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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 **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF**

I. INTRODUCTION

The global COVID-19 pandemic continues. To date the lives of 4,161 Idahoans have been lost.[1] The death toll mounts as we enter the long winter and the virus mutates as it persists among us. Against this bleak public health crisis, Plaintiffs challenge the city of Hailey's mask mandate, a public health measure adopted to protect the public and prevent the virus' spread.

Because the Plaintiffs lack standing and their complaint fails to state a cause of action, the Defendants promptly moved for the dismissal of the Plaintiffs' case. The motion to dismiss is now fully briefed and pending before the Court. Dkt. 11, 12, and 16. After briefing was complete on the motion to dismiss, but before it could be heard, Plaintiffs moved for temporary and injunctive relief. Dkt. 18, 18-1, ("Pl.'s PI Memo").

In opposition to Plaintiffs' injunctive request, the Defendants provide the Declaration of Dr. David Pate, the former CEO and President of St. Luke's Health System in Idaho, and an authority in Idaho on the COVID-19 pandemic. Pate Declar. ¶4. As a respected medical expert in Idaho and a member of the Idaho Governor's Coronavirus Work Group advising the Governor on the state's response to managing the coronavirus pandemic, Dr. Pate has provided the citizens of Idaho and its

[1] Idaho's official COVID-19 website last visited December 30, 2021. https://coronavirus.idaho.gov/.

government trustworthy guidance throughout this unprecedented public health crisis. Pate Declar. ¶¶ 5-11. Dr. Pate's declaration stands in sharp contrast to the three foreign declarations relied upon by the Plaintiffs. Dkt. 18-2, -3, and -4. Because Plaintiffs' declarants lack expert qualifications, a Daubert-styled motion to strike Plaintiffs' declarations has been filed concurrently with this response brief.

As set forth in this response, as well as the briefing in support of both the Defendants' motion to dismiss and motion to strike Plaintiffs' declarations, Defendants ask the Court to granted its motions, deny Plaintiffs' motion, and dismiss the case.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their complaint in September and alleged two claims: a violation of the Supremacy Clause and a violation of their substantive due process rights under the 14th Amendment and international *jus cogens* norms. Compl., ¶¶ 83-103.[2] The City filed a motion to dismiss, in lieu of filing an answer because Plaintiffs lack standing and fail to state a claim upon which relief can be granted. Dkt. 11. In response to the motion to dismiss, Plaintiffs abandoned their Supremacy Clause claim. Dkt. 12. Now many months after initiating the case, Plaintiffs request injunctive relief. The Court has scheduled oral argument for February 16th on these motions. Plaintiffs support their

[2] Plaintiffs first filed their case in May 2021 but it was dismissed by the Court as moot when the City initially rescinded its mask mandate ordinance. *See* Dkt. 4, Case No.1:21-cv-212-DCN. The ordinance was then re-issued last summer when the pandemic persisted. Plaintiffs' present Complaint is a revived version of their first challenge.

alleged irreparable harm based on their experts' declarations who lack the requisite qualification of experts under F.R.E. 702. Defendants ask that their motion to strike these declarations also be heard at the February hearing.

III. LEGAL STANDARD

To obtain preliminary injunctive relief, the moving party must demonstrate (1) that they will suffer irreparable injury if the relief is denied; (2) there is a strong likelihood that they will prevail on the merits at trial; (3) the balance of potential harm favors the moving party; and (4) the public interest favors granting relief. *International Jensen, Inc. v. Metrosound U.S.A.*, 4 F.3d 819, 822 (9th Cir. 1993). The requirement of the likelihood of irreparable harm increases or decreases in inverse correlation to the probability of success on the merits, with these factors representing two points on a sliding scale. *See United States v. Nutricology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992). The burden of persuasion remains with the party seeking preliminary injunction relief. *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 956 (11th Cir. 1982)(citation omitted). Because a preliminary injunction is an extraordinary remedy, courts require the movant to carry its burden of persuasion by a "clear showing." *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted); *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012).

