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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; ERICK 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 JORGENSON; STEPHEN 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.

APPELLANTS' OPENING BRIEF

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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STATEMENT OF THE ISSUES

1. Appellants made a *prima facie* case that the compulsory masking policies enacted by the School Districts violate the constitutional rights of students and their parents.

2. The School Districts' masking policies cannot survive constitutional scrutiny.

3. The District Courts committed an abuse of discretion by failing to consider any evidence of harm to children presented by forced masking.

4. The District Court in the Bozeman Case incorrectly interpreted Mont. Code Ann. § 40-6-701.

STATEMENT OF THE CASE

This action arises out of two civil actions challenging the implementation of policies by various school districts across Montana mandating the wearing of masks or other face coverings. The first, *Stand Up Montana et al. v. Missoula County Public Schools et al.*, Cause No. DV-21-1031 (Missoula case) was filed on August 23, 2021. The second, *Stand Up Montana et al. v. Bozeman School District No. 7*

et al., Cause No. DV-21-975B (Bozeman case) was filed on October 20, 2021. The complaints in both cases are substantially similar and contain identical allegations that the mask mandates infringe upon the rights of students and their parents to Substantive Due Process, Equal Protection, Privacy, Human Dignity, and Freedom of Expression. The complaints also contain a claim alleging the mandates violate SB 400 (now codified as Mont. Code Ann. § 40-6-701), passed by the Montana Legislature during the 2021 legislative session. The complaints also seek identical relief, that being for the School Districts to be enjoined from compelling the wearing of masks.

In the Missoula case, Appellants filed their Motion for Preliminary Injection and Brief in Support on August 27, 2021. The Missoula school districts filed their brief in opposition on August 30, 2021. Appellants filed a reply brief on September 16, 2021, and oral argument was held on September 29, 2021. The District Court issued an order denying Appellants' request for a preliminary injunction on October 1, 2021. A timely appeal was filed on October 28, 2021.

In the Bozeman case, Appellants filed their complaint on September 13, 2021, and a motion requesting a temporary restraining order and show cause hearing on September 21, 2021.[1] The District Court denied Appellants' request for a temporary restraining order and set a hearing on Appellants' request for a preliminary injunction, on September 21, 2021. Oral argument was held on October 5, 2021. The District Court issued its findings of fact, conclusions of law, and order denying Appellants' request for a preliminary injunction on October 20, 2021. Appellants filed a timely appeal on October 28, 2021. Both cases were consolidated by this Court on November 3, 2021.

STATEMENT OF FACTS

1. Introduction.

Appellant Stand Up Montana is a Montana non-profit corporation with its principal place of business in Gallatin County, Montana. (AR 0003 (Missoula Complaint, ¶ 2)). Its mission is to encourage

[1] Appellants sent the Bozeman School districts a draft of their brief in support of their motion for temporary restraining order on September 17, 2021 pursuant to Rule 6(D) of the Montana Eighteenth Judicial District Court Rules. The Bozeman school districts then filed their brief in opposition on the same day.

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 activities." (*Id.*) All other named plaintiffs in both the Missoula case and Bozeman case are parents, with at least one child enrolled in a school district with a forced masking policy. (*Id.*)

Appellees are various school districts from Missoula and Bozeman, Montana. From Missoula, the school districts are Missoula County Public Schools, Target Range School District, and Hellgate Elementary School District. From Bozeman, the school districts are Bozeman School District No. 7, Monforton School District No. 27, and Big Sky School District No. 72. Hereinafter, all school districts in both the Missoula and Bozeman cases shall collectively be referred to as the "School Districts."

2. The science of universal masking as a strategy to combat Covid-19.

Statistics compiled by the U.S. Center for Disease Control (CDC) show that Covid-19 does not present much of a threat to schoolchildren. More people under the age of 18 died of influenza during the 2018-19 flu season—a season the CDC labeled of "moderate severity" that lasted eight months—than have died of Covid-19 across more than 18 months. (AR 0098 (Missoula Br. for Prelim. Injunc., p. 7)). The CDC has also published statistics showing the infection rate, and death rates, for Covid-19. (AR 0142; 0143 (Missoula Br. for Prelim. Injunc.,)). A comparison of those statistics show that those aged 0–19 that become infected with Covid-19 do not ultimately succumb to the disease. (*Id.*)

Notwithstanding the fact that Covid-19 does not present any more of a significant risk to schoolchildren than any other disease, substantial scientific evidence suggests that the use of non-sterile cloth masks, worn in non-sterile environments, are ineffective in preventing the transmission of Covid-19. (AR 0030–0052 (Sturdivant Decl.)). For example, the CDC published a study entitled: "Mask Use and

Ventilation Improvements to Reduce COVID-19 Incidence in Elementary Schools — Georgia, November 16–December 11, 2020."[2] The study found that mask use among teachers and staff correlated (without making any conclusions on causation) with a lower incidence of COVID-19. "This study found that before the availability of COVID-19 vaccines, the incidence of COVID-19 was 37% lower in schools that required mask use among teachers and staff members and was 39% lower in schools that reported implementing one or more strategies to improve classroom ventilation." (*Id.*)

The ineffectiveness of masks was also noted as early as May 2020 in the larger scientific community. As stated in the New England Journal of Medicine, "We know that wearing a mask outside health care facilities offers little if any, protection form infection. . . In many cases, the desire for widespread masking is a reflexive reaction to anxiety over the pandemic." (AR 0041 (Sturdivant Decl. ¶ 44)). The evidence prior to 2020 is captured in a review by the World Health Organization (WHO).

