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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

HEALTH FREEDOM DEFENSE FUND, INC.; RUSSELL AND LISA ADAMS, husband and wife, on their own behalf and as natural guardian for and on behalf of their minor children, C.A.A., W.N.A., and T.R.A.; HUGH AND RENATA PARIS PEDDY, husband and wife, on their own behalf and as natural guardians for and on behalf of their minor child, A.P.; Plaintiffs, vs. KEITH ROARK, LARA STONE, AMBER LARNA, DAN TURNER, and GRETCHEN GORHAM, all in their official capacities as members of the BOARD OF TRUSTEES OF BLAINE COUNTY SCHOOL DISTRICT NO. 61, as well as in their personal capacities for the Section 1983 claims asserted herein, Defendants.	Case No. 1:21-cv-406-CWD **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

COME NOW, the Defendants, by and through their undersigned counsel of record, and hereby submit this Memorandum in Support of Defendants' Motion to Dismiss.

I. INTRODUCTION

The global COVID-19 pandemic that began in the winter of 2020 has caused widespread death, hospitalizations and suffering across Idaho, the United States and the entire world. As the virus made its way through Idaho in the spring of 2020, the Idaho State Board of Education allowed school districts across Idaho to shut down for the remainder of the 2020-2021 school year.[1] School boards, superintendents, teachers and other school staff were left with the awesome responsibility of teaching students remotely and ensuring that all students had access to the technology required for this new way of teaching Idaho's children. As the pandemic raged on in the summer of 2020, school boards across Idaho struggled with how best to return students and staff to school for the 2020-2021 school year while protecting the health and safety of those students and staff. With the new delta variant of COVID-19 appearing in 2021, school boards again faced the question of how best to safely serve students in the 2021-2022 school year while facing rising case counts and hospitalizations.

Defendants, Trustees ("Trustees") of the Blaine County School District No. 61 ("District"), spent a good portion of the summer of 2021 addressing various ways in which to safely open schools for the 2021-2022 school year. Relying on updated guidance from the U.S. Centers for Disease Control ("CDC"), state and local health partners, and parent and community input, and using their authority under Idaho Code §§33-506(3)(a), 33-512(4) and 33-212(2), the Trustees adopted the Guidelines for Face Coverings at School (the "Guidelines"). Plaintiffs now seek to strike down the Guidelines that implements an indispensable COVID-19 precaution as

[1] The State Board of Education initially issued COVID-19 School Operations Guidance on March 3, 2020, which directed schools to implement a "soft closure" through April 20, 2020. https://boardofed.idaho.gov/resources/covid-19-school-operations-guidance/. (last visited December 23, 2021). That order was revised on April 6, 2020 to remain in effect for the remainder of the 2019-2020 school year. https://boardofed.idaho.gov/resources/board-extends-soft-closure-for-k-12-schools-with-option-for-reopening/. (last visited December 23, 2021).

recommended by the CDC, the Idaho Department of Health and welfare, and local public health agencies. The Trustees move to dismiss the Complaint on the grounds that Plaintiffs lack standing and have failed to state any claim upon which relief may be granted.

II. BACKGROUND

A. The District's Guidelines and the Trustees' Statutory Authority to Adopt Them.

At least three Idaho statutes provide authority to the Trustees for adoption of the Guidelines at issue here. First, the Trustees have a general obligation and duty under Idaho Code §33-506(3)(a) to make "…rules and regulations for its government and that of the district, consistent with the laws of the state of Idaho and the rules and regulations of the state board of education." Second, the Trustees have the power and duty under Idaho Code §33-512(4) "[t]o protect the morals and health of the pupils." Third, the Trustees have authority under Idaho Code §33-212(2) "…*to require*, in schools or during school programs or activities, *measures intended to prevent the spread of contagious or infectious disease*." (emphasis added). This last statute was adopted during the 2021 Idaho legislative session in part to address sometimes conflicting local orders regarding mask mandates and other COVID-19 prevention measures, and in part to reaffirm that local boards of trustees are in the best position to make determinations about what COVID-19 prevention measures should be adopted in their districts. Indeed, the U.S. Supreme Court has noted that "[u]nder the Constitution, state and local governments, not the federal courts, have the primary responsibility for addressing COVID-19 matters such as quarantine requirements, testing plans, *mask mandates*, phased reopenings, school closures, … and the like…." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2614 (2020) (Kavanaugh, J., Alito, J. dissenting)(emphasis added).

