Allen Shoff, ISB #9289
Davillier Law Group, LLC
414 Church St Suite 308
Sandpoint, ID 83864-1347
208-920-6140
Email: ashoff@davillierlawgroup.com

Attorneys for Plaintiff

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' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF

I. INTRODUCTION

Defendants cite the general proposition that, while "[s]ome may disagree with the public health efficacy of mask orders…federal courts do not sit in a policy-checking capacity to second-

guess the wisdom of state legislative acts." *Oakes v. Collier Cty.*, 515 F. Supp3d 1202, 1209 (M.D. Fla. 2021). Plaintiffs agree with this general rule well-stated in *Oakes*, and recently reiterated by the Supreme Court in its decision striking down the OSHA vaccination mandate: "There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the 'general power of governing,' including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government." *Nat'l Fed'n of Indep. Bus. v. DOL*, Nos. 21A244, 21A247, 2022 U.S. LEXIS 496, at *13 (Jan. 13, 2022) (internal citation omitted). Fundamentally, state and local governments, including such governmental entities as the Blaine County School District No. 61 ("BCSD"), have broad discretion via their police powers to take actions for the common good, and courts, particularly federal district courts, remain rightfully reticent to intervene on matters of policy.

Yet federal courts can, and do, intervene, even in these matters of policy, when those policies interfere with the fundamental rights of the citizenry. As the court articulated in *Jacobson v. Massachusetts*, "While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law." *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358, 366 (1905). Plaintiffs recognize that preliminary relief is an extraordinary measure; but these are extraordinary times. It is critical that in an otherwise well-intentioned desire to protect citizens, the fundamental rights of those students and faculty of BCSD are not unlawfully infringed, for "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

Furthermore, it is vital that the health and safety of the Plaintiffs—and all those who attend school in and work for BCSD—are also protected. Plaintiffs' concerns have been well articulated in the declarations of their experts and elaborated upon in their initial motion: that far from being an effective tool for mitigating the spread of SARS-CoV-2, masks, especially those worn in the community, increase risk of infection, and likely lead to serious and lifelong health consequences,

both physiological and psychological. Therefore, while "[e]very violation of a person's bodily integrity is an invasion of his or her liberty," the risks at stake here are to both fundamental rights and to health, and thus Plaintiffs request that these requirements that students and faculty at BCSD facilities wear masks ("Guidelines") be enjoined pending the final adjudication of this matter for the protection of the Plaintiffs and all other students and faculty. *Washington v. Harper,* 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part).

II. PROCEDURAL NOTE

As the Plaintiffs and Defendants both filed motions on the same day (the Plaintiffs' Motion for Temporary and Preliminary Injunctive Relief, [DE 9], and the Defendants' Motion to Dismiss, [DE 10], both filed December 23, 2021), the timelines have been necessarily entwined. The result has been that arguments made by Plaintiffs to counter Defendants' contentions about the merits—in particular, those pertaining to standing, the arguments against Plaintiffs' first and second cause of action, and the question of the tiers of scrutiny applicable in this matter—were read for the first time by this Court in Plaintiffs' Opposition to the Motion to Dismiss, [DE 18]. Because Defendants filed their Opposition to the Motion for Preliminary Injunction ([DE 17]) on the same day, January 17, 2022, Defendants in this Opposition that Plaintiffs here answer re-articulated their position from the Motion to Dismiss, having not yet had the opportunity to review Plaintiffs' arguments against them. While Plaintiffs await Defendants' Reply to the Opposition to the Motion to Dismiss, in this Reply Plaintiffs will not address again at length these questions on the merits, in respect to judicial economy. Rather than reiterate what was already analyzed in the Opposition to the Motion to Dismiss, Plaintiffs here focus on the new arguments brought forth by Defendants, and specifically their declaration and the arguments against Plaintiffs' declarations discussing the question of irreparable harms, the balance of the equities, and the public interest.

