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IN THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF IDAHO

HEALTH FREDOM DEFENSE FUND, INC.; RYAN BLASER, on his own behalf and as natural guardian for and on behalf of his minor children, K.B.B. and K.S.B.; MICHELLE SANDOZ, on her own behalf and as natural guardian for and on behalf of her minor children, R.S. and E.S.; BARBARA MERCER, an individual; EMILY KNOWLES, on her own behalf and as natural guardian for and on behalf of her minor children, A.G.K. and A.T.K.; and KENDALL NELSON, an individual,

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

I. INTRODUCTION

Justice Gorsuch, writing in concurrence with the decision blocking the federal government's OSHA vaccination mandate on January 13, 2022, posed a simple question. "The central question we face today is: Who decides? No one doubts that the COVID-19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, Nos. 21A244, 21A247, 2022 U.S. LEXIS 496, at *12-13 (Jan. 13, 2022)(J. Gorsuch, concurring). The pandemic has brought change to nearly every facet of life, and it is tempting to move quickly to try to save lives or lessen the damage. In each of their filings, Defendants have echoed similar sentiments to Justice Breyer's dissent in the same case: "COVID-19 poses grave dangers to the citizens of this country…the disease has by now killed almost 1 million Americans and hospitalized almost 4 million." *Nat'l Fed'n of Indep. Bus.*, at *20 (Jan. 13, 2022). Yet, as the same court reminded us last year, "[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). An urgency or overwhelming desire to act cannot override the fundamental safeguards built into our system of government. "Respecting [the] demands [of the law] may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little." *Nat'l Fed'n of Indep. Bus.* at *20 (J. Gorsuch, concurring).

There is still a fundamental need to weigh the constitutionality of actions and determine whether they are appropriate, especially when the lives of citizens are on the line. Plaintiffs have asked this Court to consider imposing a preliminary injunction in this case, blocking the City of Hailey from enforcing or implementing further emergency orders imposing mask mandates upon the citizens and people of the City of Hailey. This request is based upon Plaintiffs' evidence suggesting that, far from protecting the health of the Plaintiffs and others in the City of Hailey, masks fail to impart protection, likely increase the risk of infection with SARS-CoV-2, and also

are likely to cause serious physiological, psychological, and developmental harm, especially to children.

The City of Hailey just reimplemented the underlying emergency order in this action—now entitled Public Health Emergency Order No. 2022-01—on January 11, 2022, scheduled to sunset on February 15, 2022. Defendants have also provided a single declaration in support of their Opposition to the Motion for Temporary and Preliminary Injunctive Relief, that of Dr. David Pate. Defendants state that Dr. Pate's declaration stands in sharp contrast to the Plaintiffs' three declarations. Plaintiffs are inclined to agree: after all, Dr. Pate provides no *curriculum vitae*, no list of publications, no educational or vocational basis in the study of the matters about which he speaks, limited scientific background for his opinions, and speaks well outside of his field of expertise as a hospital administrator who has not worked as an internal medicine specialist for at least a decade. For this reason, and for others that will be put forth in the subsequently filed Motion to Strike Declaration of Dr. David Pate and Memorandum in Support, Plaintiffs will request that this Court strike the Declaration of Dr. David Pate, and ask that argument on that matter be heard concurrently with the other motions so scheduled on February 16, 2022.

ARGUMENT

1) *Likelihood of success on the merits*

Rather than address the merits of the case, Defendants elect instead to argue that, because they believe that the case should be dismissed for lack of standing, Plaintiffs cannot make a strong showing on the merits. Defendants dedicate substantial time to a rehash of their arguments in the Motion to Dismiss. This Court has already had the issue of standing fully briefed, but it is worthwhile to address standing in brief.

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

2137 (1992) (internal citation omitted). Plaintiffs argued at length in their Opposition to the Motion to Dismiss regarding the particularized harms they allege, and it is not necessary to readdress that here. Yet Defendants again argue that Plaintiffs would need to allege a citation for refusal to wear a mask, or that they were forced to comply. [DE 20], at 5. Setting aside the concrete, tangible harms for a moment, as Defendants do, it seems that Defendants decline to consider the question of intangible harm.

"Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340, 136 S. Ct. 1540, 1549 (2016). The *Spokeo* court gives two examples of intangible injuries: the denial of a permit to place a permanent monument in a city park, implicating freedom of speech; and laws preventing animal sacrifice in accordance with a group's religious observations, implicating free exercise of religion. *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). When implicating a fundamental right, the effects of government overreach are often intangible: denying the placement of a statue, preventing protected speech, regulating how religious rituals are to be performed, or outlawing the performance thereof.

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

Defendants also address the question of fundamental rights, repeating their earlier statement that Plaintiffs' logic implies wearing a gown to be "experimental medical treatment." The analogy collapses on numerous levels. The FDA issued an EUA for gown manufacturing, but they are not definitionally medical devices. Masks are because the FDA has defined that they are, when they are intended for a medical purpose. [DE-1], Exhibit B; as cited in Footnote 1 of [DE 1]. Further, face masks remain the subject of ongoing experimental inquiry and study; gowns, because they are not medical devices, are not. Finally, hospital gowns are not forced upon the citizens of and visitors to the City of Hailey as a medical treatment.

Defendants then attempt to sweep aside the "technical FDA classifications"—classifications and definitions created by the governmental entity most responsible for defining, enforcing, and protecting the safe use of medicine and medical devices in the country—and arguing that "common sense and precedent" are the guide. [DE 20], at 8. The case Defendants cite, for the proposition that mask mandates are not medical treatments, makes the stunning analogy that a mask mandate is akin to "requiring shoes in public places, or 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). Similarly, Defendants cite to *Machovec v. Palm Beach County*, which analogizes masks to "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).

Yet facially these analogies are imperfect at best. None discuss a medical device, and so from the start the analogy and reality diverge. Smoking is a prohibition requiring the individual to forego something, not to wear something, and certainly not to wear a medical device. Shoes and motorcycle helmets, in addition to not being medical devices, are also well-understood

mechanically and are certainly not experimental, while debate still rages about whether masks even provide benefit to preventing viral transmission, and the potential harms are equally in contention. These analogies simply do not contemplate what a mask actually is, at one hand dismissing them as akin to an article of clothing, but then on the other considering them a critical measure. It cannot be both. Either masks are medical devices, in which case the FDA has deemed them experimental and Defendants have an obligation to acknowledge and obtain consent; or they are not medical devices, in which case they are little more than facial decorations that fail under even a rational basis test.

The court in *Machovec* unintentionally acknowledges this dichotomy. It states that

> 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)*.

Machovec v. Palm Beach Cty., 310 So. 3d 941, 946 (Fla. Dist. Ct. App. 2021) (emphasis supplied).

While attempting to differentiate the masks from medical treatment, the court acknowledges that masks treat a medical condition—but just do so secondarily to the primary effect of protecting one citizen from another.

Plaintiffs have addressed the question of levels of scrutiny previously in both its initial motion and in its Opposition to the Motion to Dismiss, as well as the question of *jus cogens* norms.

2) The likelihood of irreparable harm in the absence of preliminary relief

There will be ample opportunity in the Plaintiffs' Response to the Motion to Strike filed by Defendants (DE 21), as well as in Plaintiff's own Motion to Strike, to address the scientific basis for Dr. Pate's Declaration in depth, as well as to discuss the myriad studies and scientific surveys relied upon by Plaintiffs' three subject matter experts. Sufficient for now is an overview.