[2] https://www.cdc.gov/mmwr/volumes/70/wr/mm7021e1.htm

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. (AR 0041 (Sturdivant Decl. ¶ 45)).

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. (AR 0041–0042 (Sturdivant Decl. ¶ 46)).

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.) Even if masks filter some percentage of particles, the number of such particles which are not filtered 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.) 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 that 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.)

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's 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.)

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.) 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.)

3. Forced student masking.

A. The Missoula Case.

Missoula County Public Schools (MCPS) has an enrollment of approximately 9,200 students and employs approximately 1,500 staff members between a preschool, nine elementary schools, three middle schools, four high schools, an alternative program, and an online academy. (AR 0174 (Missoula Order, p. 2)) Target Range School District consists of approximately 555 students and 75 staff members. (*Id.*) The Hellgate Elementary School District has an enrollment of approximately 1,485 students and employs approximately 185 staff members. (*Id.*)

Mask mandates were first imposed by the Missoula school districts, generally, during the 2020-2021 school year after a hybrid teaching model was adopted. (*Id.*) A hybrid teaching model involves both in-person and remote instruction. (*Id.*) On August 10, 2021, the MCPS Board of Trustees voted to continue the face covering requirements for all students, staff, and visitors on campus for the

2021-2022 school year. (AR 0174–0175 (Missoula Order pp. 2-3)). Target Range School District adopted a similar policy on August 16, 2021. Hellgate Elementary School District Followed on August 23. (*Id.*)

B. The Bozeman Case.

The Bozeman School District began the 2020-2021 school year in a hybrid teaching model, similar to the Missoula school districts. (AR 0190 (Bozeman FOFCOL, p. 2)). By February 1, 2021, students in pre-kindergarten through eighth grade were in in-person learning. (*Id.*) Highschool students remained in a hybrid schedule with four days of in-person learning and one day of remote instruction for the entire year. (*Id.*) The Board of Trustees for the Bozeman School District adopted a new masking policy on August 23, 2021 which allows the superintendent to establish or lift mask requirements based on multi-week trends of Covid-19 transmission. (AR 0191 (Bozeman FOFCOL, p. 3)). The policy requires face coverings for all students, staff, and visitors unless: (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. (AR 0191 (Bozeman FOFCOL, p. 3)).

The Big Sky School District also adopted a masking policy for the 2021-2022 school year on August 24, 2021. (AR 0192 (Bozeman FOFCOL, p. 4.)) Like the Bozeman School District Policy, the Big Sky mask policy requires the wearing of a disposable or reusable mask while present in any school building unless the individual is: (a) consuming food or drink; (b) engaging in physical activity; (c) communicating with someone who is hearing impaired; (d) receiving medical attention; or (e) precluded from safely using a face covering due to a medical or developmental condition. (AR 0193 (Bozeman FOFCOL, p. 5.)) In adopting this policy, the Big Sky School District allegedly considered information from the CDC and Gallatin County Health Department. (*Id.*)

The Monforton School District began the 2021-2022 school year with an optional masking policy, but decided to adopt a mandatory policy after only 14 people began to show symptoms of Covid-19. (AR 0193–0194 (Bozeman FOFCOL, p. 5-6.) Based upon the recommendation of the CDC and Gallatin County Health Department, the Monforton School District re-instituted a face covering policy on September 7, 2021. (*Id.*) Like the other school districts, masks were required at all times unless a person was: (a) consuming food or drink; (b) engaging 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 due to a medical or developmental condition. (AR 0191 (Bozeman FOFCOL, p. 3)).

Six public school districts in Gallatin County have publicly posted Covid-19 protocols that allow for optional mask use. (AR 0207 (Bozeman Case, Plfs.' Request for Judicial Notice, p. 2)). These school

districts are Manhattan # 03, Three Forks # 24, Gallatin Gateway # 35, Belgrade # 44, West Yellowstone # 69, and Amsterdam # 75. (AR 0208 (*Id.*, p. 3)). A comparison of "mask mandatory" and "mask optional" school districts shows that the rate of active Covid-19 cases is substantially similar between the two. (AR 0209–0210 (*Id.*, pp. 4-5)). The highest active rate in mask mandatory districts was 1.1%, while the highest rate in mask optional districts is 0.76%. (*Id.*) The average rate for the 15 mask mandatory districts is 0.39%, while the average rate for mask optional districts is 0.38%. (*Id.*)

STANDARD OF REVIEW

A district court's grant or denial of a preliminary injunction is reviewed for a manifest abuse of discretion. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386 (citing *Davis v. Westphal*, 2017 MT 276, ¶ 10, 389 Mont. 251, 405 P.3d 73). A manifest abuse of discretion is one that is obvious, evident, or unmistakable. *Id.* (quoting *Weems v. State,* 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4). If the decision on a preliminary injunction was based on legal conclusions, however, then those conclusions are reviewed to determine if the

district court's interpretation of the law is correct. *Id.* (citing *City of Whitefish v. Bd. Of Cty. Comm'rs of Flathead Cty.*, 2008 MT 436, ¶ 7, 347 Mont. 490, 199 P.3d 201). Finally, in considering whether to issue a preliminary injunction, the underlying merits of the case are neither considered nor determined. Such inquiries are reserved for a trial on the merits. *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 7, 395 Mont. 160, 437 P.3d 142 (citing *Caldwell v. Sabo*, 2013 MT 240, ¶ 19, 371 Mont. 328, 308 P.3d 81).

