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**IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO**

HEALTH FREEDOM DEFENSE FUND, INC.;
RYAN BLASER, on his own behalf and as
natural guardian for and on behalf of his minor
children, K.B.B. and K.S.B.; MICHELLE
SANDOZ, on her own behalf and as natural
guardian for and on behalf of her minor
children, R.S. and E.S.; BARBARA
MERCER, an individual; EMILY KNOWLES,
on her own behalf and as natural guardian for
and on behalf of her minor children, A.G.K.
and A.T.K.; and KENDALL NELSON, an
individual,

Plaintiffs,

vs.

CITY OF HAILEY, IDAHO, a municipal
corporation; and MARTHA BURKE, in her
official capacity as the Mayor of the City of
Hailey, as well as in her personal capacity for
purposes of Section 1983 claims asserted
herein.

Defendants.

Case No. 1:21-cv-389

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR
TEMPORARY AND PRELIMINARY
INJUNCTIVE RELIEF**

I. INTRODUCTION

It is a core principle of international law that informed consent is required before subjecting anyone to human experimentation. The United States has established a protocol under Title 21 United States Code to ensure that people in the United States are not forced to participate in human experiments without legally effective informed consent. *See* 21 C.F.R. § 50.20.

The safety and efficacy of masks for viral transmission prevention has not been established, and the sale and use of such masks as a medical device is only permitted in the United States under an Emergency Use Authorization promulgated by the Food and Drug Administration (“FDA”). Beyond the bounds of Emergency Use Authorization, the use of these untested medical devices, whether as source control or to prevent the spread of infectious disease, is not authorized. The imposition of a mandate, to prevent the spread of SARS-CoV-2, by wearing these medical devices at all times indoors in public or in certain situations outdoors within the limits of the City of Hailey, violates fundamental rights—both those derived from international law under *jus cogens* norms, and from the right to bodily integrity and autonomy emanating from the Fourteenth Amendment. Such a mandate must thus be subject to strict scrutiny under a substantive due process analysis. The order of the Mayor and the City of Hailey violates fundamental rights, even were masks ultimately determined to be efficacious or beneficial.

However, evidence demonstrates that such facial coverings offer negligible benefit and, indeed, may well cause serious short- and long-term physiological, psychological, developmental, and societal harm to the citizens of and visitors to the City of Hailey. Evidence further suggests that, far from protecting the wearer or nearby individuals from infection, masks may actually increase the risk of infection, both to the wearer and to those nearby. Rather than providing any benefit, in the balance the evidence argues that masks cause more harm than good. In particular, the risks of permanent, long-term neurological and physiological harm from the increase in

PLAINTIFFS’ MEMORANDUM IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTIVE RELIEF

respired carbon dioxide, for adults but especially for children and pregnant women; an increase in stillbirths and birth defects; and additional serious psychological and physiological risks, especially developmental delay for school-age children, leads to the necessity of the Court acting quickly to enjoin this masking requirement for the protection of the citizens of and visitors to the City of Hailey.

Therefore, HEALTH FREEDOM DEFENSE FUND, et al. (collectively the “Plaintiffs”), by and through their attorneys, respectfully move this Court that the CITY OF HAILEY and MAYOR MARTHA BURKE’s (“Defendants”) Public Health Emergency Order No. 2021-07, and any such orders previous to or subsequent to this order (“Mask Mandate”), which amount to human experimentation without informed consent, and which likely harm Plaintiffs and the citizens of and visitors to the City of Hailey and potentially increases their risk of infection with SARS-CoV-2, be temporarily and preliminarily enjoined, and submit the below Memorandum of Points and Authorities in support of their requested relief.

II. FACTUAL BACKGROUND

A. City of Hailey Public Health Emergency Order No. 2021-07 forces human experimentation on US citizens without their consent

The Mask Mandate implements a mandatory human experiment under which residents of and visitors to Hailey are forced to use a medical device when the medical impact on adults and children, including physical, psychological, short, and long-term side-effects of such use, has not been tested, evaluated, and approved by the FDA under normal procedures. Because these face masks are medical devices without approval, available only under a specific and limiting Emergency Use Authorization, they are definitionally and practically experimental, and thus mandating their use violates international law, federal law, and Idaho law.