IV. DISCUSSION

A. Plaintiffs are not likely to succeed on the merits of their claims.

1. Plaintiffs are not likely to succeed because Plaintiffs lack standing.

Plaintiffs cannot make a strong showing they will succeed on the merits because their claims should be dismissed under F.R.C.P. 12(b)(1) for lack of standing. Plaintiffs fail to allege an injury-in-fact as required by Article III of the Constitution. To establish standing under Article III, a plaintiff must show that (1) she has suffered an "injury in fact"; (2) her injury is "fairly traceable to the challenged action of the defendant"; and (3) her injury is likely to "be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-181 (2000). In the absence of standing, the Court lacks subject-matter jurisdiction to hear the case.

None of the Plaintiffs allege that they have ever been cited for violating the current (or prior iterations of) the mask mandate, or that they have been personally forced by the City to wear a mask. Instead, the Plaintiffs assert that they strongly object to the mask mandate, but routinely wear a mask as required by the mandate, albeit against their will. The Plaintiffs all allege that they object to the mask mandate but nevertheless comply with it. Compl., ¶¶ 13-17.

In the absence of allegations that any Plaintiff has ever been forced to wear a mask, or cited for their refusal to do so, they have not suffered any concrete and particularized injury with respect to the City's mask requirement. *See Bechade v. Baker*, 2020 WL 5665554 (D. Mass., Sept., 23, 2020). 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 policy underlying adoption of the requirement, and precedent is clear that "[a] mere interest in an event—no matter how passionate or sincere the interest and no matter how charged with public import the event—will not substitute for an actual injury," *citing United States v. AVX Corp*., 962 F.2d 108, 114 (1st Cir. 1992). *See also*, *Oakes v. Collier County Eyeglasses*, 515 F.Supp.3d 1202, 1214 (M.D. Fla. 2021)(no standing where individual was never cited for mask mandate violations).

As discussed below, the serious medical and psychological harms that Plaintiffs allege masks wearing inflicts have been resoundingly rejected by the medical and scientific communities. And, like the plaintiffs in *Oakes* and *Bechade*, Plaintiffs' passionate opposition to the City's mask mandate is inadequate to establish standing. In the absence of an actual injury in fact, the Court should grant Defendants' motion to dismiss and deny Plaintiffs' motion for an injunction as Plaintiffs lack standing.

2. Plaintiffs are not likely to succeed because the mask-mandate is a public health measure not implicating any fundamental right.

Plaintiff's Fourteenth Amendment argument is irreparably flawed because mask-mandates do not implicate the fundamental right to refuse medical treatment. The issue has been well litigated. State and federal courts have consistently rejected due process challenges to mask-mandates during the COVID-19 pandemic and found that

mask-mandates are not a form of medical treatment that triggers a fundamental liberty interest.[3] The courts that have evaluated mask-mandate challenges have unanimously adopted either the *Jacobsen* test or a rational basis standard of review and then ruled against the plaintiffs. Here, Plaintiffs have failed to address the strong authority on this issue.

Plaintiffs' claims are anchored in the false presumption that because the Food and Drug Administration ("FDA") issued an Emergency Use Authorization ("EUA") for masks, masks-mandates are "medical treatment," a "mandatory human experiment," and therefore violate international *jus cogens* norms and the Due Process Clause. Compl. ¶ 2, Ex. B.[4] This is a disingenuous mischaracterization of both masks and EUAs. Indeed, the EUA at issue in this case is guidance aimed at manufacturers, outlining specific requirements for mask manufacturers during the pandemic – it is not a document authorizing the public's use of face masks. In fact, the FDA has issued