SUMMARY OF THE ARGUMENT

At the heart of this matter is Montana's spirit of individuality, value of privacy and bodily autonomy, and fundamental desire to forge one's own path. Mont. Cost. Art. II, Sec. 10 guarantees the right to privacy absent a showing of a compelling government interest. Mont. Cost. Art. II, Sec. 4 guarantees the right to human dignity. "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States—exceeding even that provided by the federal constitution." *Armstrong v. State*, 1999 MT 261, ¶ 36, 296 Mont. 361, 989 P.2d 364. Indeed, this Court has long recognized that

the right to individual privacy and human dignity are fundamental rights upon which any infringement will trigger the highest scrutiny. *Walker v. State*, 2003 MT 134, ¶ 74, 316 Mont. 103, 68 P.3d 872.

The forced masking policies enacted by the School Districts have stripped Appellants, and their children, of the fundamental choice to choose to accept or reject the use of masks as a tool to address the Covid-19 pandemic. *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 27, 366 Mont. 224, 232, 286 P.3d 1161. The District Courts, in both cases, concluded this intrusion upon bodily autonomy was insufficient to constitute a violation of Appellants' constitutional rights. Both District Courts misapplied the law. Although the School Districts argued, and the District Courts in both cases agreed, that masks are "personal protective equipment" as opposed to "medical devices," it is undisputed that compulsory masking was enacted in an attempt to prevent the spread of Covid-19. Semantics aside, masks and other face coverings are being used to treat Covid-19 on a societal level.

Yet, as Appellants argued in their application for a preliminary injunction, a substantial amount of scientific evidence demonstrates two

things. First, Covid-19 does not present an elevated risk to those aged 0-19 compared to other common diseases like the common cold or influenza. Second, assuming that Covid-19 does present a significant risk to life for those aged 0-19 for the sake of argument, using non-sterile cloth masks in a non-sterile environment does nothing to prevent the spread of Covid-19.

The School Districts, in the face of Appellants' scientific evidence, presented nothing. The record is bare of anything to suggest that the evidence put forth by Appellants is faulty or unreliable. The District Courts in both cases concluded that the mask mandates were enacted pursuant to guidance from the CDC and local health departments. The question, however, is so what? Appellants put forth detailed and unrefuted evidence recounting studies that show masks are ineffective. The orders of the District Courts lack any justification for ignoring Appellants' evidence, and to do so constitutes a manifest abuse of discretion. Accordingly, the District Courts should be reversed.

DISCUSSION

1. Appellants made *prima facie* showing that they suffer and continue to suffer of irreparable harm absent a preliminary injunction.

In considering whether to issue a preliminary injunction, a district court must exercise its otherwise broad discretion only "in furtherance of the limited purpose of [a] preliminary injunction[:] to preserve the status quo and minimize the harm to all parties pending final resolution on the merits." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 401 Mont. 405, 413, 473 P.3d 386, 391 (string citation omitted). The "status quo" is the "last actual, peaceable, non[-]contested condition which preceded the pending controversy." *Id.*

Beyond that, a district court need only find that parties seeking a preliminary injunction "made a *prima facie* showing [they] 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.* "Prima facie is defined as 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Id.*

For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury. *Id.,* ¶ 15. "Because a preliminary injunction does not decide the ultimate merits of a case, however, parties need establish only a *prima facie* violation of their rights to be entitled to a preliminary injunction—even if such evidence ultimately may not be sufficient to prevail at trial." *Id.* (citing cases and 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3, 201 (3d ed. 2013) ("All courts agree that a plaintiff must present a prima facie case but need not show a certainty of winning").)

A. The mandatory mask policies infringe upon Appellants' and their children's right to privacy because they restrict the ability to make their own health care decisions.

Restrictions and impositions on the movements of people who do not have a communicable disease and are not reasonably believed to have a communicable disease is an illegal infringement upon fundamental constitutional rights of individuals. Specifically in this case, the student mask mandates implicate the right of individual

privacy guaranteed by Article II, Section 10 of the Constitution. Under *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997) and *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, the Montana Supreme Court holds that medical care choices are protected by the right of individual privacy. Quoting from *Armstrong*: "the personal autonomy component of this right 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 the interference of the government . . .." *Armstrong*, ¶ 75. *See Baxter v. State*, 2009 MT 449, ¶ 65, 354 Mont. 234, 224 P.3d 1211 (Nelson, J., concurring).

In *Armstrong*, the plaintiffs challenged a state law prohibiting certified physicians' assistants from performing abortions. The Montana Supreme Court struck down the law because it infringed on an individual's personal autonomy protected by the right to privacy. *Armstrong*, ¶ 75. The Court concluded in *Armstrong* that the right to health care is a fundamental privacy right. Subsequently, the Court in *Wiser v. State*, 2006 MT 20, ¶ 16, 331 Mont. 28, 129 P.3d 133 clarified

that "the right to privacy is certainly implicated when a statute infringes upon a person's ability to obtain ***or reject*** a lawful medical treatment." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 27, 366 Mont. 224, 232, 286 P.3d 1161 (emphasis added). The Armstrong decision was adamant on this point. *Armstrong*, ¶¶ 52-55. Thus, forcing people to wear medical devices on their faces invades their fundamental right of privacy.

Meanwhile, "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States—exceeding even that provided by the federal constitution." *Armstrong*, ¶ 34. Privacy is "one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical ***abhorrence and distrust*** of excessive governmental interference in their personal lives." *Id.* (quoting *Gryczan*, 283 Mont. at 455, 942 P.2d at 125) (emphasis added). "For this reason, legislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny] analysis—i.e., the legislation must be justified by a compelling state interest and must be

narrowly tailored to effectuate only that compelling interest." *Id.* (string cite omitted).