The Trustees exercised the authority granted to them under the U.S. Constitution and the

Idaho Code to protect the health of the District's students, as well as its teachers, staff and greater school community by adopting the Guidelines, which are attached as Exhibit A to the Complaint. The Guidelines were revised in August 2021 and provide, in pertinent part:

> In accordance with our district return to learn plan and CDC recommendations[2] to reduce the spread of COVID-19, Blaine County School District is requiring that all staff and students wear a face covering at school while our county is identified as in the yellow, orange or red levels of transmission as defined by CDC data tracker, unless one of the following applies:
>
> - Inability to remove their own face-covering, or
> - Have a medical condition precluding them from wearing a face-covering, or
> - Other exceptions based on case manager and team decision.

Under the Guidelines, face covering options include:

- A securely attached cloth face-covering which covers the nose and mouth,
- A securely attached medical-grade paper covering which covers the nose and mouth, OR
- A clear face-shield which wraps around the face and extends to below the chin.

The Guidelines have the following four exceptions to wearing a mask:

- When outside such as at recess, outdoor learning times, etc.
- Persons with medical conditions or religious exemptions that prevent them from wearing a face covering, with appropriate documentation.
- Anyone who is unconscious, incapacitated, or unable to remove the face covering without assistance.
- Other exceptions, based on case manager and team decision, with appropriate documentation.

Students whose healthcare provider has determined he or she should not wear either a face covering or a face shield are requested to fill out an exemption form and return it to school. The exemption form includes the requirement that the student's healthcare provider complete a portion

[2] As it relates to schools, the CDC's *Guidance for COVID-19 Prevention in K-12 Schools* was updated on July 9, 2021 and again on August 4, 2021. The August 4, 2021 update included a recommendation for *universal indoor masking for all students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status. See* CDC page on guidance for COVID-19 prevention in K-12 schools, https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html. (last visited December 21, 2021).

of the form explaining the reason(s) the student cannot wear a face covering or face shield. The Guidelines further provide that where an exemption is in place for a student, additional mitigation strategies will be implemented for the individual student or other students and staff, such as adjusted seating arrangements; additional physical distancing; and/or increase sanitation and hand washing.

At the outset, it is notable that none of the individual plaintiffs, or the individual members of Plaintiff Health Freedom Defense Fund, Inc. ("HFDF"), who have submitted declarations attached to the Complaint as Composite Exhibit D, allege that they have requested exemptions on behalf of their minor children. This is true despite the fact that two of the three individual members of HFDF who submitted declarations, Denise Vidaillet and Rebecca Binns, allege that their children have medical conditions for which an exemption to the Guidelines may apply.[3] Similarly, none of the individual Plaintiffs or members of HFDF have alleged that their children have been prohibited from attending school, have suffered poor grades, or have otherwise suffered from any manifested injury as a result of the Guidelines.

B. Summary of the Plaintiffs and their Complaint.

Plaintiffs are HFDF, individuals Russell and Lisa Adams, on their own behalf and the behalf of their three minor children, and individuals Hugh and Renata Paris Peddy, on their own behalf and the behalf of their minor child. The individual plaintiffs live in the District and send their children to school at District schools. They allege that although they are opposed to what they refer to as the "Mask Mandate," they have made their children wear masks in accordance with the Guidelines. (Complaint, ¶¶15-16). HFDF is a Wyoming corporation that "…opposes laws and regulations that force individuals to submit to the administration of medical products,

[3] District staff have been working with both Ms. Vidaillet and Ms. Binns to address concerns regarding the wearing of face coverings for their children.

procedures, and devices against their will." (Complaint, ¶13). It asserts associational standing as it alleges three of its members reside in Blaine County, Idaho and within the Blaine County School District No. 61 and are directly affected by the District's Guidelines. (Complaint, ¶¶13-14). These three members are Rachael Broderson, Rebecca Binns and Denise Vidaillet, who have each provided a declaration on behalf of HFDF that is attached to the Complaint as Composite Exhibit D.

