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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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

All governmental authority is bounded, whether by statutory limitations or, most profoundly of all, by the fundamental and inalienable rights protected by the Constitution of the United States. Thus, while Plaintiffs agree that Defendants, as members of the Board of Trustees

of a legally established school district, have authority "to require…measures intended to prevent the spread of contagious or infectious disease," and that "the Board of Trustees may exclude from school students who are diagnosed with or suspected of having contagious diseases," the question before this Court is one of bounds. I.C. § 33-212(2); I.C. § 33-512(7); *See* [DE-10], at 16.

Plaintiffs do not challenge whether statutes generally afford Defendants the authority to impose reasonable measures to protect the health of students, but whether this particular measure, the Guidelines for Face Coverings at School ("Guidelines"), violates fundamental rights. Plaintiffs contend that the imposition of nonconsensual medical experimentation, and Defendants' requirement that Plaintiffs and their children wear a medical device against their will, violates international *jus cogens* norms and fundamental rights guaranteed by the United States Constitution and must therefore be struck down. Plaintiffs have articulated concrete allegations sufficient to demonstrate standing by injury-in-fact and to survive a Motion to Dismiss, and therefore respectfully request that this Court deny Defendants' Motion to Dismiss.

II. LEGAL STANDARD

a. Rule 12(b)(1)

A motion to dismiss an action for failure to state a claim or for want of subject matter jurisdiction may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Calhoun v. United States*, 604 F.2d 647 (9th Cir. 1979) (*adopting opinion from Calhoun v. United States*, 475 F. Supp. 1, 2-3 (S.D. Cal. 1977)). Courts have interpreted jurisdiction afforded under Article III, Section 2 of the United States Constitution to require a three-part test:

> To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 704 (2000).

"The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. Where…a case is at the pleading stage, the plaintiff must clearly . . . allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 1547 (2016) (internal citations omitted).

> An association's assertion of standing on behalf of its members requires three points:
>
> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.
>
> *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

"The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211-12 (1975).

b. Rule 12(b)(6)

"In evaluating a Rule 12(b)(6) motion, the court accepts the complaint's well-pleaded factual allegations as true and draws all reasonable inferences in the light most favorable to the plaintiff." *Adams v. United States Forest Serv*., 671 F.3d 1138, 1142-43 (9th Cir. 2012) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Courts have gone so far as to say that although it "appear[s] on the face of the pleadings that a recovery is very remote and unlikely", "that is not the test"

before the Court. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974). The court may affirm a dismissal only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Abboud v. INS*, 140 F.3d 843, 848 (9th Cir. 1998).

III. ARGUMENT

A. Standing

1. Plaintiffs have suffered concrete and particularized injury in fact

The first plank of a standing analysis concerns injury in fact, which must be concrete and particularized and actual or imminent, not conjectural or hypothetical. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992) (internal citation omitted).

A particularized injury "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S. Ct. 1540, 1548 (2016). There is no question that Plaintiffs, and each of them individually, are personally affected by the Guidelines in a particularized way: the Guidelines require Plaintiffs to violate their bodily integrity and place a medical device upon their body, and that of their children.

A concrete injury may be tangible or intangible. "Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340, 136 S. Ct. 1540, 1549 (2016). The *Spokeo* court gives two examples of intangible injuries: the denial of a permit to place a permanent monument in a city park, implicating freedom of speech; and laws preventing animal sacrifice in accordance with a group's religious observations, implicating free exercise of religion. *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009); *Church of Lukumi Babalu*

Aye, Inc. v. Hialeah, 508 U. S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). When implicating a fundamental right, the effects of government overreach are often intangible: denying the placement of a statue, preventing protected speech, regulating how religious rituals are to be performed, or outlawing the performance thereof.

Defendants seem to argue that, although Plaintiffs object to wearing masks, their compliance with Defendants' mandated Guidelines somehow nullifies their standing. Yet the cases specifically identified as containing intangible harms by the *Spokeo* court foreclose that argument. Unwilling acquiescence to unlawful government authority does not absolve the act's unlawfulness, just as handing a mugger one's wallet does not sanction the robbery. There is no evidence on the record that the Church of Lukumi Babalu Aye violated the city ordinances passed to criminalize their religious practices; rather, they filed suit to strike them down. Similarly here, Plaintiffs must comply because Defendants' promulgated their Guidelines under color of law; Plaintiffs' recourse is to comply to avoid the imposition of governmental force, while seeking to strike down the requirement for its violative nature.