Here, the District Court in the Missoula case concluded that the mandatory mask policies enacted by the school districts do not implicate the fundamental right to privacy based upon a conclusion that masks are not "medical devices." (AR 0180 (Missoula Oder, p. 8)). The District Court, instead, concluded that masks are more akin to "personal protective equipment" as the term is used in SB 65, which was signed into law following the 2021 Legislative session. (AR 0181 (Missoula Order, p. 9)). Further, the District Court refused to apply the guarantees to privacy enshrined in *Armstrong* because "[Appellants] do not seek access to constitutionally protected individual health care as in *Armstrong*." (*Id.*) Rather, the Missoula Court determined that the right of privacy does not include the right to be left alone from government-imposed mask mandates, and to find otherwise would be the same error committed by the district court in *Montana Cannabis Industry Ass'n v. State*, 2012 MT 201, 366 Mont. 224, 286 P.3d 1161 (*MCIA I*). (AR 0181 (Missoula Order, p. 9)). The District Court's reading of *Armstrong* and

its progeny led it to conclude that, "despite the broad guarantee of the individual right to medical judgments referenced in *Armstrong* at ¶ 75, the Montana Supreme Court has recognized rights may be limited by policies aimed at the protection of public health and safety." (*Id.*)

In the Bozeman case, the District Court's reasoning largely tracks that of the District Court in the Missoula case. The District Court came to the same conclusion that facemasks are not "medical devices" but are instead "personal protective equipment" as stated in SB 65. (AR 0200 (Bozeman FOFCOL, p. 12, ¶ 11)). The Court in the Bozeman case also made a similar conclusion that the right to privacy is not implicated by forced masking because such policies were enacted "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 spaces—to mitigate the spread of COVID-19 and to maintain in-person instruction. (*Id.*)

The District Courts' interpretation of Montana's fundamental right to privacy is drastically narrow. As the Court has acknowledged on multiple occasions, "the right to privacy is certainly implicated when

a statute infringes upon a person's ability to obtain or ***reject*** a *lawful* medical treatment." *MCIA I,* ¶ 27 (citing *Wiser*, ¶ 20; *Armstrong*, ¶ 65) (emphasis on "reject" added).

Although the District Courts and the School Districts characterized masks as "personal protective equipment," the law respects form less than substance. Mont. Code Ann. § 1-3-219. The only reason mask mandates were enacted was to address a medical issue: the spread of COVID-19. As both the School Districts and District Courts acknowledge, the number of infected is being monitored and the mask mandates will eventually be unnecessary. (AR 0184; 0203 (Missoula Order, p. 12; Bozeman FOFCOL, p. 15.) Hence, following the District Courts' logic, masks will no longer be necessary once Covid-19 is no longer of concern, assuming they are effective at achieving that purpose at all. Contrast to other personal protective equipment discussed by the Missoula Court, namely helmets. Helmets are not worn by medical providers in medical settings for medical purposes. They were not designed nor intended to prevent the spread of disease. They are not worn all day long regardless of need or during

academic instruction. They are efficacious for their purpose and they cause no harm to the wearer. If the analogy were any weaker, it would be downright silly.

Medical masks worn to mitigate the spread of medical infection are medical devices by any reasonable definition. Calling them otherwise to dodge the strictures of medical privacy exalts form over substance. Students are forced to mask for medical purposes. To rule otherwise reduces serious constitutional inquiry to futile nonsense. Once the subject ailment or injury is treated, the device becomes unnecessary. In the case of masks, it is treatment by alleged prevention. That is exactly the scenario described by the District Courts, and exactly what this Court has explicitly stated Montanans are entitled to reject under the right to privacy. *MCIA I,* ¶ 27. Accordingly, the District Courts erred in concluding that Appellants' right to privacy is not violated by compulsory mask mandates.

B. The forced masking policies enacted by the School Districts violate the fundamental right to human dignity.

Article II, Section 4 of Montana's 1972 Constitution provides:

> Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Article II, Section 4 (the Dignity Clause) is a stand-alone, fundamental constitutional right. See *Walker v. State*, 2003 MT 134, ¶¶ 74, 82, 316 Mont. 103, 68 P.3d 872 (explaining that the rights found in Article II are "fundamental" and that the plain meaning of the Dignity Clause "commands that the intrinsic worth and the basic humanity of persons may not be violated"); Matthew O. Clifford and Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 Mont. L.Rev. 301, 305–07 (2000). As former Justice Nelson noted in his concurrence *Baxter v. State*, 2009 MT 449, ¶ 79, 354 Mont. 234, 224 P.3d 1211, this interpretation "is consistent with the debate on Article II, Section 4 at the 1971–1972 Constitutional Convention."

Meanwhile, "[h]uman dignity is, perhaps, the most fundamental right in the Declaration of Rights." *Id.*, ¶ 83. "'No individual may be

stripped of her human dignity under the plain language of the Dignity Clause. No private or governmental entity has the right or the power to do so. Human dignity simply cannot be violated—no exceptions.'" *Id.* (quoting *Snetsinger v. Montana University System*, 2004 MT 390, ¶ 77, 325 Mont. 148, 104 P.3d 445 (Nelson, J., specially concurring)).

Id. "[I]n our 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." *Id.*, ¶ 84 (citing Clifford and Huff, 61 Mont. L.Rev. at 307).

