

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

HEALTH FREEDOM 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-DCN

Boise, Idaho
February 16, 2022
3:01 p.m.

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE DAVID C. NYE
CHIEF UNITED STATES DISTRICT COURT JUDGE

*Proceedings recorded by stenography. Transcript produced by
computer-aided transcription.*

APPEARANCES:

For the Plaintiffs: MR. ALLEN J. SHOFF
Davillier Law Group
414 Church Street, Suite 308
Sandpoint, Idaho 83864

For the Defendants: MS. DEBORAH A. FERGUSON
MR. CRAIG DURHAM
Ferguson Durham, PLLC
223 North Sixth Street, Suite 325
Boise, Idaho 83702

Court Reporter: MS. ANNE BOWLINE, RMR, CRR
Anne_Bowline@id.uscourts.gov

I N D E X

<u>MOTIONS</u>	<u>PAGE</u>
Motion to Dismiss	
Ms. Ferguson	5
Mr. Shoff	13
Ms. Ferguson	26
Motion for Preliminary Injunction	
Mr. Shoff	28
Ms. Ferguson	30
Motion to Strike	
Ms. Ferguson	33
Mr. Shoff	36

1 (Proceedings commenced at 3:01 p.m., February 16, 2022.)

2 THE COURT: Counsel, are we ready to go forward?

3 MS. FERGUSON: Yes, Your Honor.

4 MR. SHOFF: Yes, Your Honor.

5 THE COURT: All right. Patti, if you'll call the
6 case, we'll get started.

7 THE COURTROOM DEPUTY: The Court will now hear the
8 motion hearing in Health Freedom Defense Fund versus Blaser
9 and the City of Hailey, Case Number 1:21-CV-389.

10 THE COURT: Thank you.

11 Good afternoon, everyone. My understanding is there
12 are three motions for today: a motion to dismiss, a motion
13 for preliminary injunction, and a motion to strike. I'd like
14 to start with the motion to dismiss and argue that one first.
15 Ms. Ferguson, I understand that's your motion. We'll argue
16 it. You can save whatever time you want for rebuttal out of
17 your 20 minutes, and then after we've got all the arguments,
18 we'll turn to the preliminary injunction and the motion to
19 strike. You both okay with that?

20 MR. SHOFF: Yes, Your Honor.

21 MS. FERGUSON: Yes.

22 THE COURT: Ms. Ferguson, maybe before you get
23 started, you can help me out. I think the order that's
24 attached to the complaint actually expired yesterday. Was
25 there an extension of that?

1 MS. FERGUSON: Yes, Your Honor. That's been -- that
2 public health order has been renewed, and it was renewed
3 yesterday by order of the mayor and the city council for
4 another 60 days, until April 16.

5 THE COURT: Okay. Then we've got a case in
6 controversy as least as far as that goes. You may go ahead
7 and make your argument.

8 MS. FERGUSON: Thank you. Deborah Ferguson. And
9 beginning with that motion to dismiss, the plaintiffs have
10 brought a two-count complaint. The first count was based on
11 the supremacy clause. And my understanding is the plaintiffs
12 have abandoned Count 1, because they have acknowledged that
13 the supremacy clause doesn't create a private right of action.
14 That's found in their response brief to the motion to dismiss
15 at page 7, Your Honor, and that's based on U.S. Supreme Court
16 precedent in the *Armstrong* case.

17 THE COURT: That's also my understanding too. And
18 I'll just ask, Mr. Shoff, is that correct? You're abandoning
19 the first count?

20 MR. SHOFF: That is correct, Your Honor, yes.

21 THE COURT: Okay. Go ahead, Ms. Ferguson.

22 MS. FERGUSON: Thank you. So turning to Count 2,
23 that's the substantive due process claim, and we move to
24 strike Count 2 because the plaintiffs here lack standing. The
25 standing test is set forth in the *Laidlaw* case, the Supreme

1 Court case, and requires the three factors -- all three
2 factors must be fulfilled. The initial one is the injury in
3 fact. It has to be traceable to the challenged action and
4 redressable by the Court's order.

5 Now, as set forth in my briefing, three federal
6 courts have dismissed mask mandate challenges for lack of
7 standing. This is the *Bechade* case, *Oakes*, and *Parker*. In
8 plaintiffs' response briefing, they ignore these cases. They
9 just do not address them. I'd like to point out to the Court
10 that no one here has been forced to wear a mask, and the order
11 as drafted by the city council has eight separate exemptions.
12 So this allows plaintiffs to choose, you know, whether or not
13 they will go to public indoor places in Hailey. They can
14 shop, they can eat out, and they can take exercise classes,
15 whatever, in other communities that aren't subject to the mask
16 mandate if they so choose.

