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

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

HEALTH FREEDOM DEFENSE FUND, INC., et al, Plaintiffs, vs. CITY OF HAILEY, IDAHO, a municipal corporation; and MARTHA BURKE, in her official capacity as the Mayor of the City of Hailey, as well as in her personal capacity for purposes of Section 1983 claims asserted herein. Defendants.	Case No. 1:21-cv-389 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

COMES NOW HEALTH FREEDOM DEFENSE FUND, INC. ("HFDF"), RYAN BLASER and his minor children, K.B.B. and K.S.B., MICHELLE SANDOZ and her minor children, R.S. and E.S., BARBARA MERCER, EMILY KNOWLES and her minor children, A.K. and A.K., and KENDALL NELSON, by and through their undersigned counsel, and, pursuant to F.R.C.P. 12(b)(1) and F.R.C.P. 12(b)(6) and interpreting precedent, respectfully request this Court deny Defendants' Motion to Dismiss.

1. INTRODUCTION

Defendants bring a Motion to Dismiss on two main grounds: first, alleging a failure of standing, and second, arguing that Plaintiffs fail to state a case upon which relief can be granted.

Plaintiffs have alleged particularized and concrete injuries-in-fact in detail in the complaint—more detail, in fact, than would be necessary under the minimal pleading standard. Plaintiffs bring two causes of action. The first argues that Defendants' emergency order is preempted by the federal Supremacy Clause. The second articulates a Fourteenth Amendment claim of substantive due process, based on two groups of fundamental rights: the right to bodily integrity, autonomy, and right to consent to medical treatment; and the *jus cogens* norm against human experimentation without consent.

The instant case is distinguishable from any of the cases cited by Defendants in opposition. Plaintiffs bring numerous specific, factual allegations outlining the short- and long-term risk of harms—physical, psychological, social, and developmental—that result from the enforced wearing of masks. Plaintiffs further allege that the mask mandate, far from having a real and substantial relation to the object of public health, likely causes more harm than good, failing the test of *Jacobson v. Massachusetts*. Further, none of the cases cited by the Defendants address the detailed analysis of the *jus cogens* norm against human experimentation without consent.

Defendants characterize the mask mandate as a "necessary step" and an "indispensable COVID-19 precaution" to preserve public health. *Plaintiff's Memorandum in Support of Defendants' Motion to Dismiss ("Motion to Dismiss")*, 2. Plaintiffs provide sufficient well-pled factual allegations that Defendants' mask mandate fails to protect, and in fact impairs public health, and as a result ought to be struck down.

2. 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)

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).

3. ARGUMENT

a. Plaintiffs have Standing Due to i) their Allegations of Concrete and Particularized Injuries and the Threat of Future Injuries; ii) the Link between their Injuries to Defendants' Mask Mandate; and iii) the Likelihood of Redress of these Injuries by Favorable Decision.

i. Injury-in-fact

Injury-in-fact is the "[f]irst and foremost" of the three elements of standing. *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). To establish injury-in-fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), citing *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 363 (1992).

While it is true that Plaintiffs cannot solely allege a "bare procedural violation, divorced from any concrete harm" to allege an injury-in-fact, "'concrete' is not, however, necessarily synonymous with 'tangible.' 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.,* at 1549.

Defendants argue that Plaintiffs "have not suffered any concrete or particularized injury with respect to the City's mask requirement." *Motion to Dismiss*, 9. Curiously, Defendants also, in summarizing the Complaint, list some of the concrete and particularized harms alleged by the Plaintiffs, but then argue that Plaintiffs simply ought not to follow the emergency order—that, as a matter of practice, anyone can rely on the honor system and sidestep the emergency order by claiming a medical exemption under exemption (b). *See Motion to Dismiss*, 6; *Motion to Dismiss* Exhibit A, 4. Whether claiming exemption (b) would truly protect Plaintiffs when confronted with

Hailey City Police enforcement[1] aside, a purely medical exemption certainly does not provide relief for the economic, developmental, or social impact of the order, at minimum. Defendants further state that the Plaintiffs who articulated harm through their restricted participation in dance, Pilates, and yoga classes are exempt from compliance under exemption (e). *Motion to Dismiss*, 6. Yet the plain language of the exemption states that athletic *competitions* are exempt, while Defendants misstate that athletic *endeavors* are exempt from compliance. *Ibid*.; *Motion to Dismiss* Exhibit A, 4. To Plaintiffs' knowledge, dance, Pilates, and yoga are not competitive endeavors, and Plaintiffs do not have the luxury of casually subjecting duly promulgated orders to their own interpretation when faced with enforcement by the Hailey City Police Department.