Face masks are regulated by the FDA when they meet the definition of a “device” under section 201(h) of the Act. Generally, face masks fall within this definition when they are intended for a medical purpose. *Plaintiff’s Complaint for Declaratory and Injunctive Relief* (“Complaint”), Exhibit B. “In the U.S., FDA regulates the sale of medical device products. Before a medical device can be legally sold in the U.S., the person or company that wants to sell the device must seek approval from the FDA. To gain approval, they must present evidence that the device is reasonably safe and effective for a particular use.” *FDA’s Role in Regulating Medical Devices*, FOOD AND DRUG ADMINISTRATION, <https://www.fda.gov/medical-devices/home-use-devices/fdas-role-regulating-medical-devices> (last visited December 10, 2021). When a medical device not approved by the FDA, but merely permitted under the purview of an Emergency Use Authorization, the provider, manufacturer, or seller must inform the affected persons that the mandated medical device has only been approved by the FDA for emergency use, of the significant known and potential benefits and risks of the emergency use of the device, and of the extent to which such benefit and risks are unknown, of the alternatives to the device that are available, and of their benefits and risks, and of the option to accept or refuse administration of the device, of the consequence, if any, of refusing administration of the device. *See Enforcement Policy for Face Masks and Respirators During the Coronavirus Disease (COVID-19) Public Health Emergency September 2021*, <https://www.fda.gov/media/136449/download> (last visited December 10, 2021), at 12.

Defendants have failed to follow the requirements established by federal law by failing to inform the public of the risks associated with their mandated medical devices and have required their use for participation in society. These federal requirements were in part established to enjoin in law the *jus cogens* norm against nonconsensual human experimentation, as well as

generally to protect the safety of individuals who would purchase or otherwise use medical devices in the United States. As such, the Plaintiffs, if they wish to work, shop, or recreate anywhere within the city limits of Hailey, are compelled by ordinance to don medical devices which lack any formal finding by the FDA as to either efficacy or safety. This fundamentally violates seven decades of international consensus against nonconsenting human experimentation.

B. Masks are ineffective as a medical intervention and may actually increase the risk of infection

Asymptomatic transmission of SARS-CoV-2—that is, transmission of the virus in sufficient quantities to infect those nearby before manifestation of symptoms—is very rare. Exhibit A, Declaration of Harald Walach, Ph.D. (“Walach Declaration”), ¶ 20. In Wuhan, China, after the initial outbreak in early 2020, a follow-up study of “almost 10 million people found 300 asymptomatic individuals, but no positive case was found among the close contacts” of these infected individuals. *Id.*, at ¶ 21. This bears out the conventional wisdom of infectious disease spread: contacts in public, indoors or outdoors, at three or more feet of separation, for less than fifteen minutes—that is, the majority of public interactions—are “not associated with a realistic risk of pathogen transmission.” *Id.*, at ¶ 25. In short, even assuming *arguendo* that the masks should prove efficacious, the public health justification is limited at best given the current understanding of the transmission of SARS-CoV-2, and the Mask Mandate is demonstrably less effective than measures like hand hygiene, social distancing, limiting occupancies, contact tracing, quarantines for the infected, and more. *Id.*, at ¶ 46; *Id.*, at ¶ 25.

Yet masks simply “do not offer a tangible benefit to reduced infection of self or others.” *Id.*, at ¶ 44. Many of the studies commonly cited for the proposition of mask effectiveness base their reasoning not on real-world data, but on mathematical models and “mechanistic probability.”