Plaintiffs' Complaint rests on the extraordinary assertion that the District's Guidelines constitute a "grand medical experiment" which is being imposed upon them without their informed consent. (Complaint, ¶10). Consequently, they argue, the Guidelines are a violation of some unspecified international, federal and Idaho law. (*Id.*) Based on these allegations, Plaintiffs assert two causes of action in the Complaint. In Count I, Plaintiffs allege that the District's Guidelines are preempted under certain portions of the federal Food, Drug and Cosmetic Act related to Emergency Use Authorizations and, as such, the Guidelines violate the Supremacy Clause. In Count II, Plaintiffs contend their substantive due process rights under the Fourteenth Amendment to the U.S. Constitution were violated, under the theory that they have a protected liberty interest to be "free from forced medical experimentation" and "free from non-consensual administration … and/or …the forced administration of medical procedures and devices." (Complaint, ¶¶88, 91). In the alternative, Plaintiffs allege that the Guidelines violate their fundamental rights related to personal autonomy and consent to or self-determination of medical care, and that the Guidelines are not narrowly tailored to achieve a compelling state interest.

III. ARGUMENT

A. Plaintiffs Lack Standing to Bring this Lawsuit.

In order to properly be before this Court, Plaintiffs must have standing. The standing

doctrine encompasses both a constitutional and prudential component. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1108 (9th Cir. 2003). The constitutional component derives from Article III, Section 2 of the Constitution addressing cases and controversies. *Id*. "A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. V. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). Standing requires injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). That is, plaintiffs must have suffered "an invasion of a legally-protected interest which is (a) concrete and particularized…and (b) actual or imminent, not 'conjectural' or 'hypothetical." *Lujan*, 504 U.S. at 560 (internal citations omitted). Second, the injury must be fairly traceable to the challenged action of the defendant and not the result of independent action of some third party not before the court. *Id*. (internal citations omitted). Third, it must be "likely" as opposed to "merely speculative," that the injury will be redressed by a favorable decision. *Id*. at 561. (internal citations omitted). Plaintiffs have the burden of establishing these elements as "an indispensable part" of their case, such that each element must be supported in the same way as any other matter on which the Plaintiffs bear the burden of proof. *Id*. at 561.

The prudential component of standing supplements the constitutional requirements and include judicially self-imposed limits on the exercise of federal jurisdiction. *Oregon Advocacy Center*, 322 F.3d at 1108. Such judicially imposed limits include "the general prohibition on a litigant's raising another person's legal rights…." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Thus, an organization such as HFDF may assert rights of its individual members but only if certain conditions are satisfied: (1) at least one of its members would have standing in his or her own right; (2) the interests the suit seeks to vindicate are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Fleck and Associates, Inc. v. City of Phoenix*, 471 F.3d 1100, 1105-06 (9th Cir. 2006) (citing *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996)).

Additionally, an organization suing on its own behalf can establish injury sufficient to confer standing when it suffered "both a diversion of its resources and a frustration of its mission." *Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quoting *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). An organization "cannot manufacture an injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Forest*, 624 F.3d at 1088. Here, the Complaint is devoid of any allegations that HFDF's mission is frustrated by the Guidelines or that the Guidelines have forced HFDF to divert resources. Rather, the allegations in the Complaint suggest that HFDF is asserting standing on behalf of its members. (Complaint, ¶14).

Plaintiffs' claims should be dismissed under F.R.C.P. 12(b)(1) because they have failed to allege sufficient facts to support the elements of standing. In particular, Plaintiffs have failed to allege an injury-in-fact that is fairly traceable to the Trustees' adoption of the Guidelines, as required by Article III of the U.S. Constitution. Each of the individual Plaintiffs allege that while they object to the Guidelines and do not consent to the same, they routinely require their minor children to wear masks in compliance with the Guidelines. (Complaint, ¶¶15-16). Similarly, the Plaintiff HFDF alleges that three of its members also routinely require their minor children to wear masks in compliance with the Guidelines, even though they strenuously object to the Guidelines (*See* Declarations of Broderson, Binns and Vidaillet, attached as Composite Exhibit D to the Complaint). None of the Plaintiffs allege that their children have been prohibited from attending

school because of the Guidelines. None of the Plaintiffs allege their children have suffered from poor grades or have otherwise suffered any injury that is directly linked to the Guidelines. Likewise, none of the Plaintiffs allege that they have sought an exemption to the Guidelines for their minor children, even though some of the members of HFDF have children with conditions that would allow them to request such an exemption.