Dr. Pate cites what appears to be a total of seven sources in his declaration. The quality of several of his sources were questioned at length, particularly by Prof. Dr. Walach, for attributing far too much weight to weak mathematical models. The majority of Dr. Pate's assertions are made without supporting evidence detailing the basis for his claims; from ¶¶ 27-35 he cites no source to support any of his arguments, nor does he show by analysis why he believes the numerous studies cited by Plaintiffs fail to show any harms. Yet Defendants cite to Dr. Pate as an authority for the proposition that masks "do not cause physical harm," and even accuse Plaintiffs of "attempting to manufacture real and meaningful harm where only small inconveniences exist." [DE 20], at 19. Defendants bring no doctor of veterinary medicine to explain how the animal studies showing marked acute and chronic damage from relatively small carbon dioxide exposures, and their applicability to humans with the appropriate scaling factor, may be distinguished from the present case; they are content to rely on Dr. Pate's unsubstantiated, unsupported, citation-less, conclusory claim that no high-quality studies exist. Defendants further bring no psychologist or psychiatrist to attempt to rebut the claims made by Plaintiff's clinical psychologist Daniela Prousa, but again cite Dr. Pate, an internal medicine physician who has not practiced (legally, as he is not licensed in Idaho) for a decade, dismissing with a wave of the hand all of psychology. Indeed, so eager is Dr. Pate to discount the evidence that he does not even address Prousa's citation of a highly respected physician who personally believes masks are beneficial, and yet still cautions as to their potential for damaging emotional and developmental effects on children. [DE 18]-4, at ¶¶ 18-22, *see especially* Footnote 18.

Instead of offering evidence-based scientific analysis of the issues, analyzing the arguments of Plaintiffs' experts and weighing the credibility of the studies, Defendants and their declarant merely brush aside their statements, dismissing experts with decades of experience not on the virtues of their scientific arguments but on the rumors of their reputation.

On the contrary, Prof. Dr. Walach cites 20 independent scientific papers and scholarly articles and analyzes multiple at length. He does not shy from contrary positions, but instead demonstrates how, in his expertise as the author of 204 peer-reviewed publications and 112

scholarly book chapters, that he believes the higher-quality evidence rests with his position. Dr. Susanne Wagner cites twenty-seven independent papers and scholarly articles for her propositions. Daniela Prousa cites fifteen independent scholarly articles and scientific papers. Statements made are not just in a vacuum, but arguments borne out of research and out of scholarly development. And the picture these three experts paint is clear: masks simply impose upon Plaintiffs—and upon the citizens and visitors of the City of Hailey—a high likelihood of irreparable harm.

3) Balance of the equities and the public interest

Defendants meld the two points of "whether the balance of equities tips in [Plaintiffs'] favor" and "that an injunction is in the public interest" into one. Defendants conclude their Opposition to the Motion for Temporary and Preliminary Injunctive Relief by saying that

> 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.
>
> [DE-20], at 20.

This disingenuous and inflammatory rhetoric serves as a tidy counterpoint to Plaintiffs' even-handed attempts to offer solutions in their Motion. Plaintiffs, in the original Motion, suggested what they characterized as a "non-exhaustive list of potential alternate resources" to combat the pandemic:

> Social distancing requirements, limitations to building occupancy, hand-washing requirements or hand-sanitizer provisions for businesses, vigorous contact tracing, quarantine of the infected, pre-testing quarantines for those displaying any cold-like symptoms, or heightened testing or monitoring…There are nearly limitless combinations of scientifically validated, safe, and reasonable measures to combat the pandemic, or even ways to narrowly tailor the mask requirements, yet Defendants have chosen not to avail themselves of these methods.
>
> [DE-18], at 12.

Plaintiffs, contrary to the implication of Defendants' rhetoric, desire the citizens of and visitors to the City of Hailey to be safe and healthy. Plaintiffs charitably believe that Defendants intend the same. Yet Defendants have so tied themselves to this single measure—one which is minimally useful, maximally invasive, and likely maximally dangerous of the possible measures available—that they have been unwilling to consider the alternatives, or to consider the dangers and the constitutional infringement of their chosen option.

CONCLUSION

Plaintiffs have therefore no recourse but to this honorable Court. Plaintiffs request that this Court grant the motion for temporary and preliminary injunctive relief, to safeguard the health and well-being of Plaintiffs and the citizens of and visitors to the City of Hailey from this reflexive use of emergency executive powers.

DATED this 13th day of January, 2022.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2022, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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