Id., at ¶¶ 36-38. The real-world studies, using randomized controlled trials, meta-analyses, and systematic reviews—the gold standard of scientific, peer-reviewed inquiry—paint a very different picture to the abstract simulations and probabilities. A meta-analysis found that there was no evidence that masks reduce influenza transmission (influenza, as a viral particle of similar size to SARS-CoV-2, is an effective analog). Id., at ¶ 41. A “massive systematic review of 67 randomized control trials found with moderate certainty that wearing a mask probably made little to no difference” compared to not wearing a mask with regard to influenza spread. Id., at ¶ 43. But on top of the mounting evidence that masks simply do not provide benefit, studies—including the World Health Organization-funded meta-analysis cited above—indicate that incorrect or long-term use of masks may *increase* the risk of transmission, especially with cloth or “community” masks. Id., at ¶ 41. Additionally, given the critical nature of hand hygiene to prevent transmission, correct handling of masks—difficult among even highly trained medical personnel—is “not even remotely achievable” among the general public. Id., at ¶¶ 47-48. But a reduction to hand hygiene is not the only factor increasing infection risk. The cloth masks widely used by the public aggravate the “problem of moisture building on a mask,” and “moisture retention, reuse of cloth masks and poor filtration may result in increased risk of infection.” Id., at ¶ 49.

C. Masks likely lead to serious, short- and long-term physiological, psychological, and developmental harm

In fresh, outdoor air, the atmospheric concentration of carbon dioxide is at about 0.04%. Exhibit B, Declaration of Dr. Susanne Wagner (“Wagner Declaration”), at ¶ 29. The wearing of masks—surgical, N95, and community-made cloth—leads to experimentally measured increases in CO₂ concentrations in the inhaled air under masks, from a six- to seven-fold increase in five minutes of measurement to as high as eighty-fold, or 3.2% of the inhaled volume, in half an hour of measurement. Id., p. 9, Table 1. This volume of inhaled carbon dioxide well exceeds the limits

implemented for workers by the National Institute for Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Administration (OSHA). *Id.*, at ¶¶ 14, 19. Animal testing has demonstrated that levels of as little as 0.5% carbon dioxide for under an hour per day is “capable of inducing stillbirth and teratogenic birth defects.” *Id.*, at ¶ 6. Indeed, in light of the animal testing demonstrating serious risk to expectant mothers or women who wish to become pregnant, US naval toxicity experts, concerned about CO₂ exposure aboard submarines and naval vessels, set the exposure limits to 0.8% with strict exposure time limits. *Id.*, at ¶ 8.

While all the mechanisms of damage are not known, it is known that the body, in an attempt to balance the pH changes caused by increased levels of CO₂ in the blood, will calcify tissues and arterial walls to attempt to regulate acidity when the kidneys cannot maintain it. The exposure necessary to induce “significant tissue calcification” in animals was a mere 1% CO₂ for two weeks, or eight weeks of exposure at 0.5% CO₂. *Id.*, at ¶ 9. There are deeply concerning signs that this hypothesized increase in stillbirths due to increased carbon dioxide respiration has already begun, with data from Italy—a country which imposed a mask mandate during lockdown—showing an increase of three times as many stillbirths as normal, but while a country that did not impose mask restrictions but did impose the other “lockdown” procedures like quarantine, Sweden, did not see an increased risk of stillbirth or premature births in the same time period. *Id.*, at ¶¶ 22-27.

Beyond calcification and increases in stillbirths and birth defects, elevated carbon dioxide exposure also leads to oxidative stress, which causes permanent neurological damage. Even levels of 0.3% CO₂ for seven weeks are sufficient to induce permanent, irreversible neuron damage in adolescent mice. *Id.*, at ¶ 12. Elevated CO₂ exposure—even after a single exposure of 2.5% for four hours—has also been demonstrated in animal testing to lead to marked damage to testicular function and diminished fertility. *Id.*, at ¶¶ 13, 14. Because of the obvious ethical concerns about

testing for toxicity in humans, especially children, scientists are limited to animal testing to understand short- and long-term harms of such exposures, with the imposition of appropriate species uncertainty factors. *See generally* Id., at ¶ 13. Mask wearing has also been associated with fatigue, blood-oxygen saturation, and an increase in heart and respiratory rates, with “long-term disease-relevant consequences” like coronary heart disease and neurological diseases “to be expected.” Walach Declaration, at ¶¶ 53-54.