Plaintiffs have also failed to allege sufficient facts tracing the Trustees' adoption of the Guidelines to any alleged injuries suffered by them or their minor children. The Complaint is replete with references to the many ways in which they believe masks generally harm children, (Complaint, ¶¶64-68), but includes only minimal, conclusory statements that the Guidelines are causing Plaintiffs' minor children stress, anxiety and difficulty in school. (Complaint, ¶¶69-70). Notably, the City of Hailey, wherein a significant portion of the District lies, has also instituted a mask mandate.[4] Therefore, it is entirely possible that Plaintiffs' injuries, if any, are traceable to the City's mask mandate and not the District's Guidelines. Regardless, the conclusory allegations regarding causation in the Complaint are simply insufficient for the purposes of standing. In light of the individual Plaintiffs' failure to allege sufficient facts to confer standing under Article III, the Court should dismiss their claims. Additionally, the Court should decline to confer standing on HFDF because, as noted above, none of its individual members has standing.

B. Plaintiffs Have Failed to State a Claim for a Violation of the Federal Food, Drug and Cosmetic Act.

Even if Plaintiffs have properly alleged an injury sufficient to confer standing, Count I must be dismissed because Congress has not conferred a private right of action under the Federal Food, Drug and Cosmetic Act ("FDCA"). In Count I of the Complaint, Plaintiffs FDCA, 21 U.S.C.

[4] HFDF and several of its members have filed a separate lawsuit in this Court challenging the City's mask mandate. See *Health Freedom Defense Fund, Inc. v. City of Hailey, Idaho*, No. 1:21-cv-389-DCN (D. Id., filed Sept. 27, 2021).

§360bbb-3(e)(1)(A)(ii), and its implementing regulations preempt the Guidelines and, accordingly, the Guidelines violate the Supremacy Clause. However, there are multiple cases – both pre- and post-pandemic – that establish the Supremacy Clause, and the FDCA in particular, do not include a private right of action. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015) (noting that the Supremacy Clause "is not the source of any federal rights" and holding that plaintiffs could not enforce the Medicaid Act in equity against the state); *Pacific Trading Co. v. Wilson & Co., Inc.*, 547 F.2d 367, 370 (7th Cir. 1976) (upholding dismissal of claims under several federal laws, including the FDCA, because no private right of action exists); *Jennifer Guilfoyle v. Austin Beutner*, 2021 WL 4594780, at *26-27 (C.D. Cal., Sept. 14, 2021) (dismissing claims on these grounds); *Bridges v. Houston Methodist Hosp.*, 2021 WL 2399994 at *2 (S.D. Tex., June 12, 2021) (dismissing claims that vaccine mandate violates the FDCA); *Doe v. Franklin Square Union Free School District*, 2021 WL 4957893 at *20 (E.D. N.Y. Oct. 26, 2021) (holding that FDCA does not impose private right of action to challenge school mask mandate). The FDCA also contains an express provision that states, "all such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States." 21 U.S.C. §337(a).

As discussed in *Bridges v. Houston Methodist Hospital*, the FDCA authorizes the Secretary of Health and Human Services to introduce into interstate commerce medical products intended for use in an emergency. *Id.* at * 2. While it requires the Secretary to ensure "product recipients understand the 'potential benefits and risks of use' and 'the option to accept or refuse administration of the product,'" it "does not confer a private opportunity to sue the government…." *Id*. As further noted in *Doe*, a private right of action to sue under the FDCA is not separately supplied by the Supremacy Clause: "It is not the source of any federal rights and certainly does

not create a cause of action." *Doe*, at *20 (quoting *Armstrong*, 575 U.S. at 325).

Plaintiffs here assert the same misguided and ill-conceived argument that has been squarely rejected by numerous federal courts.[5] Whether masks could be conceived an "investigational product" under the Emergency Use Authorization referred to in the Complaint misconstrues both the Trustees' obligations and Plaintiffs' enforcement rights under the law. Neither the FDCA nor the Supremacy Clause provide a private right of action under which they can assert the claim alleged in Count I of the Complaint. Accordingly, Plaintiffs' claim fails as a matter of law and Count I must be dismissed under F.R.C.P. 12(b)(6).

C. Plaintiffs Have Failed to State a Substantive Due Process Claim Under the Fourteenth Amendment to the U.S. Constitution.