Defendants argue that "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." [DE-10], at 9. Yet only a single paragraph later, Defendants admits the Complaint is "replete with references" to general harms to children and acknowledges the existence of what they consider to be "minimal, conclusory statements" identifying harms. *Id.* Defendants' position, that these allegations are too conclusory to provide standing, is untenable in light of the harms alleged.

Here, Plaintiffs allege compelling intangible harms. Plaintiffs allege a fundamental right to their bodily integrity, to be free from the forced administration of medical devices, to make the decisions about controlling and consenting to the administration of medical devices and products

on their children, and to self-determination in the matter of medical care. [DE 1], ¶¶ 91-92. Much more than the organization in *Pleasant Grove City*, which merely sought the approval of a previously denied permit to require the placement of a statue, here Plaintiffs and their children must submit to the imposition of a medical device upon them.

Yet Plaintiffs also allege compelling tangible harms. The children of Plaintiffs Russell and Lisa Adams are denied social, psychological, and developmental experience essential to development; W.N.A. and T.R.A. are stressed and anxious by wearing masks and have suffered delay in their Spanish language development. [DE 1], ¶ 69. A.P., the child of Plaintiffs Hugh and Renata Paris Peddy, suffers from severe sinus congestion from wearing a mask at school, and sleeps poorly at night as a result. [DE 1], ¶ 70. D.S. has suffered breathing difficulties, tiredness, lethargy, and lightheadedness, not to mention social ostracization, as a result of the imposition of masks. [DE-1]-4, *Declaration of Denise Vidaillet*, ¶¶ 7-8. J.B. has developed a regular cough due to restricted breathing and skin irritation on his face, not to mention fear and emotional damage due to the actions of his teachers. [DE-1]-3, *Declaration of Rachael Broderson*, ¶¶ 7-11. Whether Defendants believe them, or whether the Court finds the factual allegations actionable, remains for a later date and is beyond today's scope. Sufficient for this stage is that the Plaintiffs have alleged specific factual, concrete, and particularized injuries. Plaintiffs' obligation at this stage of pleading is not to provide detailed factual analysis of, for instance, A.P's sinus congestion; sufficient is the allegation as made that A.P. developed sinus congestion after wearing a mask and suffers ill sleep as a result, or J.B. developing a regular cough after the imposition of the Guidelines.

2. Plaintiffs' injuries are traceable to the challenged action of the defendant

It is evident on the face of the matter that Plaintiff's intangible injuries, those impugning their fundamental rights to be free from nonconsensual human experimentation, those to be free

of affronts to their personal bodily integrity and autonomy, and the self-determination of medical treatment, are directly implicated by the challenged action of the Defendant. On this matter alone, Plaintiffs have provided sufficient allegations to continue. Yet as above, Plaintiffs have much more than provided cursory allegations. Plaintiffs have not provided doctors' notes, but neither are Plaintiffs required to. Plaintiffs have provided specific physiological symptoms and identified their relation to Defendants' challenged action: the Guidelines.

Defendants discuss the fact that the City of Hailey has also imposed a mask requirement, and question whether Plaintiffs' injuries are fairly traceable to the Guidelines or to the city's requirement. Plaintiffs would answer that, even accepting *arguendo* the assumptions implicit in the statement—that Plaintiffs live in Hailey, for instance, and not outlying areas of Blaine County—this argument falls on its face. Students attending public school in the United States spend the majority of their waking hours on school grounds, five days a week, and upon concluding the day's schooling, either remain on campus for extracurricular events or, more readily than not, return home. Even were a child to spend the time after school in the city limits of Hailey, it would not even come close to the time under the authority of the Board of Trustees and their Guidelines, and the injuries would be more appropriately traced to the Guidelines.

3. Plaintiffs' Injuries redressed by a favorable decision

This plank was not specifically addressed by Defendants. There is no question that Plaintiffs' children would be freed of the intangible and tangible injuries suffered from the obligation to wear masks on school property were the Guidelines struck down.

4. The Health Freedom Defense Fund appropriately alleged the requirements for associational standing

While it is true that "a plaintiff cannot establish standing by asserting an abstract general interest common to all members of the public," courts have established the right of associations to

represent the interests of its members upon the meeting of certain criteria. *Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (internal citation omitted). The three criteria, as cited above, are whether "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441. So long as these criteria are met, "the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211-12 (1975)

The Health Freedom Defense Fund ("HFDF") has established the standing of its members Ms. Broderson, Ms. Binns, and Ms. Vidaillet, in their declarations to that effect and by the arguments above. All three of these declarants are members of the HFDF. *See* [DE-1]-2, *Declaration of Rebecca Binns*, ¶ 12; [DE-1]-3, *Declaration of Rachael Broderson*, ¶ 12; [DE-1]-4, *Declaration of Denise Vidaillet*, ¶ 9.