Finally, Defendants argue that none of the Plaintiffs have been "personally forced to wear a mask" or "have ever been cited for violating…the mask mandate." *Motion to Dismiss*, 9. While it is true that the Plaintiffs have not been cited for violations, it is disingenuous to argue that they have not been "personally forced." Defendants' order is an emergency order duly enacted and promulgated under the provisions of Emergency Powers Ordinance 1290, itself enacted under the aegis of I.C. § 50-302. Defendants argue the unusual position that the emergency order of the City of Hailey is illusory, that its provisions can be bent or ignored at will, and that the amorphous quality of the order forecloses Plaintiffs' injuries-in-fact. However, as citizens of and visitors to the City of Hailey, Plaintiffs must take the City Council and Mayor at their word, because the laws of the State of Idaho grant them the power to enforce it.

Defendants cite the United States Supreme Court in *Laidlaw* for the three-part test to

[1] On September 28, 2021, Hailey City Police Chief Steve England threatened that due to "a gradual increase in complaints regarding lack of compliance," "if push comes to shove, we will enforce the Public Health Order that was voted into place by our duly elected officials." *Message from the Chief*, Facebook Post by Hailey Police Department, September 28, 2021, https://www.facebook.com/haileypolice/posts/226668829501353 (last visited November 8, 2021).

establish injury-in-fact. *Laidlaw* was a case involving industrial discharges into the environment, and suit was brought by an association of concerned citizens. In establishing the three-part test, the court there found that:

> [t]he affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests.
>
> *Laidlaw ,* 528 U.S. 167, 183-84.

In other words, the existence of mere "recreational, aesthetic, and economic" interests was sufficient to demonstrate standing. Here, Plaintiffs allege a number of concrete, particular physiological and psychological harms directly caused by the wearing of masks pursuant to the mandate, including depression, social isolation, breathing difficulties, headaches, anxiety, joint inflammation, panic attacks, feelings of suffocation, devastating economic injury to businesses and livelihoods, and reduced attendance or foreclosed participation in social and athletic events for adults and children alike. *See Complaint*, ¶¶ 72-79; *Complaint* Exhibit D*,* Declarations 1-3. Plaintiffs further allege particular and concrete child developmental harms (*Complaint*, ¶ 70) and short- and long-term physiological and psychological harms resulting from the limitation of oxygen and the increase in carbon dioxide levels in the bloodstream caused by the wearing of masks (*Complaint*, ¶ 67). Plaintiffs easily exceed the simple "recreational, aesthetic, and economic" interests alleged in *Laidlaw* and have clearly articulated injuries-in-fact.

ii. Injury is fairly traceable to the challenged action of the defendant

The Defendants did not address the second plank of the injury-in-fact test of *Laidlaw* in their Motion to Dismiss. It suffices to state that Plaintiffs have alleged these harms were caused solely and particularly by the wearing of masks as required under the Defendants' order.

iii. Injury is likely to be redressed by a favorable decision.

Defendants have not contended that the Plaintiffs' injuries would be redressed by a favorable decision. Plaintiffs have alleged that the injuries and threat of future injuries alleged in the Complaint are caused purely by the imposition of the mask mandate by the Defendants. As such:

> [i]t can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress.
>
> *Laidlaw*, 528 U.S. at 185-86.

In the absence of the requirement to wear masks pursuant to the Defendants' order, Plaintiffs would again be able to breathe freely and not suffer the physiological, developmental, economic, social, and psychological harms alleged.

b. **Plaintiffs' Preemption Cause of Action States a Claim Under the Supremacy Clause, Not the Food, Drug, and Cosmetics Act**

Turning to the first of two Causes of Action contested under F.R.C.P. 12(b)6, Defendants address 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III) and correctly point out that the Food, Drug, and Cosmetics Act ("FDCA") does not offer a private right of action. However, Plaintiffs' allegations were not drawn from the FDCA; instead, Plaintiffs argued that the imposition of a mask mandate based upon an experimental medical device is unconstitutional in that it is preempted by the Supremacy Clause. In other words, the Supremacy Clause provided the cause of action, and the FDCA provided the law under which the cause of action would be brought.

