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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

HEALTH FREEDOM DEFENSE FUND, INC., et. al., Plaintiffs, v. 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 her personal capacity for the purposes of Section 1983 claims, Defendants.	Case No. 1:21-cv-389-DCN **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS [Docket No. 11]**

Since the filing of Defendants' Motion to Dismiss a month ago, an additional 564 Idahoans have suffered and died after they became infected with the COVID-19 virus. [1]

[1] Idaho's official COVID-19 website last visited November 23, 2021. https://coronavirus.idaho.gov/.

In the face of this ongoing deadly pandemic, the City has attempted to keep its population safe by passing a modest ordinance that requires residents and visitors to wear a mask while they are in shared public spaces. Though Plaintiffs may disagree with this policy choice – and they may even find it inconvenient – that is not the kind of injury that would give them standing to sue in federal court. And even if they did have standing, requiring someone to wear a lightweight face covering temporarily while in close proximity to others in public does not amount to violation of a fundamental right. It is not medical experimentation or treatment without consent. Plaintiffs' conclusory statements to the contrary do not make it so. This Court should dismiss.

I. Plaintiffs Have Abandoned Count I of Their Complaint.

There is no private right of action to enforce provisions of the Food, Drug and Cosmetic Act, 21 U.S.C. § 360bbb-3. (Defendants' Brief, p. 11-12). Plaintiffs now acknowledge this fact. (Plaintiffs' Brief, p. 7). Likewise, the Supreme Court has held the Supremacy Clause "certainly" does not create a private cause of action. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S 320, 324- 5 (2015). Plaintiffs offer no contrary authority and appear to have abandoned Count I of their Complaint. The Court should dismiss Count I with prejudice, as repleading this count would be futile.

II. Count II Must Also Be Dismissed as Plaintiffs Lack Standing and Fail to Allege a Viable Substantive Due Process Claim

A. Plaintiffs Lack Standing

Plaintiffs erroneously assert that the existence of mere "recreational, aesthetic and economic" interests is sufficient to demonstrate standing in this case, relying on *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 183-184 (2015). Plaintiffs' reliance is misplaced. *Laidlaw* arose in the environmental context under the Clean Water Act, over the negative effects of illegal discharges of an extremely toxic pollutant into a river in a community. *Laidlaw* does not hold that recreational, aesthetic, and economic interests are enough to create standing in the context of this case, and the Court specifically referenced these harms as they pertained to environmental plaintiffs. *Id*. If mere recreational, aesthetic and economic interests were sufficient to demonstrate standing in this case, then standing to challenge a mask mandate could be established by allegations that masks make indoor weightlifting more difficult (a recreation interest), that masks are ugly and make one appear less attractive (an aesthetic interest) or that a mask mandate reduces consumer spending for a business owner (an economic interest). None of these allegations create standing to challenge a mask mandate.

The Court should instead apply the three-part standing test in *Laidlaw*. It requires 1) an injury in fact, 2) that is traceable to the challenged action, which is 3) redressable by a favorable decision. *Id*. at 180-181. Plaintiffs need to demonstrate all three and fail to establish any of these factors. As to the first factor, there is no injury in fact. None of the Plaintiffs have been cited under the ordinance and none have disobeyed it. The injury must be "*certainly* impending"- allegations of possible future injury are not enough

(quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2, (1992)) (emphasis in original). The Court should draw on the persuasive guidance of *Bechade v. Baker*, 2020 WL 5665554 (D. Mass., Sept., 23, 2020), which Plaintiffs simply ignore. In *Bechad*e, the Court found that the plaintiff had not shown that the mask requirement caused her any concrete and particularized or actual or imminent harm, finding that she pled "nothing more than disagreement" with the mask mandate which a court will not substitute for an actual injury, *citing United States v. AVX Corp*., 962 F.2d 108, 114 (1st Cir. 1992). Plaintiffs also offer no response to *Oakes v. Collier County Eyeglasses*, 515 F.Supp.3d 1202, 1214 (M.D. Fla. 2021). There the court found no standing where the plaintiff was never cited for mask mandate violations, just as the instant Plaintiffs have never been cited.

Parker v. Wolf, 506 F.Supp.3d 271 (2020) merits close review on the issue of standing to challenge a mask mandate. In *Parker*, the Court, rather than the parties, raised standing and dismissed the mask mandate challenge. It held that when the alleged injury is undifferentiated and common to all members of the public, courts routinely dismiss such cases as 'generalized grievances' that cannot support standing. *Id*. at 287-288. Further the *Parker* court noted that when plaintiffs have chosen to restrict their activities because of the mandate, then these are self-imposed injuries. *Id*. at 284.