Plaintiffs have alleged that this action is germane to its purpose. HFDF is "a member organization that seeks to advocate and educate the public on the topics of medical choice, bodily autonomy, and self-determination, and that *opposes laws and regulations that force individuals to submit to the administration of medical products, procedures, and devices against their will*." [DE-1], ¶ 13 (emphasis added). Actions such as this are precisely the purpose of the organization, and therefore it is appropriate that the organization be tasked with the representation of its members.

Finally, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. As the cause of action revolves around the constitutionality of the Guidelines, relief need not be granted on an individual basis but rather by the striking down of

an unconstitutional use of state power directly targeting fundamental rights, which will relieve all Plaintiffs equally.

Therefore, the members of the HFDF have appropriately conferred their standing upon the association to advocate on their behalf.

B. First Cause of Action

Plaintiffs' First Cause of Action is based upon the principle that, because the federal government has preempted the regulation of medicines and medical devices, and specifically preempted the limited emergency approval of experimental devices and treatments remaining in the clinical investigation stage, that any such contrary action by a state or local government would therefore be preempted by the Supremacy Clause of the United States Constitution. However, Plaintiffs do acknowledge the line of cases addressed by Defendants, specifically *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015), which belies the idea that the Supremacy Clause creates a private right of action. Plaintiffs inquire how, in light of *Armstrong*, private citizens may seek redress for injurious actions by state and local governments that violate federal law when federal authorities do not intend to enforce these provisions and have not included an explicit right to redress in the drafting of the legislation. Plaintiffs question the precedent and respectfully ask this Court to consider the question.

The Emergency Use Authorization for masks explicitly requires that all individuals to whom the product is administered be informed "of the option to accept or refuse administration of the product." Further, the

> FDA believes that the terms and conditions of an EUA issued under section 564 preempt state or local law, both legislative requirements and common-law duties, that impose different or additional requirements on the medical product for which the EUA was issued in the context of the emergency declared under section 564… To the extent state or local law may impose requirements different from or in addition to those imposed by the EUA for a particular medical product within the

> scope of the declared emergency or threat of emergency (e.g., requirements on prescribing, dispensing, administering, or labeling of the medical product), such law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and "conflicts with the exercise of Federal authority under [§ 564].
>
> [DE-1], Exhibit C, *Emergency Use Authorization of Medical Products and Related Authorities: Guidance for Industry and Other Stakeholders*, at 39-40.

Similarly, humans may not be the subject of research without legally effective informed consent, pursuant to 21 C.F.R. § 50.20. Therefore, Plaintiffs suggest that, in light of specific, actionable language protecting fundamental rights enshrined in the supreme law of the land—such as the *jus cogens* norm against nonconsensual human experimentation addressed much more in depth below—and guidance that federal law preempts attempts to declare otherwise at the state and local level, private citizens ought to have redress via the Supremacy Clause to contest the actions of state and local governments that are violative of the same.

C. Second Cause of Action

a. Defendants fail to address the jus cogens *basis for the fundamental right*

Defendants allege that 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." [DE-10]-1, at 13. While the fundamental right to determine ones' own medical treatment, and that of ones' children, composes the alternative basis of Count II of Plaintiffs' Complaint, Defendants fail to address the primary plank of Count II, alleging that Defendants' Guidelines violate the *jus cogens* norm, enshrined by international law, against nonconsenting human experimentation. *See* [DE-1], at ¶¶ 87-90. Defendants mistakenly believe Plaintiffs argue that "the Guidelines are a violation of some unspecified international, federal and Idaho law." [DE-10]-1, at 6. Indeed, the breadth of Defendants' misapprehension of the basis and development of the *jus cogens* norm appears explicitly in the Motion to Dismiss when Defendants' refer to Plaintiffs'