[3] *See, e.g., Denis v. Ige*, WL 3892657 (D. Haw., Aug. 31, 2021) (dismissing a Fourteenth Amendment challenge to a statewide mask-mandate with prejudice because mask-mandates "do not infringe on fundamental rights."); *Forbes v. County of San Diego*, 2021 WL 843175, at 5 (S.D. Cal., Mar. 4, 2021) (granting a motion to dismiss a due process challenge to California's statewide mask-mandate because the mandate did not implicate "a fundamental liberty interest protected by the substantive component of the Due Process Clause"); *Zinman v. Nova S.E. U., Inc*., 2021 WL 4025722, at 17 (S.D. Fla. Aug. 30, 2021) (noting that "nor can one plausibly allege that the government is requiring medical treatment by requiring individuals to wear a face mask"); *Stewart v. Justice*, 518 F. Supp. 3d 911, 916 (S.D. W.Va., 2021) (dismissing a substantive due process challenge to statewide mask-mandate with prejudice); *Klaassen v. Trustees of Indiana U*., 2021 WL 3073926, at 24 (N.D. Ind., July 18, 2021) (denying a motion for a preliminary injunction against a university's mask-mandate and COVID-19 testing protocol because the court "decline[d] 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"); *Miranda ex rel. M.M. v. Alexander*, 2021 WL 4352328, at 4 (M.D. La., Sept. 24, 2021) (noting that "there is no fundamental constitutional right to not wear a mask"); *Sonderman v. Ragsdale*, 2021 WL 2024687, at *2-3 (N.D. Ga., May 12, 2021); *Shelton v. City of Springfield*, 497 F. Supp. 3d 408, 414 (W.D. Miss. 2020).

[4] Ex. B to the Complaint is a FDA memorandum on the EUA at issue, not the EUA itself.

many such EUAs during the pandemic, including a nearly identical one for gowns, surgical caps, shoe-covers, and other apparel.[5] This underscores the absurdity of tethering the definition of "medical treatment" and a "human experiment" to the FDA's technical administrative classification of a device, especially in the context of fundamental rights. Under Plaintiffs' logic, wearing a gown could be considered "experimental medical treatment" that implicates fundamental rights simply because the hospital gown is a medical device authorized by an EUA. An EUA is not a magical hook that brings all medical devices within the purview of the Due Process Clause. Because of its fundamental inapplicability, the City neither cited to nor relied on the EUA when it issued the mask-mandate.

As noted, courts around the country have roundly rejected the notion that mask-mandates are a form of medical treatment that implicate fundamental rights. Pl.'s PI Memo at 12-17. Rather than relying on technical FDA classifications to determine whether mask wearing is a form of medical treatment that implicates fundamental rights, courts have relied on common sense and precedent in arriving at the conclusion that although "mask mandate[s] [are] obviously intended as a health measure, it no more requires a 'medical treatment' than laws requiring shoes in public places, or

[5] https://www.fda.gov/media/138326/download

helmets while riding a motorcycle." *Doe v. Franklin Square Union Free Sch. Dist.*, 2021 WL 4957893 at *18 (E.D.N.Y. Oct. 26, 2021) (citations omitted).

Nonetheless, Plaintiffs have doubled down on their flawed theory that mask-mandates are *per se* a form of medical treatment that triggers strict scrutiny simply because masks are the subject of an EUA and the FDA classifies masks as medical devices. This theory, which ignores the fact that the FDA's technical classifications of a device does not control this court's determination of what constitutes "medical treatment," conflates a public health measure with medical treatment. A Florida court summarized the flaws in Plaintiff's theory succinctly when it rejected a motion for a preliminary injunction that was also based on the proposition that mask-mandates constitute medical treatment because of the FDA's classification:

> Appellants' argument that the individuals required to wear facial coverings are being subjected to forced "medical treatment" distorts the nature of the County's mask ordinance . . . . "Masks are primarily intended to reduce the emission of virus-laden ('source control')" . . . . Thus, requiring facial coverings to be worn in public is not primarily directed at treating a medical condition of the person wearing the mask/shield. Instead, requiring individuals to cover their nose and mouth while out in public is intended to prevent the transmission from the wearer of the facial covering to others (with a secondary benefit being protection of the mask wearer). Requiring facial coverings in public settings is akin to the State's prohibiting individuals from smoking in enclosed indoor workplaces.

Machovec v. Palm Beach County, 310 So.3d 941, 946 (Fla. 4th Dist. App. 2021), review denied, 2021 WL 2774748 (Fla. July 2, 2021).