To survive a motion to dismiss, Plaintiffs' Complaint must contain sufficient factual matter, accepted as true, to "state a claim that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Legal conclusions and conclusory statements need not be accepted by the Court as true on a motion to dismiss. *Id*. at 555. Where a complaint contains allegations that could be characterized as unrealistic or nonsensical, "[i]t is the conclusory nature of [Plaintiffs'] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 681. Much of Plaintiffs' Complaint includes conclusory assertions and opinions about the use of masks and their scientific efficacy in combatting COVID-19, as well as the inexplicable analogy of the use of masks to "the barbaric medical experiments performed on unwilling victims of Nazi Germany's concentration camps." (Complaint, ¶24). These "factual" assertions, however, are insufficient to withstand dismissal

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[5] One court swiftly declined the plaintiff's invitation to invoke the Nuremberg Code as a reason to overturn a school mask mandate, noting that the mask mandate "is not an experiment or clinical trial; it is a school safety measure. Recasting it as an unlawful human experiment is an irrational leap of logic." *Doe,* at *20.

under F.R.C.P. 12(b)(6). Accordingly, Plaintiffs' claims should be dismissed with prejudice.[6]

1. Plaintiffs' Alleged Liberty Interests/Fundamental Rights Do Not Entitle Them to Relief.

In Count II of the Complaint, Plaintiffs allege the Guidelines infringe on various protected liberty interests and/or fundamental rights in violation of their substantive due process rights under the Fourteenth Amendment to the U.S. Constitution. In particular, Plaintiffs allege they have the following protected liberty interests: (i) to be free from "forced medical experimentation;" and (ii) to be free from "non-consensual administration of medical procedures and devices…that [they] believe will cause them harm." (Complaint ¶¶88, 91). Plaintiffs also allege the following fundamental rights: (i) to personal autonomy and bodily integrity; (ii) to control and/or consent to the administration of medical products and medical care to their minor children; and (iii) to self-determination in matters of medical care and the administration of medical products and devices. (Complaint ¶92). Elsewhere in their Complaint, Plaintiffs allege that while they require their children to comply with the Guidelines by wearing face coverings, they "assert their parental rights to determine whether or not" their children should wear a face covering. Regardless of the characterization of the rights claimed, however, it is notable that federal courts have consistently rejected Fourteenth Amendment due process challenges to mask mandates during the COVID-19 pandemic and have applied rational basis review to uphold such mandates. See, e.g., *Doe*, at *19 (holding that school mask mandate does not impinge upon any fundamental right, and applying rational basis review); *Oberheim v. Bason*, 2021 WL 4478333 at *11 (M.D. Pa. Sept. 30, 2021) (denying motion for preliminary injunction enjoining school district mask mandate because the mandate "does not infringe on the constitutionally guaranteed rights of the students or their

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[6] Dismissal with prejudice is appropriate where leave to amend under F.R.C.P. 15 would be futile. See *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990).

parents…"); *Klaasen v. Trustees of Indiana University*, 2021 WL 3073926 (N.D. Ind. July 18, 2021) (holding that students' substantive due process claim based on a school mask mandate was unlikely to succeed because "there is no fundamental constitutional right to not wear a mask."); *W.S. by Sonderman v. Ragsdale*, 2021 WL 2024687, at *2 (N.D. Ga. May 12, 2021) ("Rational basis is the proper standard of review for the mask mandate" because it "neither discriminates against a protected class nor infringes a fundamental right.").

The crux of Plaintiffs' Complaint is that they have the right to be free from unwanted medical procedures and the right to determine what medical care their children receive. The *Doe* court squarely addressed the issue of the right to refuse medical treatment. The court noted that there is no question such a right is fundamental, see *Washington v. Glucksberg*, 521 U.S. 702, 722 n. 17 (1997), but it also noted that context matters: "While the Mask Mandate was obviously intended as a health measure, it no more requires a 'medical treatment' than laws requiring shoes in public places…or helmets while riding a motorcycle…." *Doe*, at *18 (internal citations omitted). It therefore distinguished the mask mandate –which was designed to balance the competing interests of the individual and public health – from single-person bodily integrity cases such as physician-assisted suicide and the right to refuse life-prolonging hydration and nutrition. *Id*. Accordingly, the court declined to find that the mask mandate implicated a fundamental right.