As to the second element, Plaintiffs alleged physiological and psychological injuries also are not traceable to the challenged ordinance, which explicitly provides that those who cannot medically tolerate a cloth covering of their nose and mouth can

instead wear or position themselves behind a face shield. (City Order No. 2021-07, Exemption b). Plaintiffs ignore this obvious solution to the harms they allege masks inflict on them and do not allege harm from the use of face shields.

Plaintiffs also fail to establish the third prong of the test: the harm must also be redressable by the court. Even if the Court struck down the City's mask mandate, masks would still be required in many public places in Hailey- such as its schools (which are currently subject to a separate mandate), medical establishments, houses of worship and many businesses. *Parker* at 288-289. Striking the mandate would not redress Plaintiffs' injuries, as masking requirements would still remain at many public places in the community. Because Plaintiffs have failed to carry their burden of establishing all three factors to support standing, the case must be dismissed for lack of standing.

As set forth above, many of the courts deciding challenges to mask mandates have dismissed them for lack of standing. This Court should also do the same.

B. Plaintiffs Have Not Alleged Facts to Support a Due Process Claim

If the Court finds Plaintiffs have standing under Count II, the case should still be dismissed for failure to state a claim. The facts alleged by Plaintiffs don't back up the claim that the mask mandate violates bodily integrity, autonomy, or the right to consent to medical treatment. Nor is the mandate a violation of international law.

1. **The Mask Mandate Doesn't Implicate a Fundamental Right as It Does Not Violate Bodily Integrity, Autonomy, or the Right to Consent to Medical Treatment**.

Numerous courts have considered similar challenges to mask mandates and found that mask mandates don't implicate a fundamental right. Many of these cases were dismissed at the pleading stage, as this case should be. Mask mandates don't violate bodily integrity, autonomy, or the right to consent to medical treatment. Masks are not medical treatment or forced experimentation. Defendants have provided the Court with a broad survey of relevant cases in support of their motion (Defendants' Brief, p. 14-17). For the most part Plaintiffs failed to even acknowledge, let alone address the authorities cited against their claim that dismantle their theory of recovery for a substantive due process claim. Defendants turn first to cases Plaintiffs did address and then provide the Court additional authority to dismiss this claim.

In *Zinman v. Nova S.E. U., Inc.*, 2021 WL 4025722 (S.D. Fla. Aug. 30, 2021), a Florida court granted a motion to dismiss a mask-mandate challenge. Plaintiffs make the curious argument that the *Zinman* case is distinguishable from this case because they disagree with it. Plaintiffs' Brief, p. 8. In fact, the *Zinman* court was squarely addressing the same questions presented in this case and flatly rejected Plaintiff's argument with respect to medical treatment: "Nor can one plausibly allege that the government is requiring medical treatment by requiring individuals to wear a face mask." *Zinman* at 17.

Plaintiffs attempt to distinguish *Denis v. Ige*, WL 3892657 (D. Haw., Aug. 31, 2021), which also granted a motion to dismiss a mask-mandate challenge with

prejudice, on the ground that the Plaintiff there did "not allege a violation of a fundamental right." Plaintiffs' Brief, p. 8-9. Plaintiffs are correct that the *Denis* court granted the motion to dismiss in part because the Plaintiff there failed to "allege[] that the Mask-mandates affected his fundamental rights." *Denis* at 9. Nonetheless, the *Denis* court held, unequivocally, that mask-mandates do not infringe on fundamental rights: "The mask-mandates, by contrast, require individuals to accept an inconvenience so that they can protect themselves and others from a deadly disease. . . . *The Mask-mandates do not infringe on fundamental rights*." *Id*. (emphasis added).

Plaintiffs also try to distinguish is *Forbes v. County of San Diego*, 2021 WL 843175 (S.D. Cal., Mar. 4, 2021), which also granted a motion to dismiss a mask-mandate case. Plaintiffs argue that *Forbes* is distinguishable from this case because they allege "a fundamental right to their bodily integrity and autonomy, as well as the jus cogens norm to be free from nonconsensual human experimentation . . . ." Plaintiffs' Brief, p. 9. In response to many of the same complaints in this case, the *Forbes* court found that the plaintiff did not identify a fundamental liberty interest or a fundamental right that had been violated. *Forbes* at 5. So too here..