Forcing children to cover their faces demeans their human dignity and can be allowed only upon application of strict scrutiny. Human dignity is inseparable from individuality and well-adjusted maturation. "The ability to recognize facial expressions of emotion is vital for effective social interaction." Beverly L. Sheaffer, Jeannie A. Golden & Paige Averett, "Facial Expression Recognition Deficits and Faulty

Learning: Implications for Theoretical Models and Clinical Applications," *Intern'l Journal of Behavioral Consultation and Therapy*, Vol. 5, No. 1.[3] Facial expressions convey emotional cues, and accurate recognition of these cues is a necessary step in the evaluation of interpersonal interactions and for the subsequent application of appropriate social skills. *Id.* Research has shown support for the association between facial expression recognition (FER) abilities and social competency, relationship difficulties, and various psychological and psychiatric conditions, including anxiety, bipolar disorder, and psychopathology. *Id.* Other studies have shown support for associations between FER deficits and childhood maltreatment and attachment. *Id.* According to emotions theorists, the inability to recognize nonverbal forms of emotion expression can negatively affect intra-and interpersonal behavior and may serve as a risk factor for poor adjustment and future adverse outcomes. *Id.*

[3] https://files.eric.ed.gov/fulltext/EJ861352.pdf (accessed 26 Aug 2021).

"The middle and lower face are noted to be very influential with regards to emotional recognition." Nour Mheidly, et al., "Effect of Face Masks on Interpersonal Communication During the COVID-19 Pandemic," *Frontiers in Public Health*.[4] Children need to see the mouth to recognize a neutral expression and "is best for recognizing the emotion of happiness". *Id.* The ability of children to recognize fear, surprise, disgust, and anger based on information from the upper, middle, or lower face, and found that children can recognize fear, surprise, and anger using expressions involving the lower face, and disgust using expressions involving their being able to see the middle face. *Id.* "While the upper face is also pivotal for the development of emotional expressions, the roles of the middle and lower face cannot be understated." *Id.* In sum, if human dignity for children means anything, especially for children, it can mean nothing if it does not include the freedom from being forced to cover one's face.

[4] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7755855/ (accessed 27 Jan 2022).

In this case, the District Courts narrowly focused on the factual distinctions between this matter and *Walker* while ignoring the bigger picture. (AR 0183; 0201 (Missoula Order, P. 11; Bozeman FOFCOL, p. 13)). While *Walker* did concern the mistreatment of a prisoner, this Court has never indicted that the right to human dignity is limited to situations where the State subjects a person to barbaric conditions. To the contrary, as the District Court in the Missoula case recognized, "[t]he Montana Supreme Court recognizes human dignity as fundamental meaning that the right is a significant component of liberty, any infringement of which will trigger the highest level of scrutiny." (AR 0182 (Missoula Order, p. 10) (citing *Walker*, ¶ 74).

The mask mandates substitute the judgment of parents for that of the School Districts. Effectively, the School Districts have sent the message that they know what is best, and they are going to dictate compliance for compliance's sake. Students and parents are barred from following the clear-cut science that shows universal masking is ineffective or that forced masking is the source of grave harm to children in the physical and emotional health, as well as their

educational development. Instead, the School Districts dictate that students' and parents' reliance on science and their individual circumstances in their decision making simply cannot be tolerated because, regardless of scientific evidence, "we have to do something" to control the pandemic. This is exactly the type of paternalistic treatment which the right to human dignity is supposed to prevent. *Baxter*, ¶ 84 (Nelson, J., concurring). What is clear enough is that forced masking did nothing to control infections either in the public or in the schools and the grave and likely irreversible harm to children—warned of by the science—has been done for no measurable benefit of any kind whatsoever.

The District Courts also insinuate that wearing a mask is not an individual or parental health care decision because the mandates were imposed as a "public health care measure. . . to control the spread of a communicable disease as one element of a multi-part strategy." (AR 0183 (Missoula Order, p. 11)). So what? The fact that the mask mandates accompany other measures meant to fight the pandemic, such as social distancing, frequent hand washing, cleaning and disinfecting

surfaces, and well-ventilated spaces, does not mean Appellants' rights are violated to a lesser extent. Out of all those measures, masking is the only policy that, without any disputed, causes substantial harm to them.

The School Districts may ignore the science, as well as 24 months of experience, and choose to believe whatever they want about masks and their efficiency. They may believe that choosing not to wear one is a social faux pas. The School Districts cannot, and should not, however, be allowed to trump the choices of parents, especially in view of the failure of forced masking as an efficacious means of controlling the spread of COVID-19. Appellants have put forward evidence which suggest that masking both: 1) does nothing to fight the pandemic; and 2) does a list of identifiable and long-lasting harm to children. Parents not only have the right, but they are also the most ideally positioned, to make the necessary cost-benefit analysis for their own children. This is exactly what the right of human dignity is meant to protect and is exactly what is stripped of parents and children by forced masking of

students. Accordingly, the School Districts' mandatory mask policy violates the right to dignity.

2. The School Districts' mask mandates violate fundamental rights, and therefore strict scrutiny applies, and the mandates cannot survive.

When a motion for preliminary injunction is under consideration, "[w]hen determining whether an applicant has made a prima facie showing of constitutional injury or appears to be entitled to the relief sought, a court may determine with which level of scrutiny to evaluate the challenged statute." *Driscoll*, ¶ 18. "The extent to which the Court's scrutiny is heightened depends both on the nature of the interest and the degree to which it is infringed." *Id.*

"The most stringent level of scrutiny, . . . is strict scrutiny, used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights." *Id.* Strict scrutiny of a statute is required "when the classification impermissibly interferes with the exercise of a fundamental right." *Id. Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (citing *Arneson v. State, By Dept. of Admin.*, 262 Mont. 269, 272, 864 P.2d 1245, 1247 (1993)). Under strict scrutiny, statutes

will be found unconstitutional "unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest." *Id.* In this case, at least two issues spring from the Montana Declaration of Rights: privacy and dignity. Strict scrutiny, therefore, applies.