However, in preparing briefing for this Court, Plaintiffs analyzed the Supreme Court case *Armstrong v. Exceptional Child Ctr., Inc.,* 575 U.S. 320, 135 S. Ct. 1378 (2015) and conclude that it likely refutes the legal theory that the Supremacy Clause creates private causes of action.

c. **Plaintiffs have Alleged Sufficient Facts for the Second Cause of Action to Survive a F.R.C.P. 12(b)6 motion.**

i. Rational basis is an inappropriate standard because Defendants mandate a treatment or medical device that implicates Plaintiffs' fundamental rights

Defendants argue that "most courts have applied the rational basis test" in dismissing cases that bring challenges to mask mandates on substantive due process grounds. *Motion to Dismiss*, 15. Defendants cite four district courts for that proposition, one in the Middle District of Pennsylvania, one in Hawaii District Court in the 9th Circuit, one in the Southern District of Florida, and one in the Southern District of California in the 9th Circuit. The Pennsylvania court was not addressing a motion to dismiss; rather the court denied a motion for a preliminary injunction, a much higher bar of proof for the plaintiff than required under F.R.C.P. 12(b)6. *Oberheim v. Bason*, No. 4:21-CV-01566, 2021 U.S. Dist. LEXIS 188843, at *25 (M.D. Pa. Sep. 30, 2021). However distinguishable, it is accurate that the court in *Oberheim* applied a rational basis test in its inquiry.

The court in Florida denied the argument that the mask mandate implicated a fundamental right based upon what the Plaintiff argues in Section 3(c)(iv) below is a flawed understanding of a medical treatment or device. *Zinman*, 2021 WL 4025722, at *17. As such, it is distinguishable from the instant case.

The sole argument pled in the District of Hawaii case related to the due process claim was the bare contention that the wearing of masks was unhealthy, and the further non-sequitur that wearing the mask was a "sign of slavery" which was "abolished in 1865," and so is entirely distinguishable from the present case as the plaintiff does not allege a violation of a fundamental

right. Alan[2] v. Ige, No. 21-00011 SOM-RT, 2021 U.S. Dist. LEXIS 164694, at *24 (D. Haw. Aug. 31, 2021).

Finally, the *Forbes* court, in applying rational basis review, found that the plaintiff did not allege a fundamental right, and as such, strict scrutiny was not implicated and rational basis applies. *Forbes v. Cty. of San Diego*, No. 20-cv-00998-BAS-JLB, 2021 U.S. Dist. LEXIS 41687, at *12 (S.D. Cal. Mar. 4, 2021). Unlike in *Forbes*, and unlike in the other cases cited above hypothesizing rational basis review, Plaintiffs here allege a fundamental right to their bodily integrity and autonomy, as well as the *jus cogens* norm to be free from nonconsensual human experimentation. Therefore, the instant case is distinguishable from those cited by Defendants. Plaintiffs allege two separate groups of fundamental rights, drawn from two sources.

1. The fundamental liberty right to bodily integrity, autonomy, and the right of consent to medical treatment

"[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.,*

[2] Plaintiff evidently styled himself "Megeso-William-Alan: Denis, although some sources caption the case with his apparent given name, William Denis, hence the discrepancy between Plaintiffs' and Defendants' citations.

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' mask mandate.

2. The fundamental prohibition against nonconsensual human experimentation, borne out of international jus cogens *norms*

Defendants argue that "Plaintiffs' Complaint rests on the bizarre assertion that the City's mask mandate is a grand medical experiment and a mandatory human experiment performed upon them, absent their informed consent." *Motion to Dismiss*, 7. Defendants completely mischaracterize the nature of Plaintiffs' complaint as "analogiz[ing] the mask mandate to the barbaric medical experiments performed on unwilling victims of Nazi's[sic] Germany's concentration camps." *Motion to Dismiss*, 3. Defendants further note that other courts have found such claims reprehensible. *Motion to Dismiss,* Footnote 3. Yet as this Court will no doubt recognize upon a review of the complaint, Plaintiffs did no such thing. Rather, Plaintiffs were quite literally required by caselaw to establish the necessary factual basis of the *jus cogens* prohibition against human experimentation without consent—with the unfortunate necessity to begin the story where it started, in the International Military Tribunal established in 1945 in the wake of World

War II.

"It is clear that *jus cogens* norms of international law are part of the laws of the United States," but the law of nations does not in itself create a personal right of action for individual citizens; "federal courts may imply a personal right of action for violations of *jus cogens* norms of international law." *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1255 (C.D. Cal. 1999).

The 9th Circuit has, while recognizing that it is a "fairly exacting standard," expressed a willingness to consider *jus cogens* norms as a basis for private rights of action, because "like statutory and constitutional laws, they are justiciable in our courts." *United States v. Struckman*, 611 F.3d 560, 576 (9th Cir. 2010).

> Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting jus cogens transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II. The universal and fundamental rights of human beings identified by Nuremberg - rights against genocide, enslavement, and other inhumane acts, - are the direct ancestors of the universal and fundamental norms recognized as jus cogens. In the words of the International Court of Justice, these norms, which include "principles and rules concerning the basic rights of the human person," are the concern of all states; "they are obligations *erga omnes*."
>
> *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992).

"Jus cogens norms are a subset of 'customary international law'; 'customary international law' is defined as the general and consistent practice of states followed by them from a sense of legal obligation." *Struckman*, at 576 (internal citations omitted). The short list of *jus cogens* norms may be arrived at by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law, and must ask whether the international community recognizes the norm as one from which no derogation is permitted." *Struckman*, at 576 (internal citations omitted).

In 2009, the 2nd Circuit summarized the requirements to demonstrate a *jus cogens* norm

when the court considered the question of whether human experimentation was among their number:

> 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)

Courts have repeatedly addressed the Nuremberg trials when considering the question of *jus cogens*, simply because that dark period in human history was the root of these universal condemnations. After all, "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, 3066 (1987). The *Abdullahi* court summarized the situation:

> Currently, the laws and regulations of at least eighty-four countries, including the United States, require the informed consent of human subjects in medical research. That this conduct has been the subject of domestic legislation is not, of course, in and of itself proof of a norm. However, the *incorporation of this norm into the laws of this country and this host of others* is a powerful indication of the international acceptance of this norm as a binding legal obligation, where, as here, states have shown that the norm is of mutual concern by including it in a variety of international accords.
>
> *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 181 (2d Cir. 2009) (internal citations omitted) (emphasis supplied).

Plaintiffs allege that federal laws and regulations, including but not limited to 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III) and 21 C.F.R. § 50.20, serve as links in the chain of the much higher authority of the *jus cogens* norm that preempts the Defendants' imposition of an experimental medical device upon the citizens and visitors of Hailey.

ii. *Plaintiffs allege that federal regulations provide evidence that masks and facial coverings are experimental*

Defendants state that "Plaintiffs attempt to avoid the Jacobson test and rational basis review by mischaracterizing the mask-mandate and couching it as a form of forced medical experimentation or procedure, without their informed consent which they argue violates a fundamental liberty interest and thus triggers strict scrutiny." *Motion to Dismiss*, 17. However, the Court need not explore very far to find that masks and facial coverings, when used in the context of the pandemic, are experimental medical devices. The federal government permitted the use of masks and facial coverings under an Emergency Use Authorization as unapproved products. *See generally Complaint*, 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. *Complaint*, 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 here were not so circumspect.

iii. Masks are medical devices used for a medical purpose

Defendants cite an opinion written by a magistrate of the Southern District of Florida that argues that a mask requirement is not a "compulsory bodily intrusion" because it "sits on the outer surface of one's face to cover one's nose and mouth" and that it is not a medical treatment to be required to wear a mask. *Zinman v. Nova S.E. U., Inc.*, 2021 WL 4025722, at *17 (S.D. Fla., Aug. 30, 2021). Defendants then argue that Plaintiffs are mischaracterizing the Defendants' mask mandate because the masks are not a bodily intrusion or medical treatment.

Not only does this citation not address the fact that masks are deemed medical devices by the federal government as articulated above, but, with all respect to the court in *Zinman*, defining a medical treatment or device by its position on the body is facially erroneous, as anyone who has ever worn a cast for a broken arm, a tourniquet for a severed artery, or contacts to correct vision can attest. By way of counter-example, OSHA defines medical treatment for the purpose of reporting injuries and illnesses as "the management and care of a patient to combat disease or disorder," without reference to the interior or exterior of the body. *Recording and Reporting Occupational Injuries and Illnesses*, Occupational Safety and Health Administration (2001), 1904.7(b)(5)(i). From that definition, it follows that the masks serve as a treatment, in that they are being prescribed by Defendants explicitly to combat disease, and intended as prophylactic medical devices to prevent transmission of infection. If not medical devices, or prophylactic treatment of the citizens of Hailey with the intention of preventing the spread of SARS-CoV-2 infection, masks are so many scraps of cloth, good for little more than aesthetics. Defendants cannot have it both

ways; either masks are experimental medical devices or treatments provisionally permitted only by consent under federal emergency use authorization; or they are not medical devices or treatments and serve as little more than decorations, completely failing even a rational basis analysis.

iv. Strict Scrutiny 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' mask mandate. First, the right of bodily integrity and autonomy in choosing medical treatment; second, the *jus cogens* norm prohibiting human experimentation without informed consent. 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 products, and the state of medical science, makes the widespread, short- and long-term use of masks and facial coverings by the whole population 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.