In addition to the purely physical manifestations of damage, there are serious psychological ramifications as well. A large percentage of individuals who feel burdened by the mask mandate report multiple symptoms of chronic stress, like anxiety, fatigue, headaches, discomfort, and trouble concentrating. Exhibit C, Declaration of Daniela Prousa (“Prousa Declaration”), at ¶¶ 6-7. Chronic psychological stress has deleterious downstream effects, from impairing immune defense to increased risk of stroke or heart disease. Id., at ¶¶ 8-10. Those attempting to avoid the stress by withdrawing from the public sphere, social isolation, are also at increased risk of depression, suicidal ideation, and exacerbation of existing disorders, “in particular post-traumatic stress disorder.” Id., at ¶¶ 11-13.

Furthermore, masks obscure facial expressions and identity, contributing to a damage to “emotional reading and comprehension, personal identification, forming impressions like trustworthiness about individuals, and understanding audible messages.” Id., at ¶¶ 15-19. While studies on adults show damage to emotional identification, a recent study demonstrated that children experience far stronger effects from mask wearing, confusing emotions and more readily identifying anger than happiness. Id., at ¶ 20. Early childhood and adolescence are, according to the prevailing theory of childhood development, “critical or sensitive periods” for brain development, and failure to develop or acquire critical skills like language or empathy during that

time may prevent the child from ever acquiring full proficiency. *Id.*, at ¶ 21. Given the demonstrated mechanism of masks interfering with and impairing emotional cognizance and empathetic development, not to mention the audible and linguistic difficulties impacting language acquisition, masks may impose serious developmental and emotional delays on children in particular that might never be rectified. *Id.*, at ¶¶ 20-22.

The wearing of face masks, especially for prolonged periods of time, likely causes “serious, permanent, and devastating health and developmental problems to adults and children alike,” impacts our mental health and societal bonds in “far-reaching and consequential ways,” and imposes inherent serious risks that do “more harm than good.” Wagner Declaration, at ¶ 29; Prousa Declaration, at ¶¶ 23-24; Walach Declaration, at ¶ 57.

III. THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

To obtain a preliminary injunction, Plaintiffs must establish: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Alternatively, under the sliding scale approach, a “plaintiff can meet the burden of obtaining a preliminary injunction even when there are serious questions going to the merits—a lesser showing than a likelihood of success on the merits—if the balance of hardships strongly favors the plaintiff.” *Cascadia Wildlands v. Scott Timber Co.*, 715 F App'x 621, 623-24 (9th Cir 2017) (internal cites omitted). Under the sliding scale approach, a plaintiff must still demonstrate the “likelihood of irreparable harm and that the injunction is in the public interest[.]”. *Id.*

IV. ARGUMENT

A. Plaintiffs are Likely to Succeed on their Claims.

1. *Plaintiffs are Likely to Succeed in Their Challenge to Defendant's Forced Medical Experimentation on American Citizens without their Consent*

To avoid unnecessary repetition, Plaintiffs have provided the legal justification for the argument that nonconsenting human experimentation is a *jus cogens* norm in both Plaintiffs' Complaint and Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, filed with this Court. [DE 1], [DE 12] The disagreement between the parties is not whether nonconsenting human experimentation is violative of international law, but whether the imposition of a requirement to wear masks constitutes a violation of that *jus cogens* norm.

The Defendants mandate the use of face coverings for a medical purpose: to prevent infectious disease transmission. Whether the purpose of the masks is to provide source control—that is, to prevent a knowing or unknowingly infected individual from emitting infectious particles upon others—or for self-protection, in either sense they are medical devices. As articulated in the Factual Background, Part A, above, the FDA deems masks to be medical devices when they are used for the purpose of infection prevention. Because masks, when used for this purpose of infectious disease transmission, are not well-studied and their effects not fully understood, the FDA issued the Emergency Use Authorization permitting their manufacture, sale, and distribution only for limited approved uses, and with specific statements that consent is required and that the harms must be properly described. In other words, the existence of the FDA Emergency Use Authorization identifies the problem: were these medical devices already understood and given the full regulatory approval of other medical products in the United States, the Emergency Use Authorization would not have been necessary, and the Defendants' mandate would not be an unprecedented forced human experiment.