III. ARGUMENT

a. The weight of evidence of irreparable harm leans heavily to the Plaintiffs

Defendants provide a single declaration in response to Plaintiffs' Motion for Temporary and Preliminary Injunctive Relief, that of Trustee Lara Stone. The declaration may generally be

described as a retrospective review of the actions taken by the Board of Trustees in coming to its determination of the necessity, in their view, of the mask Guidelines. Trustee Stone generally describes the goals of the changing learning systems, the switch to hybrid learning and back to a more traditional schooling method throughout the course of the pandemic, and Trustee Stone's belief that "masking is perhaps the most effective of our mitigation efforts and, augmented by our other mitigation measures, masking has proved integral to our mitigation efforts." [DE 17]-1, *Declaration of Lara Stone*, ¶ 14 ("Stone Declaration").

Yet there is an important distinction to be made. When Trustee Stone discusses measures taken, deliberations made, and decisions finalized, she is speaking within her expertise and within her personal knowledge as a trustee, and in that she provides useful information for review. Yet while she makes affirmative statements as to the efficacy of masks or their necessity for the school, Plaintiffs object to the inclusion of those statements, as they move far beyond her personal experience or expertise. Trustee Stone goes so far as to draw a statistical conclusion from a single point of data (the Blaine County School District), arguing that

> the evidence we have gathered based on our contact tracing and attendance in the fall of 2021, while our Guidelines were in place, shows that the use of masks by our students and staff have helped reduce our cases of COVID-19, despite an overall increase in cases within Blaine County.
>
> Stone Declaration, ¶ 15.

It is a humorous axiom that "the singular form of 'data' is not anecdote," yet an anecdote is what Trustee Stone puts forth as evidence here: a single data point of a single school district. But even beyond that, Trustee Stone is no epidemiologist, nor statistician. She has no medical or scientific authority with which to buttress her statement. There was no control, or scientific analysis, or statistical review, or consideration of confounding variables, nothing that would indicate that masks *in particular* had any stronger effect on the lower level of cases than any other single

variable, whether something as simple as random chance or complex as the social dynamics of a school environment as opposed to that of the rest of society. In short, this conclusion is not adequately borne out by the evidence.

What Trustee Stone does show, however, is an implementation of many of the same protective measures provided by Mr. Petty in his declaration, as well as the Plaintiffs in their briefing: air filtration, voluntary vaccination and booster clinics at school, changing fan traffic flows at sporting events, wellness checks before practices and games, limitation on the number of individuals in closed environments, and opportunities to eat or hold classes outside during clement weather. *See, generally,* Stone Declaration, at ¶¶ 10-11. Plaintiffs commend Trustee Stone, and the entire Board of Trustees, in their role promoting and promulgating these measures. Each of these measures, and especially cumulatively, are measures which are minimally invasive to the liberty of the students and faculty and have been analyzed and found to be maximally efficacious in preventing the spread of infectious disease in general, and SARS-CoV-2 in specific. These Plaintiffs certainly do not seek to enjoin, but rather that single measure which, contrary to these other measures, is maximally invasive and minimally efficacious, and which is most likely to cause serious irreparable harm, as alleged at length by Plaintiffs' experts in their declarations.

b. <u>The declaration of Mr. Petty withstands Defendants' scrutiny</u>

The sole argument Defendants make against the lengthy, comprehensive analysis by Mr. Petty is that his declaration "likewise fails to offer any evidence the Plaintiffs will suffer irreparable harm, instead extrapolating such conclusion from a review 'of the literature on these topics'. [DE 17], at 17. In the first place, Mr. Petty's primary focus as a Certified Industrial Hygienist, Certified Safety Professional, and Professional Engineer in six states, is developing methods to protect employees and the public from injury and danger, especially to mitigate "airborne/dermal hazards