"Under the strict scrutiny standard, Defendants bear the burden of showing that the law, or in this case the policy, is narrowly tailored to serve a compelling government interest." *Snetsinger v. Montana University System*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445 (emphasis added). Thus, it falls solely on the School Districts to prove that both the legislation is "justified by a compelling state interest" ***and*** that it is "narrowly tailored to effectuate only that compelling interest." *Id.*; *Gryczan*, 283 Mont. at 449, 942 P.2d at 122; *State v. Pastos*, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994). Furthermore, it is important to remember that unless two fundamental rights are in opposition (e.g., the right to privacy versus the right to know), strict scrutiny does ***not*** involve a balancing test. Only the less stringent "middle-tier scrutiny" involving rights not deemed "fundamental" allows the State to prevail if

it can demonstrate an interest in a law which "***outweighs*** the value of the right to an individual." *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 18, 302 Mont. 518, 15 P.3d 877 (emphasis on "outweighs" added).

Under the strict scrutiny standard, at the threshold issue, the School Districts—not Appellants—must first prove there exists a compelling state interest ***before*** moving to the narrowly tailored/least restrictive means test. *Montana Human Rights Div. v. City of Billings* (1982), 199 Mont. 434, 649 P.2d 1283. In the *Montana Human Rights Division*, for example, the question was whether—in investigating claims of employment discrimination—the Montana Human Rights Commission ("HRC") could lawfully subpoena private and personal information of employees who had neither consented to disclosure nor complained of discrimination. *Id.*; 199 Mont. at 443-45, 649 P.2d at 1288-89. Before ever reaching the question of what steps should be taken to protect the private information sought to be disclosed, the Court ***first*** determined that there was a compelling state interest at

stake. It decided that the defendants had a compelling interest in investigating illegal discrimination.

> We do not find that the HRC has failed to establish a ***compelling state interest*** by failing to contact and obtain the permission of those employees and ex-employees of the City and County whose files they seek. The practical realities of the situation, and ***the greater importance of the protection from discrimination*** convince us that the HRC has made a sufficient showing of a ***compelling state interest***, and that the disputed files and materials must be made available to the HRC.

Id.; 199 Mont. at 446, 649 P.2d at 1289 (emphasis added). Thus, the right of privacy came in conflict with—and in the circumstances was required to yield to—the fundamental right of due process. But only ***after*** such holding did the Court then turn to what protections should be in place to reasonably ensure that private material was protected from public disclosure. Had there been no compelling state interest, however, there could have been no public disclosure—regardless of the amount of security.

The District Court in the Missoula case concluded that the mask mandates did not implicate Appellants' fundamental rights, and therefore strict scrutiny was inappropriate. (AR 0184 (Missoula Order.

P. 12)). Rather, the Court concluded the rational basis test was appropriate. (*Id.*) The Bozeman Court concluded that even if strict scrutiny did apply, then the School Districts' mask policies satisfy the standard. (AR 0203 (Bozeman FOFCOL, p. 15, ¶ 26)). Both conclusions were in error.

The District Court in the Missoula case concluded that the School Districts have a legitimate government interest in "the safety of students, staff and visitors." (AR 0184 (Missoula Order, p. 12)). Yet, as Appellants have demonstrated, Covid-19 does not present a significant risk to school aged children. The data shows that influenza is more deadly for those aged 0–19. Even if Covid-19 was a deadly disease, which it is not, the data also shows that non-sterile cloth masks do almost nothing to combat transmission of the disease.

The Bozeman Court was likewise incorrect in finding the mask mandates satisfy the strict scrutiny standard. Assuming, for the sake of argument, that the School Districts possess a compelling government interest, the mask policies are not narrowly tailored. Masks are required at all times when indoors except 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. (AR 0191 (Bozeman FOFCOL, p. 3)). If Covid-19 presents as significant of a risk as the School Districts and District Courts seem to believe, why are there any exceptions at all? Some of the exceptions allow a student or visitor to be unmasked for a significant amount of time, such as when they are eating lunch, attending gym class, or giving a course lesson.

The goal of the mandates is to combat the spread of the disease, yet there is ample opportunity for spread under the policies. Using the Missoula Court's example, it would be like if motorcycle helmets were required at all times unless the rider was going between forty and fifty miles per hour. It is impossible for the mask mandates to be narrowly tailored to accomplish the School Districts' goal when they allow the

exact condition (i.e., unmasked students) which they were meant to prevent. Accordingly, the District Courts incorrectly concluded that the School Districts' mask policies survive constitutional scrutiny. Appellants have therefore made their *prima facie case* of irreparable harm, and, at the very least, have shown that it is doubtful that the mask policies are legal and that they will continue to suffer irreparable harm absent a preliminary injunction. The District Courts should be reversed.

3. The District Courts committed a manifest abuse of discretion by failing to consider and account for the undisputed evidence establishing substantial harm forced masking causes to children.

A preliminary injunction may be granted "when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consist in restarting the commission or continuance of the act complained of, either for a limited period or perpetually." Mont. Code Ann. § 27-19-201(1). "No preliminary injunction may be issued without reasonable notice to the adverse party of the time and place of the making of the application therefor." Mont. Code Ann. § 27-19-

301(1). The court receiving an application for injunction must "make an order requiring cause to be shown, at a specified time and place, why the injunction should not be granted." Mont. Code Ann. § 27-19-301(2). A preliminary injunction may be granted upon affidavits or oral testimony at the hearing. *City of Great Falls v. Forbes*, 2011 MT 12, ¶ 12, 359 Mont. 140, 247 P.3d 1086 (citing Mont. Code Ann. § 27-19-303).