The distinction between a public health measure and medical treatment is significant. The World Health Organization ("WHO") defines public health measures as "measures or actions by individuals, institutions, communities, local and national governments and international bodies to slow or stop the spread of an infectious disease, such as COVID-19."[6] Similarly, the Harvard School of Public Health has published a non-exclusive list of distinctions between public health measures and medicine, noting that public health has an "[e]mphasis on disease prevention and health promotion for the whole community," whereas medicine emphasizes "disease diagnosis, treatment, and care for the individual patient."[7] There is no question that the mask-mandate at issue here is aimed at disease prevention for the whole community.

Plaintiffs sidestep this issue by making the blanket assertion that mask-mandates are a medical treatment even when used to prevent the spread of disease: "The Defendants mandate the use of face coverings for a medical purpose: to prevent infectious disease transmission. Whether the purpose of the masks is to provide source control . . . or for self-protection, in either sense they are medical devices." Pl.'s PI Memo at 10. Neither logic or precedent agree. To the contrary, the effect that a measure has on the health and safety of others is of critical importance in determining the scope of a liberty interest, including the right to refuse medical care. A federal district court

[6] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/phsm
[7] https://www.hsph.harvard.edu/about/public-health-medicine/

articulated this principle this month, declining to enjoin a mask-mandate in public schools:

> "Throughout our history," states "traditionally have had great latitude under their police powers to legislate [for] the protection of the lives, limbs, health, comfort, and quiet" of their citizens. To this end, "[o]ur Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the [s]tates to guard and protect." Under this well-established state power, courts have upheld seatbelt and helmet laws, policies requiring patrons to wear shirts and shoes in public facilities and smoking bans, finding that the liberty interests of the individual must yield to the health and safety interests of the community.

Monica Branch-Noto et al., v. Sisolak, 2021 WL 6064795 at 3 (D. Nev. Dec. 22, 2021) (citations omitted).

With that in mind, it is not surprising that no federal court has used the EUA or the FDA's classification of masks to reach the conclusion that mask-mandates are medical treatment. The FDA promulgated the EUA in a different context and for a different purpose – to facilitate the widespread use of masks as a public health measure to slow the spread of COVID-19.[8] It was not promulgated in anticipation of providing courts guidance on whether wearing a mask constitutes medical treatment within the scope of due process protection. Courts have rightly construed mask-mandates as public health measures designed to protect the community, instead of a form of medical

[8] Exhibit B to the Complaint is an FDA memo in which the FDA explicitly notes that the EUA was promulgated to facilitate the use of masks as a public health measure "in response to concerns relating to insufficient supply and availability of face masks . . . in accordance with Centers for Disease Control and Prevention (CDC) recommendations, to prevent the spread of the virus called severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) . . ..".

treatment implicating due process rights. *See Stewart v. J.*, 502 F. Supp. 3d 1057, 1062 (S.D.W. Va. 2020) (construing mask-mandate as a public health measure and dismissing plaintiff's due process challenge).

Because the mask-mandate does not constitute "medical treatment" and does not implicate a fundamental right, it should be reviewed under the rational basis standard or the *Jacobson* test. The mandate easily passes either test. Under the rational basis test, government action is constitutional if it (1) promotes a "legitimate governmental purpose" and (2) there is a "rational relationship" between that purpose and the means chosen by the government. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). District courts have reliably held that mask-mandates comfortably clear "this low bar." *Oberheim v. Bason*, WL 4478333 at *8 (M.D. Pa., Sept. 30, 2021). Indeed, the Supreme Court has recognized a government's interest in abating the COVID-19 pandemic is not only a rational interest but a *compelling* one. *Roman Catholic Diocese of Brooklyn v. Como*, 141 S. Ct. 63, 67 (2020). There is no question that attempting to bring a pandemic under control is a legitimate purpose and that the mask-mandate bears a rational relationship to that purpose. Even if Plaintiffs' claims about the efficacy of masks were true, masks serve as a visible public reminder to take precautions because there is an ongoing pandemic, which is a rational basis in and of itself.

