face covering rules satisfy that standard. Plaintiffs concede that controlling a pandemic and maintaining in-person schooling are compelling governmental interests. Thus, the only dispute is whether the School Districts’ masking policies are narrowly tailored to this interest. The Court finds they are.

27. Students, staff, and visitors to the School Districts’ facilities are required to wear masks while indoors. However, there are a number of exceptions where masks are not required to be worn, including for those who have a medical or developmental reason which precludes them from safely wearing masks. Further, the School Districts are continuing to monitor the Covid-19 metrics within Gallatin County and their respective districts, and their policies are subject to review and amendment based on changes in the metrics. As far as mitigating the risk of spreading Covid-19, wearing masks creates minimal interference to children’s education compared to fully remote learning or even a hybrid education model of learning. While Plaintiffs challenge the science and efficacy of requiring students to mask, Plaintiffs’ position is not uncontested. In drafting and implementing the face covering policies, the School Districts considered the recommendations of the CDC, the AAP, and the Gallatin City/County Health Department. The School Districts’ policies are narrowly tailored, based on the recommendations of the CDC, the AAP, and the Gallatin City/County Health Department, to further the compelling state interest of controlling the spread of Covid-19 of keeping students in school.

D. Science/Irreparable Harm/Status Quo

28. Plaintiffs argue that the opinion of their statistician that masks do not work is unrebutted in the record and the Court is constrained to find that students are being harmed by the mask mandates because there is no nexus to the rule and the efficacy of masking.

29. The School Districts have demonstrated through the affidavits of the Superintendents that their decisions to implement face covering rules were based on recommendations from numerous reputable sources, including the Montana Medical Association, the CDC, the American Academy of Pediatrics, the Montana Chapter of the American Academy of Pediatrics. Further, the School Districts have presented recent CDC studies that concluded that pediatric Covid-19 cases rose 3.5 times faster in counties without school mask requirements than those with universal school masking. The Gallatin City County Health Department made similar findings and recently shared data demonstrating that area school districts without mask requirements have experienced more positive COVID-19 cases compared to districts with mask requirements. The Monforton School District experienced this first-hand. The District started the school year with an optional masking policy but quickly made masks mandatory after COVID-19 infections caused the schools to temporarily halt in-person instruction only days after school started.

30. While the loss of a constitutional right constitutes an irreparable harm, Plaintiffs have failed to demonstrate that they are likely to prevail on their constitutional challenges. Thus, as there is no finding of a constitutional violation, the alleged constitutional violations cannot form the basis of Plaintiffs' alleged irreparable harm.

31. As the Court has determined that Plaintiffs have failed to establish that they are likely to succeed on the merits of their constitutional challenges or that they will suffer irreparable harm if

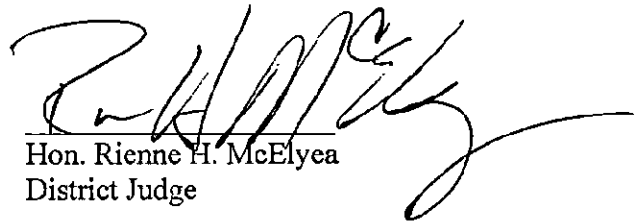
the masking policies remain in effect, the Court finds the status quo is continuing to allow the School Districts to set their policies, including masking policies.

ORDER

The Court finds that Plaintiffs have not met their burden of making a prima facie case of any constitutional violation or demonstrated a likelihood of irreparable harm in the absence of preliminary relief.

Plaintiffs' Motion for Preliminary Injunction is **DENIED**.

DATED this 20 day of October 2021.



Hon. Rienne H. McElyea
District Judge

c: Quentin M. Rhoades
Elizabeth A. Kaleva
Kevin A. Twidwell
Elizabeth A. O'Halloran

} emailed
10/20/21

CERTIFICATE OF SERVICE

I, Quentin M. Rhoades, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 10-28-2021:

Elizabeth A. Kaleva (Attorney)

1911 S. Higgins Ave.

Missoula MT 59801

Representing: Bozeman School District No. 7, Monforton School District No. 27, Big Sky School District No. 72

Service Method: eService

Elizabeth O'HALLORAN (Attorney)

1911 S. Higgins

Missoula MT 59801

Representing: Bozeman School District No. 7, Monforton School District No. 27, Big Sky School District No. 72

Service Method: eService

Kevin A. Twidwell (Attorney)

1911 South Higgins Ave

PO Box 9312

Missoula MT 59807

Representing: Bozeman School District No. 7, Monforton School District No. 27, Big Sky School District No. 72

Service Method: eService

Electronically signed by Lauren Towsley on behalf of Quentin M. Rhoades

Dated: 10-28-2021

Hon. Rienne H. McElyea
615 S. 16th Ave., Room 207
Bozeman, Montana 59715
Telephone: (406) 582-2140
Rienne.mceleyea@mt.gov

GALLATIN COUNTY CLERK
OF DISTRICT COURT
SANDY ERHARDT

2021 NOV 12 PM 2:48

FILED

BY ALK DEPUTY

**MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY**

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

Plaintiffs,

vs.

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

Defendants.

Cause No. DV-21-975B

Department No. 2
Hon. Rienne H. McElyea

**ORDER GRANTING
PLAINTIFFS' UNOPPOSED
MOTION TO STAY
PROCEEDINGS PENDING
APPEAL**

Plaintiffs having filed their Motion to Stay Proceedings Pending
Appeal with no opposition and good cause appearing,

IT IS HEREBY ORDERED that all proceedings in the present matter are STAYED pending the resolution of *Stand Up Montana, et al. v. Missoula County Public Schools, et al*, and *Stand Up Montana, et al. v. Bozeman School District No. 7, et al.*, Cause No. DA 21-0533 before the Montana Supreme Court.

DATED this 12 day of November 2021.



Hon. Rienne H. McElyea
District Court Judge

cc: ✓ Quentin M. Rhoades - courtdocs@montanalawyer.com
✓ Elizabeth A. Kaleva - eakaleva@kalevalaw.com
✓ Kevin A. Twidwell - ktwidwell@kalevalaw.com
✓ Elizabeth A. O'Halloran - bohallowan@kalevalaw.com

> E-mailed 11.15.2021