Similarly, in *Machovec v. Palm Beach County*, 310 So.3d 941 (Fla. App. 2021), the court addressed plaintiffs' argument that Palm Beach County's mask ordinance subjected them to forced medical treatment. The court referenced CDC guidance noting that while masks offer some protection to the mask wearer, the primary focus of recommending the wearing of masks is to prevent the transmission of COVID-19 to other people. Thus, the court noted,

> …requiring facial coverings to be worn in public is not primarily directed at treating a medical condition of the person wearing the mask/shield. Instead, requiring

> individuals to cover their nose and mouth while out in public is intended to prevent the transmission from the wearer of the facial covering to others (with a secondary benefit being protection of the mask wearer). Requiring facial coverings in public settings is akin to the State's prohibiting individuals from smoking in enclosed indoor workplaces.

310 So.3d at 946. Based on this analysis, the court concluded that the executive order at issue did not implicate a constitutional right to choose or refuse medical treatment. *Id*. at 947.

Even if the right at issue is Plaintiffs' claimed right to direct their children's education, the Supreme Court and the Ninth Circuit have repeatedly declined to accept the proposition that education is a fundamental right under the Constitution. *Gunter v. North Wasco County Sch. Dist. Bd of Ed.*, 2021 WL 6063672 at *7 (D. Or. Dec. 22, 2021) (citing cases so holding). In addition, while parents do have some fundamental rights with respect to making educational decisions for their children, those rights have been judicially limited. See, e.g., *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) (rejecting a substantive due process challenge to a public school's questioning of children about sexual topics); *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 711 (9th Cir. 2019)("…issues such as school discipline, the content of examinations, and dress code are issues of public education generally committed to the control of the state and local authorities."). In the COVID-19 era, multiple courts have already decided that mask mandates are another issue that does not infringe upon a parent's right to direct their child's education and that decisions to impose mask mandates rests in the sound discretion of state and local authorities. See, e.g., *Oberheim*, at *7 ("…children do not have a fundamental right to attend school without masks on."); *P.M. v. Mayfield City School District Board of Education*, 2021 WL 4148719, at *3 (N.D. Ohio Sept. 13, 2021)(concluding that a mask mandate did not violate the right to education); *Whitfield v. Cuyahoga County Pub. Lib. Found.*, 2021 WL 1964360, at *2 (N.D. Ohio May 17, 2021)("[T]here is no general constitutional right to wear, or to refuse to wear a face mask in public

places."). While the *Oberheim* court noted that parents have a right to raise their children as they see fit, it also aptly noted parents "are not entitled to undermine the Government's public health orders during a global pandemic by refusing to have their children comply with a school masking requirement." 2021 WL 4478333 at *4.

Clearly, courts that have addressed arguments similar to those raised by Plaintiffs here have concluded that mask mandates do not implicate fundamental rights. Plaintiffs have not – and cannot – establish that the rights they claim are any different from those addressed by the many courts referenced herein. Accordingly, the Trustees urge the Court to follow the overwhelming body of case law and find that the District's Guidelines do not implicate a fundamental right or protected liberty interest.

2. Rational Basis Review – Not Strict Scrutiny – Applies to the Guidelines.

The "Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty…." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If the underlying right allegedly infringed qualifies as a "fundamental right," courts generally apply strict scrutiny, i.e., the government action is permissible only if "the infringement is narrowly tailored to serve a compelling state interest." *Oberheim*, at *7 (quoting *Washington*, 521 U.S. at 521). Infringements on other rights or liberties need only satisfy the less-onerous "rational basis" standard, i.e., the government action will be upheld so long as it "rationally furthers some legitimate, articulated state purpose." *Id.* (citing *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Plaintiffs' Complaint hedges on whether strict scrutiny or rational basis applies, stating that the Guidelines are not "sufficiently narrowly tailored or lack a rational basis", and therefore infringe upon their substantive due process rights discussed above. (Complaint ¶93). As set forth above,

however, no fundamental right is at issue so the Court must use rational basis review to determine whether the Guidelines pass Constitutional muster. Under rational basis review, the Guidelines clearly do so pass.