Inherit in Montana's statutes governing equitable injunctive relief are the basic principals of fairness and due process. For example, district courts cannot grant or deny a motion for a preliminary injunction without first holding a hearing and giving both parties the opportunity to show why a preliminary injunction should or should not issue. *Flying T Ranch, LLC v. Catlin Ranch, LP.*, 2020 MT 99, ¶ 13, 400 Mont. 1, 462 P.3d 218. District courts must also set forth findings of fact and conclusions of law which constitute the grounds of its action in granting or refusing interlocutory injunctions. *Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 28, 319 Mont. 132, 82 P.3d 912 (citing M. R. Civ. P. 52(a)). This Court has further explained that "the extent of such findings and conclusions is necessarily dependent on the facts and

circumstances of each case. . . the litmus test in such cases is whether the district court's order sets forth its reasoning in a manner sufficient to allow informed appellate review." *Id.*, (quoting *Lake v. Lake County*, 223 Mont. 126, 134, 759 P.2d 161, 165 (1988)).

In this matter, the District Courts in both cases failed to set forth their reasoning for denying Appellants' application for a preliminary injunction in light of unrefuted evidence that long term compulsory masking presents the risk of both short- and long-term harm to children. Appellants put forth substantial scientific evidence in support of their claims. The School Districts presented no evidence in rebuttal, none. Nor did the School Districts offer any evidence to refute Appellants' evidence that Covid-19 does not present a substantial risk to those aged 0–19. Yet, neither of the District Courts acknowledged this stark lack of evidence.

Rather, the Missoula Court concluded the "spread of a contagious disease" is a "significant harm in and of itself." (AR 0187 (Missoula Order, P. 15)). The Missoula Court apparently arrived at the conclusion based upon non-descript studies and data compiled by the CDC and the

Missoula County Health Department, of which the Court took judicial notice *sua sponte*. (*Id.*) In denying the preliminary injunction, the Missoula Court considered the harm suffered by Appellants to be their children learning remotely. (*Id.*) The Bozeman Court likewise concluded that "wearing masks creates minimal interference to children's education compared to fully remote learning or even a hybrid education model of learning." (AR 0203 (Bozeman FOFCOL, p. 15)). As the Bozeman Court further explained:

> While [Appellants] challenge the science and efficacy of masks, [Appellants'] 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.

(*Id.*)

Neither the Missoula nor Bozeman Court made any findings or conclusions regarding harm to children caused by forced masking—even though the School Districts never contested it. There is no indication in the record that the District Courts considered Appellants' evidence,

weighed it, and concluded the argument put forth by the School Districts was more credible. The School Districts submitted no evidence to rebut the scientific evidence put forth by Appellants. The District Courts, nevertheless, ignored these undisputed facts and concluded, without evidentiary support, that the harm presented to children was not enough to justify a preliminary injunction. Neither District Court offered any explanation justifying their decisions. Completely disregarding the undisputed evidence of harm to children is, in essence, the same as denying an application for a preliminary injunction without holding a hearing at all. Doing so is a manifest abuse of discretion. *Flying T*, ¶ 13. Accordingly, the District Courts should be reversed.

4. The District Court in the Bozeman Case failed to correctly interpret Mont. Code Ann. § 40-6-701 and erred in failing to apply it as written.

A. The District Court reached a narrow non-textual interpretation of the statute based on a single statement at a legislative hearing instead of the plain language employed by the Legislature.

A new Montana statute, Mont. Code Ann. § 40-6-701, formerly known as SB 400, became effective on Friday, October 1, 2021. This new statute reads, in relevant part:

> (1) A governmental entity may not interfere with the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children unless the governmental entity demonstrates that the interference:
>
> (a) furthers a compelling governmental interest; and
>
> (b) is narrowly tailored and is the least restrictive means available for the furthering of the compelling governmental interest.

The term "governmental entity" expressly includes school districts. Mont. Code Ann. §§ 40-6-701(4) and 2-9-101(3) and (5).

The Bozeman Court noted the broad language of the statute. (AR 0201–0203 (Bozeman FOFCOL pp. 13-15.)). Yet, it then construed the language very narrowly, relying on legislative history rather than the statute's text. It ruled the statutes do no more than "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." *Id.* (citing Mont. Sen. Jud. Comm., SB 400, 67th Leg. (April 1, 2021 at 9:54:33).) Thus, it

concluded, "Plaintiffs' action here is not the type of action originally contemplated by the legislature in enacting [§ 40-6-701]". (*Id.*) The statute, however, contains no language that limits its scope to creating a cause of action or an appeals process in termination proceedings. The Bozeman Court's limitation, in short, has no textual basis.

B. Because the statute is not susceptible to more than one reasonable interpretation, resort to legislative history is an error of law.

The Bozeman Court's crabbed construction of Mont. Code Ann. § 40-6-701 violated the cardinal rule of statutory construction. "[S]tatutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required." *Boyne USA, Inc.*, ¶ 12. In other words, when the language is unambiguous, interpretation stops. Courts have no power to alter, construe, amend or shade what the Legislature, in the exercise of its function and authority, adopted. The Bozeman Court acknowledged that the language the Legislature used was "incredibly broad." But it did not find it in anyway ambiguous. Still, it decided to

look to the legislative history to narrow the statute's textual reach. It cited no authority for this methodology.