The *Jacobson* test provides that laws protecting public health survive constitutional scrutiny so long as they have a "real or substantial relation to" protecting the public health and the regulations are not "beyond all question, a plain, palpable invasion of rights secured by [ ] fundamental law." *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). Like the rational basis test, courts have found that mask-mandates easily satisfy the *Jacobson* test.[9] Plaintiffs nonetheless argue that they are likely to succeed under *Jacobson*. Pl.'s PI Memo at 13-14. Defendants disagree. As discussed above, a mask-mandate is not "beyond all question" a plain invasion of rights secured by fundamental law – it is not an invasion of fundamental rights at all. And as set forth in Dr. Pate's Declaration, there is no real question that masks have protected the public health. Accordingly, Plaintiffs' due process claim fails.

3. Plaintiffs are unlikely to succeed on the merits of their claims because the mask-mandate does not violate any *jus cogens* norms.

Plaintiffs also argue that the City's mask-mandate should be enjoined because it violates international *jus cogens* norms. Specifically, Plaintiffs argue that the mandate constitutes a form of "nonconsenting human experimentation." Pl.'s PI Memo at 10-11. Much like their due process argument, Plaintiff's *jus cogens* norms argument is premised entirely on a distortion of the nature of the mask-mandate. As discussed

[9] *See, e.g., Forbes v. County of San Diego*, 2021 WL 843175 (S.D. Cal. Mar. 4, 2021).

above, the mandate is not a form of medical treatment or experimentation. The proposition that the mandate is a forced medical experiment collapses when the mandate is viewed in the correct light – as a public health measure.

Defendants agree with the proposition that there is a *jus cogens* norm against forced medical experimentation on people. Mask-mandates however have been widely adopted throughout the world. In fact, over half of the countries of the world have enacted mask-mandates of some kind during the pandemic.[10] The implementation of mask-mandates around the globe cannot be reconciled with the *jus cogens* norm against forced medical experimentation. This is because mask-mandates are not a form of medical treatment or medical experimentation. Like the federal courts who have considered the issue, the global community sees wearing a mask for what it is – a simple public health measure, not a sinister medical experiment. [11] Plaintiffs are unlikely to succeed on the merits of their *jus cogens* norms claim because there is no *jus cogens* norm against mask mandates. Instead, throughout most of the world, masks are the international norm during the pandemic, and are preventing the spread of the virus.

B. Plaintiffs have failed to meet their burden of establishing a threat of irreparable harm.

[10] *See* The Council on Foreign Relations website at https://www.cfr.org/in-brief/which-countries-are-requiring-face-masks.
[11] *See* Pate Declar. ¶24, discussing a new large randomized study supporting mask-wearing conducted by researchers from Stanford and Yale in rural Bangladesh. Based on the study results, the interventional model is being scaled up to reach tens of millions of people in Southeast Asia and Latin America over the next few months.

Plaintiffs also have not carried their burden to demonstrate irreparable harm, suggesting harm is presumed in the present case because they allege a constitutional violation. Pl.'s PI Memo at 14-15. The presumption of harm only exists when the Plaintiffs have actually demonstrated a constitutional violation, usually in the First Amendment context. As discussed above, the mask-mandate easily passes constitutional muster.

As Plaintiffs point out, "where a federal injunction is sought against a governmental entity, the party requesting relief must show a threat of 'great and immediate,' not conjectural or hypothetical, irreparable harm." *Kaiser v. Cty. of Sacramento*, 780 F. Supp. 1309, 1311 (E.D. Cal. 1991). Here, the harms are only hypothetical and conjectural, because none of the Plaintiffs have ever been cited for violating mask-mandate, or been personally forced to wear a mask which is also why Plaintiffs lack standing to pursue this case.

Plaintiffs argue that "[m]asks are ineffective as a medical intervention and may actually increase the risk of infection" and that masks cause a litany of other harms. Pl.'s PI Memo at 5-9. In doing so, Plaintiffs ask the Court to prefer the guidance of a recently discredited researcher with no formal education in medicine, let alone virology or epidemiology over that of the Center for Disease Control ("CDC"), World Health

Organization ("WHO"), the Mayo Clinic, and the medical community at large.[12] The reality is that masks help prevent the spread of COVID-19 because they "reduce the amount of respiratory droplets and aerosols emitted into the air by a person who is infected with the SARS-CoV-2 virus and protect those persons who are exposed to the droplets or aerosols." Pate Declar. ¶ 23.