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

Defendants very briefly address *Jacobson*, offering *Stewart v. Justice*, 518 F. Supp. 3d 911, 917 (S.D. W. Va. 2021) and arguing that "courts have found that mask-mandates easily satisfy the *Jacobson* test." *Motion to Dismiss*, 17. However, while *Stewart* does address *Jacobson*, it does so *after having received evidence* from the parties, deciding the motion to dismiss only after having

decided a motion for preliminary injunction. *Stewart*, 518 F. Supp. 3d at 915. Critically, the court cites affidavits from at least two experts multiple times in its decision under *Jacobson*. The very case cited by the Defendants demonstrates the necessity of this Complaint surviving this Motion to Dismiss: the Court needs to have the information before it, whether by affidavits in support of a motion for preliminary injunction or expert witness disclosures in advance of a motion for summary judgment, to make any determination on the merits.

The *Forbes* court, addressed earlier, made their decision not on a rational basis test (although they did perform one, as addressed above), but under a *Jacobson* standard of review, contending that while it had "its fair share of critics, particularly in the Free Exercise Clause context" *Jacobson* was still "good law." *Forbes*, at *9. Yet the plaintiff in *Forbes* neither argued that the masks cause harm, nor did the plaintiff articulate a right "secured by fundamental law." *Ibid.* On both accounts, Plaintiffs here have articulated allegations distinguishable from those in *Forbes*.

An analysis of *Jacobson* in light of Plaintiffs' complaint demonstrates, even by this relatively low standard for governmental intervention, that Plaintiff has 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. 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 *Forbes* or 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 both of these cases—indeed, from the remainder of the cases cited by Defendants—these factual allegations are unique to the instant matter. Plaintiffs argue that, whatever good intentions the Defendants have in promulgating these emergency orders, the true effect of the order is one of no benefit, and substantial injury, ultimately causing more harm than good to the citizens of Hailey. For this reason the Defendants' emergency orders fail the first part of the *Jacobson* test.

Secondly, the Plaintiffs allege that beyond all question, the Defendants' emergency order constitutes 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 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. As the court in *Stewart* stated, "For obvious reasons, courts are not routinely asked to consider the constitutionality of public health restrictions designed to control the spread of a novel virus. But the past year has not been routine." *Stewart*, 518 F. Supp. 3d at 915. For the first time in American history, municipalities like the City of Hailey are imposing widespread mandates upon their citizens, requiring them to buy or make makeshift medical devices ostensibly for the purpose of preventing the spread of a virus, and enforcing the wearing of such devices in violation of their fundamental rights to bodily integrity, while at the same time arguing that concerned citizens be forestalled from challenging these mandates on the basis of evidence and reason. It is appropriate for the Plaintiffs to have an opportunity to present evidence to support their well-pled allegations.

4. CONCLUSION

Plaintiffs, to meet the standard of F.R.C.P. 12(b)(6), need only demonstrate any set of facts that could be proved consistent with the allegations. The issue before the court is whether, if "all well-pleaded factual allegations" are taken as true, and "all reasonable inferences" are drawn "in the light most favorable to the plaintiff," "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Adams*, at 1142-43; *Abboud*, at 848. As the court famously articulated in *Twombly*, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965 (2007) (internal cites omitted). The Complaint alleges the Plaintiffs have sufficient standing via their injury-in-fact, and provides well more than the minimum required factual basis, to survive a motion to

dismiss pursuant to F.R.C.P. 12(b)(1). The Complaint further alleges particular facts that the Defendants' mask mandate implicates fundamental rights and that under the appropriate strict scrutiny—or even the *Jacobson* standard—it fails, both as a violation of Plaintiffs' bodily integrity and autonomy and, as an experimental medical device imposed upon Plaintiffs against their will, violates the *jus cogens* norm prohibiting human experimentation without informed consent. In light of the allegations made and the standard of proof sufficient for an F.R.C.P 12(b)6 motion, Plaintiffs' case ought therefore survive Defendants' motion.

Plaintiffs therefore respectfully request this Court deny Defendants' Motion to Dismiss.

DATED this 9th day of November, 2021.

DAVILLIER LAW GROUP, LLC

/s/ Allen Shoff
Allen Shoff – Of the Firm

CERTIFICATE OF SERVICE

I CERTIFY that on the 9th day of November, 2021, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Deborah A. Ferguson, ISB #5333
Craig H. Durham, ISB #6428
FERGUSON DURHAM, PLLC
223 N. 6th St., Suite 235
Boise, Idaho 83702
daf@fergusondurham.com
chd@fergusondurham.com
Telephone: (208) 484-2253

Attorneys for Defendants