Plaintiffs are therefore likely to succeed in their claim that Defendants' mask requirement violates this *jus cogens* norm, which, by virtue of its international acceptance, is equivalent to a fundamental right requiring strict scrutiny.

2. *Plaintiffs are Likely to Succeed in their Due Process Claim as the Mask Mandate is not Narrowly Tailored.*

“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). “Every violation of a person’s bodily integrity is an invasion of his or her liberty” and “any such action is degrading if it overrides a competent person’s choice to reject a specific form of medical treatment.” *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part).

The “rights to determine one’s own medical treatment, and to refuse unwanted medical treatment,” are “fundamental[.]” and individuals also have “a fundamental liberty interest in medical autonomy.” *Coons v. Lew*, 762 F.3d 891, 899 (9th Cir. 2014) (as amended) (internal cites omitted), *cert. denied* in *Coons v. Lew*, 575 US 935, 135 S Ct 1699, 191 LEd2d 675 (2015). Therefore, “a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.” *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 278 (1990). This right is rooted in “the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment.” *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997). “Governmental actions that infringe upon a fundamental right receive strict scrutiny.” *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005), as amended by 447 F.3d 1187 (9th Cir. 2006); *see also Washington v. Harper*, 494 US 210, 223, 110 S Ct 1028, 1037, 108 LEd2d 178, 199 (1990) (acknowledging in dicta that, outside of the prison context, the right to refuse treatment would be a “fundamental right” subject to a “more rigorous standard of review”).

The City of Hailey is a state actor and the right to refuse treatment, including treatment by the requirement to wear a medical device for infection prevention or control, is a fundamental right subject to strict scrutiny, therefore the Mask Mandate must be struck down unless it is narrowly tailored to serve a compelling state interest, and “advance[s] [that] compelling state interest by the least restrictive means available.” *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (internal cites omitted). It can generally be granted that the health and safety of the community of the City of Hailey is a compelling state interest, but Plaintiffs will likely succeed in their claim that the mandatory mask requirement is *per se* not narrowly tailored to accomplish the Defendants’ objective.

For nearly two years, public health officials throughout the country have used a variety of methods in an attempt to control the spread of SARS-CoV-2. Yet as articulated in the Factual Background above, the Defendants have chosen perhaps the least effective method; one which is maximally invasive to personal autonomy and bodily integrity, by mandating the imposition of an untested medical device; and one which is, given the available alternatives, likely most dangerous to individuals and to society. This non-exhaustive list of potential alternate resources available to Defendants is substantial, and is the same toolkit that has been available, and used with supporting evidence of efficacy, elsewhere around the world: social distancing requirements, limitations to building occupancy, hand-washing requirements or hand-sanitizer provisions for businesses, vigorous contact tracing, quarantine of the infected, pre-testing quarantines for those displaying any cold-like symptoms, or heightened testing or monitoring. Even masks themselves, although inefficacious and dangerous, could still be mandated in a narrowly tailored way—limiting them to those testing positive for COVID-19, or even those who are symptomatic for illness but have not yet been tested.

There are nearly limitless combinations of scientifically validated, safe, and reasonable measures to combat the pandemic, or even ways to narrowly tailor the mask requirements, yet Defendants have chosen not to avail themselves of these methods. As such, the Defendants' Mask Mandate is *de facto* not narrowly tailored to achieve the stated state interest.

3. *In the Alternative, Plaintiffs are Likely to Succeed in their Due Process Claim as the Mask Mandate Fails Under Jacobson v. Massachusetts*

The question of whether the *Jacobson* standard still applies in the era of tiered constitutional analysis is an open one. But were the Court to apply the standard put forth in *Jacobson v. Massachusetts*, it remains likely that the Plaintiffs would succeed on their claim under the *Jacobson* standard.

Jacobson established that

If a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Jacobson v. Massachusetts, 197 U.S. 11, 31, 25 S. Ct. 358, 363 (1905).