and pathogens." [DE 9]-3, Declaration of Stephen Petty, ¶ 11 ("Petty Declaration"). Industrial Hygiene also concerns itself with the design and use of personal protective equipment. *Id.* His decades of experience testifying in approximately four hundred cases, writing dozens of articles, and presenting to countless organization demonstrates his knowledge and expertise in this field, and so his conclusions are not a mere "review" but borne out by his experience. Mr. Petty articulates that "ordinary facial covers do not provide a reliable level of protection against inhalation of very small airborne particles." *Id.*, at ¶ 28. Mr. Petty discusses a paper "reviewing 44 experimental studies and 65 publications on adverse effects from masks" reviewing measurable physical effects like elevated CO2 retention after wearing a mask for a mere half hour. *Id.*, at ¶ 40. Another study showed "dizziness, listlessness, impaired thinking, and concentration problems from wearing masks" in the study group of young students. *Id.*, at ¶ 41. These are not just idle thoughts; this is the thoughtful analysis of an unparalleled expert in the field of industrial hygiene—a man whose job it is to design and analyze protective equipment to save lives—saying that, in his professional opinion, not only do masks not work, but they instead endanger the users. For this reason, Mr. Petty's declaration goes not only to the irreparable harms, as Defendants suggest, but also weighs strongly in the balance of the equities.

c. The analysis of Prof. Dr. Walach surmounts Defendants' arguments

Defendants begin by arguing that Prof. Dr. Walach bases his declaration on a single meta-study [DE 17], at 15. Yet then two pages later, Defendants acknowledge the existence of other scientific studies in his declaration, but off-handedly dismisses them as "various (mostly German) studies". [DE 17], at 17. Defendants cannot clearly have it both ways. Prof. Dr. Walach—who himself has an impressive decades-long career with over two hundred peer-reviewed publications and over one hundred book chapters, in addition to other books and commentaries—provides no

fewer than fourteen independent studies in his declaration, several of which were compilations and meta-studies themselves analyzing dozens of others, to support his contentions and expert opinion. There is simply no question that Prof. Dr. Walach is qualified to provide expert testimony upon his review of the literature for the question of the efficacy of masks, given his long and distinguished scientific pedigree and his work as head of research groups and academic analysis in the department of epidemiology at the University Hospital of Freiberg.

c. Defendants offer no evidentiary contest to the declarations of Ms. Prousa, Dr. Wagner, and Dr. Farella

Defendants focus on the question of whether Ms. Prousa, Dr. Wagner, and Dr. Farella examined or discuss the harms specific to the Plaintiffs. Yet the injuries discussed in all three of their declarations are, by nature, general, and thus apply both to Plaintiffs as well as to all the children and staff in BCSD. The articulated harms no less apply to Plaintiffs if they are but one of a larger group.

Defendants attempt to call into question Ms. Prousa's scholarship for a single paper which was discounted by the original publisher. Even granting Defendants' argument against that single publication—and setting aside all questions swirling around whether it was an appropriate step by the publisher—Defendants bring no argument against her credentials as a psychologist and an expert in psychotherapy and psychiatric work, nor the fourteen other studies cited and discussed in her declaration in support of her propositions.

It is a similar issue with Dr. Farella and Dr. Wagner. Defendants do not even attempt to call into question Dr. Farella's education and her credentials, nor her experience treating hundreds, if not thousands, of patients presenting with COVID-19. Defendants clearly misunderstand the importance of Dr. Wagner's declaration and her expertise in the matter of animal studies of

chemical exposure. Due to ethical concerns, there is no real way to test the effects of exposure of various levels of carbon dioxide upon human beings. Therefore, as with many such otherwise unethical but important studies, we turn to animals in place of humans, and apply a scaling factor to the values derived from experimentation. There is no one better qualified to understand this interaction between human/animal scaling factors, and to derive the evidentiary value from the numerous studies cited in the declaration, than Dr. Wagner, whose career as a specialist in veterinary medicine assisting in developing medicines for human consumption gives her a uniquely qualified perspective to bridge the animal studies into human proportions. But again, as with Prof. Dr. Walach, Mr. Petty, Ms. Prousa, and Dr. Farella, Defendants have no evidentiary basis from which to attack the conclusions and expert opinions of Plaintiffs' experts. Prof. Dr. Walach demonstrates that masks are inefficacious from dozens of scientific and medical studies; Mr. Petty provides the mechanical and practical analysis of the same from his perspective as an industrial hygienist, while establishing his concerns about the risks of harm. Dr. Farella weighs the risk and benefit of masks to her primary patients, children, from her experience as a pediatrician, and finds that masks are not an appropriate measure. Ms. Prousa analyzes the psychological and developmental risks from short- and long-term mask exposure and finds them serious and concerning. And Dr. Wagner demonstrates that the rise of carbon dioxide inhalation and retention established by Prof. Dr. Walach and Mr. Petty leads to serious short- and long-term consequences. In short, Plaintiffs have demonstrated a serious risk of irreparable harm, as well as the inefficacy of masks, which leans the balance of equities and the public interest far over onto the side of the Plaintiffs.