Precedent rejecting Plaintiffs' position extends well beyond these cases. Many more courts have held that mask-mandates do not implicate any fundamental rights. See e.g., *Miranda on behalf of M.M. v. Alexand*er, 2021 WL 4352328 at 4 (M.D. La. Sept. 24, 2021) ("With respect to Plaintiff's substantive due process argument, there is no

fundamental constitutional right to not wear a mask."); *Klaassen v. Trustees of Indiana U.*, 2021 WL 3073926 at 39 (N.D. Ind. July 18, 2021) ("The court declines the students' invitation to expand substantive due process rights to include the rights not to wear a mask or to be tested for a virus. . . . These aren't issues of fundamental constitution import, but often transient and trivial inconveniences."); *Whitfield v. Cuyahoga County Pub. Lib. Found.*, 2021 WL 1964360 at 2 (N.D. Ohio May 17, 2021) ("As an initial matter, there is no general constitutional right to wear, or to refuse to wear a face mask in public places. . . . federal, state and local governments may govern what must be worn in public spaces, particularly when the health and safety of the general public are at issue."); *Cangelosi v. Sheng*, 2020 WL 5960682 at 2-3 (E.D. La. Oct. 8, 2020); *Stewart v. J.*, 518 F. Supp. 3d 911 (S.D.W. Va. 2021); *Oakes v. Collier County*, 515 F. Supp. 3d 1202, 1208 (M.D. Fla. 2021) ("Likewise, nobody argues [the equal protection challenge] seeks to vindicate fundamental rights. Such an assertion would fall short anyway.")

Plaintiff's argument that mask-mandates are experimental and unwanted nonconsensual medical treatment has also already been rejected by federal courts who have recognized that context matters. Since the Defendants moved to dismiss the complaint two other federal court have rejected similar challenges. *Doe v. Franklin Square Union Free Sch. Dist.*, 2021 WL 4957893 at *18 (E.D.N.Y. Oct. 26, 2021). The *Doe* the court found that "[w]hile the Mask Mandate was obviously intended as a health measure, it no more requires a 'medical treatment' than laws requiring shoes in public

places, see *Neinast v. Bd. of Trustees of Columbus Metro. Library*, 346 F.3d 585, 593-94 (6th Cir. 2003), or helmets while riding a motorcycle, see *Picou v. Gillum*, 874 F.2d 1519, 1522 (11th Cir. 1989)." Likewise see *Dustin Lloyd, V. School Board Of Palm Beach County*, 2021 WL 5353879 (S.D. Fla. Oct. 29, 2021) (Mandates do not qualify as a "compulsory bodily intrusion" or as "medical treatment" and, therefore, do not implicate the right to bodily autonomy under the Fourteenth Amendment).

Regardless of how Plaintiffs try to window dress their due process claim, the Court should reject the premise that a mask mandate implicates the fundamental right to bodily integrity, autonomy or right to consent to medical treatment.

2. There is no Jus Cogens Norm Against Mask Mandates

Plaintiffs also argue that the City's mask mandate is a violation of international norms. This is ironic given that over one-half of the countries in the world have imposed mask mandates during the global pandemic. [2] As Plaintiffs noted, an important criteria to determine an international norm is whether it is universally accepted. (Plaintiffs' Brief at 12). Presumably the majority of the world's nations have not gone mad and rejected any standard of decency by imposing mask mandates. [3] Much like the federal courts who have considered the issue, the global community sees

[2] *See* The Council on Foreign Relations website at https://www.cfr.org/in-brief/which-countries-are-requiring-face-masks.

[3] Perhaps this is because mask-wearing is the single most effective public health measure at tackling Covid, reducing incidence by 53%, the first global study of its kind shows. *See* https://www.theguardian.com/world/2021/nov/17/wearing-masks-single-most-effective-way-to-tackle-covid-study-finds.

wearing a mask for what it is- a simple public health measure, not a sinister medical experiment. The U.S. federal government has been an outlier regarding mask mandates and left the decision to impose them to state and local governments, rather than establish a country wide mandate like the majority of the world has done. The City has acted within its well-established authority to pass an ordinance to protect the citizens and visitors within its city limits. Plaintiffs' jus cogens argument fails to pass the straight face test. Mask mandates don't violate international norms. On the contrary, mask mandates are the international norm.

III. Conclusion

Courts across the country have been inundated with a myriad of challenges to state and local mask mandates and time and again have found there is no right to be free from a mask requirement during a global health pandemic. True enough, no one likes to wear a mask. But it is a necessary and trivial inconvenience for a greater good- the health of our communities and the lives of our fellow man. As no court has found that the federal Constitution or international standards of decency are violated by mask mandates, the Court should dismiss this case in the pleadings stage.

DATED this 23rd day of November, 2021.

/s/ Deborah A. Ferguson

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CERTIFICATE OF SERVICE

I CERTIFY that on the 23rd 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:

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