In other words, *Jacobson* establishes a two-part test. First, whether the statute has a real or substantial relation to protect the public health, public morals, or public safety; second, whether it is beyond all question a plain, palpable invasion of rights secured by fundamental law. Plaintiffs need not re-iterate at length the arguments above under the Fourteenth Amendment and concerning the fundamental international *jus cogens* norm, but argue that from both the substantive due process and the *jus cogens* norm perspective, Defendants' Mask Mandate constitutes a plain, palpable invasion of those rights.

It is worth a digression to distinguish the facts in *Jacobson* from those in the present case, as Defendants may well point to that ruling in their defense. Smallpox is horrifically fatal; the CDC estimates a case fatality rate of 30%, or nearly one in three. *Smallpox*, U.S. FOOD AND DRUG

ADMINISTRATION, <https://www.fda.gov/vaccines-blood-biologics/vaccines/smallpox>, (last visited December 10, 2021). Infection by SARS-CoV-2, again according to the CDC estimates, leads to death 0.6% of the time, or less than one in a hundred infections—two orders of magnitude less dangerous. *Estimated COVID-19 Burden*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/burden.html> (last visited December 10, 2021). A vaccine for smallpox, at issue in *Jacobson*, was initially developed in 1796 and was, in fact, the world’s first vaccine, with more than one hundred years of data on its efficacy and importance at the time of *Jacobson*; masks, meanwhile, as articulated in the Factual Background above, altogether lack that pedigree, offering at best a dim “mechanistic plausibility” as to their utility, and which have been demonstrated ineffective or even negative in their effects in actual randomized controlled trials. Finally, in *Jacobson* the State of Massachusetts established a minimal fine for those citizens who decided not to avail themselves of the vaccine; here, the City of Hailey has offered no such choice, requiring instead compliance or arrest and criminal prosecution.

Plaintiffs also will likely succeed in their claim when analyzed by the first part of the *Jacobson* standard—whether the statute has a real and substantial relation to the public health, morals, or safety. As articulated in the Factual Background above, the evidence regarding masks is unfavorable: they likely increase the risk of infection, and they also impose a substantial risk of harm. Unlike the smallpox vaccine in *Jacobson*, which provided well-documented, potent, sterilizing immunity, and has allowed the global community to eradicate that scourge, masks provide little to no benefit and substantially greater risk of harm. Plaintiffs will therefore likely succeed in their claim that the Mask Mandate has no real and substantial relation to health or safety.

B. Plaintiffs Face Irreparable Harm if the Mandate is Not Enjoined

1. Irreparable Harm is Presumed from Constitutional Violations

“Generally, irreparable harm is presumed if a violation of the constitution is shown.” *Kaiser v. Cty. of Sacramento*, 780 F Supp 1309, 1311 (ED Cal 1991). Therefore, “[w]hen a plaintiff seeks injunctive relief based on an alleged constitutional deprivation, the two prongs of the preliminary injunction threshold merge into one [and] in order to show irreparable injury, plaintiff must show a likelihood of success on the merits.” *Page v. Cuomo*, 478 F Supp 3d 355, 364 (NDNY 2020). “But where a federal injunction is sought against a governmental entity, the party requesting relief must show a threat of “great and immediate,” not conjectural or hypothetical, irreparable harm.” *Kaiser v. Cty. of Sacramento*, 780 F. Supp. 1309, 1311 (E.D. Cal. 1991) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 113, 75 L. Ed. 2d 675 , 103 S. Ct. 1660 (1983)).

Plaintiffs have alleged a constitutional deprivation of the most fundamental order, one which touches on rights more integral to the human person than those of speech, assembly, or arms: that of personal autonomy and bodily integrity, and of parents to protect the bodily integrity of their own children (born and unborn). Plaintiffs have further alleged that the imposition of an experimental medical device without their consent violates a *jus cogens* norm, equivalent by nature to a fundamental constitutional right. Plaintiffs also, as argued below, face great and immediate harm each time they are compelled to wear a mask pursuant to the governmental order. Accordingly, Plaintiffs’ likelihood of success on their constitutional claims also satisfies this requirement.