Complaint as "analogizing the use of masks" to Nazi concentration camps. Defendants may well have conflated Plaintiffs' arguments with those of plaintiffs in other actions, like in *Doe v. Franklin Square Union Free School District*, 2021 WL 4957893 at *20 (E.D. N.Y. Oct. 26, 2021). The plaintiff in *Doe* cited to the Nuremberg Code as a cause of action; Plaintiff here does no such thing. Far from analogizing the actions of Defendants to those of Nazi Germany, the reference to such a horrific chapter in human history is necessary—not merely for historical context, but for jurisprudential establishment of the basis of the *jus cogens* norm, as "the medical trials at Nuremberg in 1947 deeply impressed upon the world that experimentation with unknowing human subjects is morally and legally unacceptable." *United States v. Stanley*, 483 U.S. 669, 687, 107 S. Ct. 3054, 3066contd (1987). Plaintiffs went so far as to title that section of the Factual Background of the Complaint "The Genesis of the Universal Prohibition of Human Experimentation without Consent," and lay the groundwork of the formulation of *jus cogens* norm from its inception in the International Military Tribunal at Nuremberg to the present day. *See, generally*, [DE-1], ¶¶ 24-40. This detailed examination was far from arbitrary; it is all but required under the framework established by the 2nd Circuit:

> The critical inquiry is whether the variety of sources that we are required to consult establishes a customary international law norm that is sufficiently specific, universally accepted, and obligatory for courts to recognize a cause of action to enforce the norm.
>
> *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009).

In a way, it is deeply unfortunate that to trace the routes of this norm one must delve into the deprivations of Nazi rule and the dehumanization of whole populations; it is equally unfortunate for similar reasons that plaintiffs in other matters have gone so far as to liken their experiences to the Holocaust. *See Bridges v. Hous. Methodist Hosp.*, No. H-21-1774, 2021 U.S. Dist. LEXIS 110382, at *7 (S.D. Tex. June 12, 2021). It is unfortunate because, while the

reprehensible actions of the Third Reich served as a clarion call to universally decry nonconsensual human experimentation, even genuine violations, like the one alleged by Plaintiffs, of this fundamental international norm appear benign by comparison to such *malum in se* abuse of police power.

Yet the fact remains that there exists a *jus cogens* norm prohibiting nonconsensual human experimentation. The final question is whether the masks are experimental. An affirmative answer means that any attempt to require the wearing of mask without securing consent therefore violates that norm and is violative of that fundamental right. While the court in *Bridges* declines to call the hospital's vaccination requirement experimentation under a similar theory, the present case is distinguishable because it is not based on a violation of 45 C.F.R. § 46.116, but rather the *jus cogens* norm. *See Bridges v. Hous. Methodist Hosp*., 2021 U.S. Dist. LEXIS 110382, at *6 ("The hospital has not applied to test the COVID-19 vaccines on its employees, it has not been approved by an institutional review board, and it has not been certified to proceed with clinical trials."). Human experimentation encompasses more than clinical trials or institutional review boards; it is self-evident that many instances of human experimentation purposely eschew those very safeties set up to prevent unethical testing. Therefore, it suffices to explore whether the federal government believes these devices to be experimental.

The federal government permitted the use of masks and facial coverings under an Emergency Use Authorization as unapproved products. *See generally* [DE-1], Exhibit B. From March 24, 2020 on, the Secretary of HHS declared that "circumstances exist justifying the authorization of emergency use of medical devices," and face masks meet that definition. *Id.*, at ¶ 2; *Id.*, at Footnote 1. This Emergency Use Authorization ("EUA") was explicitly promulgated under the authority of 21 U.S.C. § 360bbb-3. *Id.*, at ¶ 1. Recognizing the *jus cogens* norm against human experimentation

and informed consent, the law requires that "individuals to whom the product is administered are informed of the option to accept or refuse administration of the product," where product is defined as "a drug, device, or biological product." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III); 21 U.S.C. § 360bbb-3(a)(4)(C). The experimental nature of the product is clear in the EUA guidance, as "any future use of an EUA product beyond the term of the declaration is subject to investigational product regulations"—that is, the standard regulations for new medical devices, which require investigating their harms and benefits in a rigorous manner with due concern for consent and ethical experimentation. [DE-1], Exhibit C, 29. The totality of the federal guidance and regulations demonstrate the purpose of the EUA. The EUA temporarily allows widespread use of masks and face coverings for a medical purpose: the federal government, in an effort to combat the COVID-19 pandemic, permitted masks to be used by the general public if they so desired, and even recommended that they do. But what the federal government was very careful to emphasize in official documentation, recognizing the ethical norms governing medical devices, was to ensure that individuals were still informed and given the choice of using the experimental device or not. The Defendants have not contemplated these ethical norms in their promulgation of the Guidelines.

b. Forced medication, wearing of medical devices, or medical treatment is a violation of fundamental rights

"[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"). Plaintiffs allege that their bodily integrity, autonomy, and the right of consent to and/or refusal of medical treatment, arising out of a Fourteenth Amendment liberty interest, are implicated by the Defendants' Guidelines.