Almost every factual claim that Plaintiffs make with respect to the spread of COVID-19 is false. First, Plaintiffs allege that the asymptomatic spread of COVID-19 is "very rare." Pl.'s PI Memo at 5. This is incorrect. In fact, "The majority of SARS-CoV-2 infections are spread to others by infected persons who are asymptomatic at the time." Pate Declar.¶ 15. According to a recent University of Chicago study, over 50% of the community transmissions in New York City in the year 2020 were from asymptomatic and pre-symptomatic carriers. *Id.* Another study found that "at least 50% of new SARS-CoV-2 infections was estimated to have originated from exposure to individuals with infection but without symptoms." *Id*. at 16. In an article appropriately entitled "Covid-19 myths debunked," the Mayo Clinic noted that "[c]hildren, like adults, who have

[12] All three organizations recommend the use of masks as a safe and effective measure to slow the spread of the virus. *See, e.g.* https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-masks (calling masks "a key measure to reduce transmission and save lives."); https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html (where CDC Director Dr. Robert R. Redfield stated that "Cloth face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus – particularly when used universally within a community setting."); https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449 (noting that "[f]ace masks combined with other preventive measures, such as getting vaccinated, frequent hand-washing and physical distancing, can help slow the spread of the virus.").

COVID-19 but have no symptoms (asymptomatic) can still spread the virus to others."[13] And not only is asymptomatic and pre-symptomatic spread common, but the virus is also actively becoming more transmissible with each successive variant. *Id.* at 18.

Plaintiffs go on to make the patently false claim that "masks simply 'do not offer a tangible benefit to reduced infection of self or others.'" Pl.'s PI Memo at 5. To the contrary, "[u]ntil such time that a very high level of vaccination-induced immunity is achieved, our most effective method to reduce the transmission of the SARS-CoV-2 virus and subsequent COVID-19 infections is universal masking, meaning that everyone indoors and even those in close proximity outdoors (less than 3 - 6 feet) wears a mask properly." Pate Declar.¶ 21. The only study that Plaintiffs cite in support of their position is a WHO funded meta-analysis on the efficacy of masks in controlling the spread of influenza, not the SARS-CoV-2 virus. " Pl.'s PI Memo at 6. The WHO itself clearly disagrees with the conclusions that Plaintiffs have drawn from that study, calling masks "a key measure to reduce transmission and save lives."[14]

Plaintiffs attempt to undermine the validated scientific research by arguing it is based on mathematical models and probability rather than "real-world data." " Pl.'s PI Memo at 5-6. While it is true that most models support the position that masks help curb the spread, there is also an abundance of real-world data that points to the same

[13] https://www.mayoclinichealthsystem.org/hometown-health/featured-topic/11-covid-19-myths-debunked.
[14] https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-masks

conclusion. For example, the CDC's science brief on the community use of masks to control the spread of SARS-CoV-2, which concludes that "[e]xperimental and epidemiologic data support community masking to reduce the spread of SARS-CoV-2, including alpha and delta variants, among adults and children," cites to dozens of studies based on "real-world data."[15] The science is clear: masks reduce the spread of COVID-19.

The next fallacy that Plaintiffs present is that masks cause a myriad of physical harms by increasing the concentration of carbon dioxide that the wearer breathes.[16] Pl.'s PI Memo at 6-8. The lone support for Plaintiffs' carbon dioxide claims is the declaration of Suzanne Wagner, who appears to be a Doctor of Veterinary Medicine in Germany with some unrelated experience in industrial drug research.[17] Like Plaintiffs' other factual claims, the medical community has rejected this argument. "There are currently

[15] https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html

[16] The alleged danger posed by increased carbon dioxide levels as a result of mask wearing is another myth that the Mayo Clinic has addressed specifically: "There is no risk of hypoxia, which is lower oxygen levels, in healthy adults. Carbon dioxide will freely diffuse through your mask as you breathe."[16] Likewise, the CDC's position is that "under most circumstances, mask wearing has no significant adverse health effects for wearers. Studies of healthy hospital workers, older adults, and adults with chronic obstructive pulmonary disease (COPD) reported no to minimal changes in oxygen or carbon dioxide levels while wearing a cloth or surgical mask…."