2. Plaintiffs Face Irreparable Harm to their Health and Well-Being

Furthermore, as shown in the “Factual Background” section, the attached declarations in their entirety, and as will be argued at hearing, Plaintiffs and their children face irreparable harm in the form of short- and long-term physiological, psychological, developmental, and societal injury. Far from the general misgivings of the plaintiff in *Jacobson* or cases discussed at length by

the parties in their respective motions to and opposition to motions to dismiss, Plaintiffs provide declarations from credentialed experts in their respective fields, demonstrating numerous specific, scientific, evidence-based analyses of the harms faced by the Plaintiffs. The imposition of this Mask Mandate has subjected the citizens of and visitors to the City of Hailey to the wearing of medical devices which, by all accounts, can cause permanent neurological and cognitive harm, not to mention leading to social isolation, depression, and a variety of psycho-social issues. There can be little doubt that birth defects, stillbirths, heart disease, chronic stress, fertility issues, and the other harms discussed in the declarations constitute irreparable harm that simply cannot wait for the conclusion of this case. Furthermore, the developmental damage alone to children and early adolescents who, by virtue of the critical phase of their development, simply cannot recover the lost time in their educational, linguistic, and empathetic development, demonstrates a serious harm that is fundamentally irreparable.

C. The Balance of the Equities Strongly Favors Plaintiffs

“To qualify for injunctive relief, the plaintiffs must establish that the balance of equities tips in [their] favor. In assessing whether the plaintiffs have met this burden, the district court has a "duty . . . to balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal cites omitted).

As set forth above and at length in Exhibit A, incorporated herein by reference, diligent scientific inquiry has demonstrated that masks offer little to no benefit preventing infection, either to the wearer or to those around the wearer. In fact, several studies, as cited above, have demonstrated that, contrary to providing any benefit, the wearing of masks—and particularly cloth or “community” masks—actually may increase the risk of infection. Therefore, from the equitable perspective, while recognizing the Defendants’ interest in controlling the spread of SARS-CoV-2,

this measure simply does not work, and may well make the matter worse. Therefore, there is limited risk of damage to Defendants by removing this single, ineffective tool from their toolkit of public health measures during the pendency of this case; in fact, such an injunction may well compel Defendants to examine the studies and choose from the list of alternative, efficacious methods outlined above for subsequent emergency orders, ultimately improving the health of the community of the city of Hailey.

But on the opposite side of the equation, the evidence shows mounting concern for both short- and long-term dangers to the Plaintiffs and to the public at large from the mask requirement. The dramatic and rapid increases in carbon dioxide respiration, and the numerous studies confirming the dangers of carbon dioxide toxicity, as well as the developmental and psychology harms discussed above, demonstrate very real risk and injury to the Plaintiffs. Therefore, the balance of equities strongly favors the Plaintiffs.

D. The Public Interest is Best Served by the Entry of an Injunction

"Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) (citing *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)). For the reasons set forth above, Plaintiffs are likely to succeed on their claim that the Mask Mandate fails constitutional inquiry. Therefore, this factor cuts in Plaintiffs' favor.

Even aside from this constitutional ground, the public interest is best served by entering an injunction because, as set forth above, wearing a mask does not make an individual less likely to spread SARS-CoV-2 and may make an individual more likely to spread it or to be infected upon exposure out in the public. Further, given the risk of harms as alleged above in the Factual Background, as well as by the declarations in sum as attached as Exhibits A, B, and C to this

memorandum, the balance between potential benefit to the public and potential harm to the public from the Mask Mandate is canted heavily in the direction of harms. Therefore, it is in the public interest to stop this mandated human experimentation and to encourage constitutional, effective, and evidence-based public health measures.

V. CONCLUSION

Plaintiffs have demonstrated, and will further demonstrate at oral arguments on this matter, that they are likely to succeed on their claims, that there is a likelihood of irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. Plaintiffs therefore respectfully request that this Court grant Plaintiffs' Motion for Temporary and Preliminary Injunctive Relief, and that this Court grant Plaintiffs the opportunity for oral argument before the Court on this motion.

DATED this 10th day of December, 2021.

DAVILLIER LAW GROUP, LLC

By: /s/ Allen Shoff

Allen Shoff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of December, 2021, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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DAVILLIER LAW GROUP, LLC

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