Defendants respond by citing recent cases in several jurisdictions around the country which attempt to distinguish mask requirements and medical treatment or devices. First, it is clear from the argument above, and from Plaintiffs' Complaint, that the FDA treats face masks, when used for a medical purpose, as medical devices and regulate them as such—otherwise the FDA would have no authority to issue an EUA or otherwise regulate them in the first place.

Second, the courts, particularly those in *Machovec v. Palm Beach County*, 310 So.3d 941 (Fla. App. 2021) and the previously cited *Doe*, argue by analogy that masks are akin to "laws requiring shoes in public places…or helmets while riding a motorcycle," or "akin to prohibitions on smoking in indoor workplace." *Doe*, at *18; *Machovec*, 310 So.3d at 946. Yet facially these analogies are imperfect at best. First, none of these three discuss a medical device, and so from

the start the analogy and reality diverge. Prohibitions against smoking do not require an individual to wear anything, but rather forego something. Shoes and motorcycle helmets, in addition to not being medical devices, are also well-understood mechanically and are certainly not experimental, while debate still rages about whether masks even provide benefit to preventing viral transmission, and the potential harms are equally in contention. These analogies simply do not contemplate what a mask actually is, at one hand dismissing them as akin to an article of clothing, but then on the other lending to them the same respect as Defendants when they argue the Guidelines implement an "indispensable COVID-19 precaution." [DE-10], at 2. It cannot be both. Either masks are medical devices, in which case the FDA has deemed them experimental and Defendants have an obligation to acknowledge and request consent; or they are not medical devices, in which case they are little more than facial decorations and fail under even a rational basis test.

c. Strict scrutiny, not rational basis, is appropriate

Plaintiff has demonstrated well beyond the standard of proof of a F.R.C.P 12(b)6 motion two groups of fundamental rights, based upon two independent theories, implicated by Defendants' Guidelines. First, the *jus cogens* norm prohibiting human experimentation without informed consent; second, the right of bodily integrity and autonomy in choosing medical treatment. Plaintiffs have demonstrated sufficient allegations for both of the ancillary points, that the masks and facial coverings are both medical devices and/or medical treatments, as defined by the federal government and by common sense; and that the emergency use authorization permitting the sale and use of unapproved medical products, and the state of medical science, makes the widespread, short- and long-term use of masks and facial coverings by all students, visitors, and faculty to the Blaine County School District experimental. Thus, having established that the Defendants' mask

mandate implicates multiple fundamental rights, strict scrutiny is appropriate, and Plaintiffs have made sufficient well-pled allegations that call into question whether the Defendants' mandate serves a compelling governmental interest, and whether it has been narrowly tailored to achieve that interest.

Defendants point to several recent cases which held that mask requirements fell under a rational basis analysis. Yet in each of these cases the underlying cause of action was different. In *Oberheim v. Bason*, the plaintiffs attempted to describe a right to attend school without wearing a mask. The court, of course, did not agree. *Oberheim v. Bason*, No. 4:21-CV-01566, 2021 U.S. Dist. LEXIS 188843, at *18-19 (M.D. Pa. Sep. 30, 2021). Plaintiffs here, instead, point to the lengthy discussion above that masks are in fact a medical device and, in doing so, implicate the *Glucksburg* and *Cruzan* line of cases. As dissimilar theories it is inappropriate to rely on *Oberheim* for any persuasive value toward this matter. Similarly, the court in *Branch-Noto v. Sisolak* falls into the same fallacy of analogy as discussed above, citing the same cache of laws: seatbelts, helmets, laws requiring the wearing of shirts and shoes, and smoking bans—not addressing the fact that masks are medical devices or the other shortfalls above. *See Branch-Noto v. Sisolak*, No. 2:21-cv-01507-JAD-DJA, 2021 U.S. Dist. LEXIS 244089, at *8 (D. Nev. Dec. 22, 2021).

d. Plaintiffs' allegations exceed the two-part Jacobson *test*

Defendants briefly address *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), arguing that "mask mandates easily pass its test." [DE-10]-1, 17. First, a critical point of procedure: the sole case cited by Defendants on the issue of *Jacobson*, the above-referenced *Doe*, concerns a motion for preliminary injunction, *not* a motion to dismiss. In *Doe*, the court analyzes in great detail factual and scientific submissions by both the plaintiff and defendants on the issue of masks and the scientific understanding of their functioning before coming to its conclusion. It would therefore be

inappropriate to take the court's finding that that mask mandate survives *Jacobson* and apply it here, where this Court has received a Motion for Preliminary Injunction but has yet to receive Defendants' Response, Plaintiff's Reply, or hear oral arguments.