[17] It makes sense that Plaintiffs chose not to rely on Harald Walach for their carbon dioxide argument, considering that the impact of mask wearing on carbon dioxide levels in children was the subject of one of Walach's recently retracted articles:https://jamanetwork.com/journals/jamapediatrics/fullarticle/2782288?guestAccessKey=339ebece-f4e0-49fd-aa49 d3992128c6dd&utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_content=tfl&utm_term=071621.

no high-quality studies to suggest that masks pose any physical or psychological harms." Pate Declar. ¶ 26. Modern surgical masks have been widely used since the 1960s, and there has been no serious health risk found to be associated with their use. *Id.*[18] In short, masks do not cause physical harm. Plaintiffs are attempting to manufacture real and meaningful harm where only small inconveniences exist.

True to form, Plaintiffs' final set of harms supposedly created by mask wearing, psychological and developmental injuries, has little basis in fact and is supported by another declarant with no expert qualifications. Plaintiffs argue that "[a] large percentage of individuals who feel burdened by the mask mandate report multiple symptoms of chronic stress, like anxiety, fatigue, headaches, discomfort, and trouble concentrating," Prousa Declar.¶6, Pl.'s PI Memo at 8. The declaration, in turn, cites a paper written by Prousa herself and published in "Psych Archives," a literature repository created by the Leibniz Institute for Psychology. *Id*. The Leibniz Institute for Psychology has "explicitly distance[d] itself from all content linked to [Proua's] publication," noting that it "would not withstand the scientific review process undertaken by any reputable scientific journal."[19] Nonetheless, Plaintiffs rely on Prousa, and her publication, to substantiate their developmental and psychological claims.

[18] https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html .
[19] Prousa, D. (2020). Study on psychological and psycho-vegetative complaints with the current mouth and nose protection regulations. PsychArchives. https://doi.org/10.23668/PSYCHARCHIVES.3135

In reality, there is no credible evidence that masks cause psychological or developmental damage. Pate Declar.¶¶ 26, 27. "In healthy populations, wearing a mask does not appear to cause any harmful physiological alterations, and the potentially life-saving benefits of wearing face masks seem to outweigh the …discomforts."[20]

C. The equities and the public's interest weigh strongly against an injunction.

Plaintiffs' request for a preliminary injunction is contrary to the public's interest. In turn, the balance of equities weigh strongly against the injunction sought. Masks save lives. As set forth above, Plaintiffs' arguments are diametrically opposed to the guidance from the CDC, the WHO, and the vast majority of the medical community as set forth in Dr. Pate's Declaration. An injunction could exacerbate the pandemic by enjoining common sense local government policies enacted to combat the spread of COVID-19. Plaintiffs' minimal inconvenience caused by the mask mandate is greatly outweighed by the public's right not to be infected with a deadly virus. The potential injury to the public of a deadly and highly communicable disease outweighs Plaintiffs right to proceed without caution. Plaintiffs' request demonstrates a callous disregard for the dangers of this virus and the thousands of Idaho lives it has already sadly taken.

V. CONCLUSION

[20] Scheid, J.L.; Lupien, S.P.; Ford, G.S.; West, S.L. Commentary: Physiological and Psychological Impact of Face Mask Usage during the COVID-19 Pandemic. Int. J. Environ. Res. Public Health 2020, 17, 6655. https://doi.org/10.3390/ijerph17186655

Plaintiffs are extremely unlikely to succeed on the merits of their claims. Courts have routinely upheld mask-mandates, and this should be no exception. Defendants respectfully request that the Court deny Plaintiffs' motion for an injunction, strike Plaintiffs' declarations, and grant the Defendants' motion to dismiss the case in its entirety with prejudice.

DATED this 30th day of December 2021.

/s/ Deborah A. Ferguson
Deborah A. Ferguson

FERGUSON DURHAM, PLLC

CERTIFICATE OF SERVICE

I CERTIFY that on the 30th day of December 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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