To be ambiguous, a statute must be "subject to more than one reasonable but conflicting interpretation." *State v. Stoner*, 2012 MT 162, ¶ 21, 365 Mont. 465, 285 P.3d 402. Here, the Bozeman Court identified no reasonable conflicting interpretations to choose from. The plain language of § 40-6-701 does not support the Bozeman Court's interpretation of its scope. As such, it committed an error of law by eschewing the plain meaning and resorting instead to a single sentence of legislative history. As previously discussed, there is no way for the School Districts' mask mandates to survive constitutional scrutiny. Accordingly, the District Courts should be reversed based on the plain language of Mont. Code Ann. § 40-6-701.

C. The Bozeman Court incorrectly determined that the School Districts are not bound by Mont. Code Ann. § 40-6-701 under Mont. Const Art. X, Sec. 8.

The Bozeman Court concluded below that the School Districts are not bound by Mont. Code Ann. § 40-6-701 due to the "wide latitude" of control granted by Mont. Const. Art. X, Sec. 8. (AR 0202–0203

(Bozeman FOFCOL, pp. 14-15)). Article X, Sec. 8 states, "The supervision and control of school in each school district shall be vested in a board of trustees to be elected as provided by law." The Bozeman Court also cited to several statutes and an administrative rule in determining that "[Mont. Code Ann. § 40-6-701] does not abrogate the School Districts' constitutional and statutory authority." (AR 0198 (Bozeman FOFCOL, p. 10).

First, The School Districts failed to comply with Mont. R. Civ. P. 5.1(a) precludes adjudication of the School Districts' constitutional challenge. *City of Helena v. Cmty. of Rimini*, 2017 MT 145, ¶ 43, 388 Mont. 1, 397 P.3d 1. "The failure to file a timely notice of a constitutional challenge results in a party failing to 'procedurally comply with an essential condition precedent, thus precluding this Court from reaching the constitutional challenge.'" *Id.* (quoting *Russell v. Masonic Home of Mont., Inc.*, 2006 MT 286, ¶ 20, 334 Mont. 351, 147 P.3d 216.).

More important, however, the Bozeman Court's reasoning quickly leads to an absurd result. The Bozeman Court's ruling means,

ultimately, that School Districts have constitutional authority to simply not follow laws of general applicability that do not suit their policy preferences.

"A statute is presumed constitutional unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." *State v. Christensen*, 2020 MT 237, ¶ 13, 401 Mont. 247, 472 P.3d 622. "Beyond a reasonable doubt" means the same level of certainty that a reasonable person would require in deciding "the most important of his or her own affairs." C.f., *State v. Iverson*, 2018 MT 27, ¶ 14, 390 Mont. 260, 411 P.3d 1284 (analyzing criminal jury instructions). "The party challenging the constitutionality of a statute bears the burden of proof; if any doubt exists, it must be resolved in favor of the statute." *Christensen*, ¶ 13.

Mont. Code Ann. § 40-6-701 does not single out school trustees for specific regulation. It does not touch or target exclusive rights of school trustee governance. It applies to all government entities alike. It is, therefore, a law of general applicability. The Constitutional authority to supervise and control schools does not, and logically cannot, include

the authority to override, for example, the antidiscrimination provisions of the Montana Human Rights Act, the pollution strictures of the Montana Environmental Policy Act, the "for cause" requirements of the Montana Wrongful Discharge From Employment Act, or the insurance coverage regulations of the Montana Workers Compensation Act.

While the Montana Constitution grants School Districts the authority to run their schools, there is not a modicum of authority, from any period in Montana's history, to suggest the School Districts have absolute authority to pick and choose which laws they will follow. The Bozeman Court's order essentially elevates the School Districts to be the fourth branch of government, above the Legislature and the Judiciary. If School Districts do not have to follow a civil rights law of general applicability, then why should they have to follow the orders of a court?

In their argument, the School Districts included a Parade of Horribles they claim will ensue if Mont. Code Ann. § 40-6-701 were enforced in this case. They argue that under its provisions, parents could object to, say, safety glasses in shop class or the teaching of

evolution as the origin of the human species. Imagine, however, a world where a local school district decided to discharge sewage into a local water way because it was too expensive to treat. Or one where Native students, or other students of color, could be relegated exclusively to remote learning. Or one where a school refused to carry workers' compensation insurance. This Parade of Horribles would take Montana law back to the mid-Nineteenth Century and makes the School Districts' concerns seem trite in comparison.

The School Districts do not rule over the schools with limitless authority. They, like all other governmental entities, are constrained by the law and the Constitution. Mont. Code Ann. § 40-6-701 calls for government accountability. It does not foreclose what the School Districts are hoping to do, i.e., impose compulsory mask mandates. The only thing the statute requires is for the School Districts to offer a compelling governmental interest, which they have still yet to do. The School Districts have had ample opportunity to show that masks work and help achieve their goal of stopping the spread of Covid-19. Yet, they have offered nothing. The data suggest the exact opposite. The

School Districts should not be allowed to skirt the law under the guise of absolute constitutional authority. This Court should require the School Districts to satisfy Mont. Code Ann. § 40-6-701 before the mask mandates are allowed to stand.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the decisions of the District Courts and issue an injunction enjoining enforcement of all forced masking policies enacted by the School Districts.

DATED this 7th day of February 2022.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

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

/s/ Quentin M. Rhoades
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CERTIFICATE OF SERVICE

I, Quentin M. Rhoades, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-07-2022:

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