IV. CONCLUSION

At the conclusion of this matter, Plaintiffs argue that this Court will find that Defendants' mask Guidelines have implicated and injured the fundamental rights of the Plaintiffs and their

children. Plaintiffs have argued the basis for these fundamental rights, from both the *jus cogens* norm and from the fundamental rights of bodily integrity and personal autonomy arising from substantive due process emanating from the Fourteenth Amendment. Yet while the matter is pending before this Court, Plaintiffs have provided the Court with substantial scientific evidence, based in dozens of long-term, peer-reviewed studies, articulating the harms of wearing masks, especially for longer durations, and most injuriously, to younger children in particular. Plaintiffs have also articulated numerous concerning studies describing the educational, developmental, speech and linguistic delays, not to mention the psychological damage, caused by the imposition of a requirement for children in particular to wear masks on a daily basis at school.

In response, Defendants have not brought compelling evidence-based arguments in opposition. Defendants have not brought forward experts in the field of industrial hygiene, for instance, to demonstrate how Mr. Petty is mistaken in his decades of experience marshalled to determine from the evidence that the masks have no public benefit but instead likely impose serious harms. Defendants have not brought forward an expert in analyzing the effects of acute or chronic carbon dioxide inhalation on the body, nor have they offered any evidence against Dr. Wagner's expertise with animal studies and reviews and how the results apply to human beings with an appropriate scaling factor. Defendants have not brought a psychologist to contradict Ms. Prousa's determination, as a licensed and practicing psychologist, that there are serious psychological harms, especially to those younger children still well within the critical phase of empathetic development. Defendants have not brought a pediatrician to contradict Dr. Farella's arguments that, from her training and her expertise treating patients with COVID-19, that there is no appreciable risk to the children attending school in BCSD, but that, as a physician, her medical opinion is that the risks and side effects of mask usage outweigh any marginal benefit to be gained

by wearing a mask. Defendants have not brought an epidemiologist to argue against Dr. Walach's comprehensive review of the various studies used to support masks, and demonstrating that, on the contrary, the actual randomized control studies and retrospective reviews of real-world mask usage—as opposed to lab or mechanistic testing—shows no or negative effect of an individual wearing a mask as opposed to an individual without. Defendants have instead declared that, beyond their general review of popular guidance from entities like the CDC, they've based their Guidelines on direction from a single local physician and a single physical therapist, neither of which have provided a declaration of their opinions or testimony to be scrutinized by this Court.

Therefore, in light of the overwhelming evidence demonstrating the very real risk of injury to the children and staff of BCSD, Plaintiffs have asked this Court to grant preliminary injunctive relief pending the final outcome of the constitutional inquiries of this matter. The balance of the equities and the public interest, specifically in light of the Defendants' impressive list of alternative resources they have used and continue to use to combat this pandemic provided by Trustee Stone, lean heavily in the direction of the Plaintiffs. Far from crippling BCSD's pandemic response, the removal of the masking requirement by enjoining enforcement of the Guidelines will simply remove a single tool—a tool that is the least efficacious, most infringing, and most dangerous—from the otherwise remarkably full and effective toolbox compiled by Defendants.

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 20th day of January, 2022.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th 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:

Attorney for Defendants

Jill S. Holinka, ISB No. 6563
HOLINKA LAW, P.C.
P.O. Box 190164
Boise, Idaho 83719
Phone: 208-572-3355
Email: jsh@holinkalaw.com

DAVILLIER LAW GROUP, LLC

By: /s/ Allen Shoff
Allen Shoff