Under the rational basis standard, legislation is presumptively constitutional, and the burden is on the challenging party to prove that the legislation does not bear a reasonable relationship to the furtherance of a valid governmental objective. *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993). "Indeed, the government need not actually articulate its rationale; rather, government action passes muster 'if there is any reasonably conceivable state of facts that could provide a rational basis.'" *Doe*, at *19 (quoting *Heller*, 509 U.S. at 320). With respect to mask mandates in schools, multiple courts have already concluded that it is beyond dispute that schools have a legitimate interest in promoting the health and safety of their students, which includes efforts to reduce the spread of COVID-19. See e.g., *Klaasen*, at *40; *Oberheim*, at *8; *Branch-Noto v. Sisolak*, 2021 WL 6064795 at *6 (D. Nev. Dec. 22, 2021); *Gunter*, at *10. In Idaho, school boards of trustees have the power and duty to "protect the morals and health" of students (Idaho Code §33-512(4)) and to exclude from school students who are diagnosed with or suspected of having contagious diseases (Idaho Code §33-512(7)). In addition, boards of trustees are now also among three entities in Idaho that has the "authority to require, in schools or during school programs or activities, *measures intended to prevent the spread of contagious or infectious disease*."[7] (Idaho Code §33-212(2)) (emphasis added). Idaho Code §33-212 was adopted during the COVID-19 pandemic – March 3, 2021 – to address local authority relating to the adoption of contagious disease mitigation measures.[8] The Guidelines adopted by the Trustees reflect their clearly established authority to adopt measures intended to prevent the spread of COVID-19 within

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[7] The other two entities are the Governor and the State Board of Education. Idaho Code §33-212(1)(a).

[8] See *Idaho Session Laws*, 2021, ch. 14, §2, p. 32.

District schools. As the Guidelines are rationally related to the Trustees' legitimate interest in reducing the spread of COVID-19 among its students and staff, they satisfy rational basis review.

A few courts have addressed claims relating to mask mandates under the two-part test announced in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In *Jacobson*, the U.S. Supreme Court upheld a Massachusetts statute regarding mandatory vaccination. *Id*. at 12. In doing so, it noted that where the police power is concerned, liberty of the individual is tempered by the common good. *Doe*, at *2 (citing *Jacobson*, 197 U.S. at 26-27). Under the *Jacobson* test, a public health regulation should only be struck down if it (1) "has no real or substantial relation" to public health; or (2) "is, beyond all question, a plain, palpable invasion of the rights secured by the fundamental law." *Id*. The *Jacobson* test has been described by many courts as more deferential than the modern tripartite system of review. And, like courts using rational basis review, those courts relying on *Jacobson* have found that mask mandates easily pass its test. See, e.g., *Doe, supra.*

As discussed above, Plaintiffs attempt to side-step rational basis review by mischaracterizing the Guidelines as a forced medical experiment or medical procedure which is being imposed upon them without their consent. Like the many courts that have already addressed – and squarely rejected – such mischaracterizations, the Court here should reject Plaintiffs' gross mischaracterization of the Guidelines, apply rational basis review or the *Jacobson* test, and dismiss Plaintiffs' due process claim.

IV. CONCLUSION

As more fully set forth above, Plaintiffs' claims fail at the pleading stage. Plaintiffs have failed to allege any injury in fact or causation tying the Trustees' adoption of the Guidelines to any alleged injury, and they therefore lack standing to assert their claims. Their claims should therefore

be dismissed under F.R.C.P. 12(b)(1). Plaintiffs have also failed to state any claim upon which relief can be granted under F.R.C.P. 12(b)(6). No private right of action exists for the Plaintiffs to attempt to enforce the disclosure requirements for U.S. Food and Drug Administration Emergency Use Authorization products under the FTCA. Further, the Complaint does not assert any fundamental right giving rise to a substantive due process violation under the U.S. Constitution. The District's Guidelines mandating masks is rationally related to a legitimate government interest to stop the spread of COVID-19. It is neither a mandatory medical experiment nor a violation of international, federal or Idaho law. Accordingly, Plaintiffs have failed to state any claim for which this Court may grant relief, and the Complaint should be dismissed with prejudice.

DATED this 23rd day of December, 2021.

HOLINKA LAW, P.C.

/s/ Jill S. Holinka
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of December, 2021, 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:

Allen Shoff	
Davillier Law Group	____ by U.S. mail
414 Church St., Ste. 308	____ by overnight delivery
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Phone: 208-920-6140	__x__ by CM/ECF/e-mail to:
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