An analysis of *Jacobson* in light of Plaintiffs' complaint demonstrates, even by this relatively low standard for governmental intervention, that Plaintiffs have alleged facts sufficient to survive a motion under F.R.C.P. 12(b)6. Plaintiffs allege well-pled facts that call into question both of the parts of the *Jacobson* test. For the first part, *Jacobson* questions whether a statute purporting to have been enacted to protect the public health has a real or substantial relation to those objects. Plaintiffs bring two major groups of allegations, both of which are well-pled and must be taken as true at this phase of pleadings. First, masks and facial coverings simply do not work, and therefore have no real or substantial relation to the object of public health. But further, and unlike the plaintiffs in *Oberheim*, Plaintiffs here argue particularized, concrete harms that have resulted and likely will result from the wearing of masks in both the short- and long-term under the mask mandate. From a review of the facts as summarized by the court in this case as well as in these factual allegations are unique to the instant matter. Plaintiffs argue that, whatever good intentions the Defendants have in promulgating these Guidelines, the true effect is one of no benefit, and substantial injury, ultimately causing more harm than good to the students and faculty in the Blaine County School District. For this reason, the Defendants' Guidelines fail the first part of the *Jacobson* test.

Secondly, the Plaintiffs allege that beyond all question, the Defendants' Guidelines constitute a plain, palpable invasion of rights secured by fundamental law. As articulated above, Plaintiffs allege that the forced implementation of masks, or for that matter any unapproved medical device, constitute medical experimentation and forcefully violate the necessity of

informed consent. As a *jus cogens* norm, the prohibition against nonconsenting medical experimentation is not just a fundamental law in the United States, but worldwide. Plaintiffs have not made a bare allegation that the present mask requirements violate the *jus cogens* norm, but have laid out the history of the norm from its inception to the present, and pointed to international law, treaties, and federal laws that implement and adhere to this norm to demonstrate its relevancy and applicability.

Plaintiffs also allege that their rights to bodily autonomy and integrity have been substantially violated by the Defendants' emergency orders. "The due process clause of the Fourteenth Amendment substantively protects a person's rights to be free from unjustified intrusions to the body, to refuse unwanted medical treatment and to receive sufficient information to exercise these rights intelligently." *Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002). The present case is admittedly unique in the lineup of Supreme Court and 9th Circuit precedent establishing this fundamental right of bodily autonomy; it is not the injection of antipsychotic medication into a mentally ill inmate as in *Riggins v. Nevada*, 504 U.S. 127 (1992), nor is it the decision to withhold nourishment from an adult in a vegetative state as in *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261. However, while the present case is not these, the situation facing Plaintiffs is itself altogether new in the American experience. For the first time in American history, for their children to attend a public school, Plaintiffs must buy or make makeshift medical devices ostensibly for the purpose of preventing the spread of a virus and force them upon their children, in violation of their fundamental rights to bodily integrity. It is appropriate for the Plaintiffs to have an opportunity to present evidence to support their well-pled allegations.

IV. CONCLUSION

Plaintiffs have demonstrated standing, both individually and for the associational status of the Health Freedom Defense Fund. Plaintiffs recognize the limitations of *Armstrong v. Exceptional*

Child Ctr., Inc. on private causes of action under the Supremacy Clause, but ask this Court to consider an alternative analysis. Finally, Plaintiffs have demonstrated well-pled, factual allegations sufficient to survive a Motion to Dismiss for a cause of action under the 14th Amendment substantive due process, as well as under the *jus cogens* norm prohibiting the imposition of nonconsensual human experimentation. Plaintiffs therefore respectfully request that this Court grant Plaintiffs the opportunity for oral argument before the Court on this motion, and respectfully request that this Court deny Defendants' Motion to Dismiss.

DATED this 13th day of December, 2021.

DAVILLIER LAW GROUP, LLC
By: /s/ Allen Shoff
Allen Shoff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2022, 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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