17 It's also, I think, important to note that
18 plaintiffs' complaint is really much more of a generalized
19 grievance that would be common to the public. And this is
20 something that the District Court in Pennsylvania pointed out
21 in its decision in the *Parker* case. I would also submit that
22 these allegations that they may at some future point be cited
23 under this ordinance does not -- is insufficient for standing.
24 That's possible future injuries, and that's not enough to
25 create standing.

1 Moving to the factor about whether or not a court
2 order could redress this alleged harm, I think it is important
3 to note that mask mandates would still remain in effect in the
4 community. Specifically, the Blaine County School District
5 has a mask mandate that would be unaffected by this Court's
6 order. And businesses can require them; certainly medical
7 facilities would. So I'm not sure that the relief requested
8 would be redressable by the order they seek, and I'm urging
9 that this Court do what several other federal sister courts
10 have done with similar mask mandate challenges, where they
11 have dismissed those cases for lack of standing.

12 Another basis for dismissal besides standing, Your
13 Honor, is just a plain 12(b)(6) dismissal for failure to state
14 a claim.

15 THE COURT: Before you move to that --

16 MS. FERGUSON: Yes.

17 THE COURT: -- back on the standing argument, it
18 seems to me some of the facts that are alleged in this
19 complaint are much more detailed than in the other cases you
20 cite. Does that make a difference for standing? They're not
21 just generalized grievances; they're pretty particular
22 grievances.

23 MS. FERGUSON: Uh-huh. Well, they -- I would agree
24 that they have alleged more specific instances of what they
25 say is psychological harm. I think Your Honor's correct with

1 that.

2 THE COURT: But does that make a difference in your
3 mind?

4 MS. FERGUSON: Well, you know, I -- I still think
5 they lack standing in that this is -- they're not forced to
6 wear a mask. They have choices. They can -- they can change
7 their behavior to avoid the requirements or avail themselves
8 of one of the exceptions. So I would say they don't have
9 standing to proceed.

10 THE COURT: All right. I probably ought to just
11 comment, this has nothing to do with the case, but the camera
12 that is on me is straight in front of me. I'm often looking
13 to the right. That's because that's where I see you. I'm not
14 ignoring your argument, but I'm not looking at you. I just
15 wanted you to know.

16 MS. FERGUSON: I appreciate that. I thought I was
17 uninteresting already.

18 THE COURT: That's why I said that.

19 MS. FERGUSON: Thank you. It's a new -- it's
20 definitely a new setup to do an argument sitting down in my
21 office.

22 THE COURT: You may continue.

23 MS. FERGUSON: Thank you. So turning to the 12(b)(6)
24 basis for dismissal, the requirement to wear a mask in indoor
25 public spaces in Hailey is a public health measure and, as I

1 mentioned already, subject to eight exemptions. It is not --
2 not a medical treatment, and therefore it does not violate the
3 bodily integrity of any individual. It doesn't violate their
4 right to autonomy, and it does not violate their right to
5 consent to medical treatment because it isn't medical
6 treatment.

7 So because none of these rights come into play, the
8 order doesn't implicate any fundamental right or violate the
9 constitution. Put quite simply, there is no fundamental right
10 not to wear a mask. And we have cited in our briefing very
11 recent Federal District Court cases that ruled against --
12 consistently ruled against a challenge such as this to a
13 public health mandate, and those are found at page 13 to 15 in
14 our brief. And the plaintiffs have simply ignored most of
15 that precedent. It isn't that they -- they did respond and
16 try to distinguish a few of the cases, but the majority of
17 them they just, I think, ignored as inconvenient.

18 So I want to underscore there is ample case authority
19 to support a mask mandate as a public health measure during a
20 global pandemic, and the plaintiffs have not attempted to
21 distinguish those cases. Most of them have simply just been
22 disregarded. And because there is no fundamental right not to
23 wear a mask, the local government action must be reviewed
24 under a rational basis standard.

25 Now, within the past 12 months, several Federal

1 District Courts have dismissed mask mandate challenges at the
2 pleading stage, like I'm requesting that this Court do. And I
3 would direct you specifically to the *Forbes v. The County of*
4 *San Diego* case. Plaintiffs also argue -- and it's a much more
5 nebulous argument, I think -- that masks violate international
6 norms. And this is -- this is just incorrect. Masks in the
7 pandemic are the standard throughout the world. And we have
8 provided Dr. David Pate's declaration in support of opposition
9 to the injunction. He references paragraph 24 in his
10 declaration precisely this, that internationally masks are
11 used and being used very effectively.

12 There's a recent large randomized study, the largest
13 of its kind, that came out of Stanford and Yale medical
14 centers. They went to rural Bangladesh. They studied the
15 effectiveness of masks. And the reason for this study is in
16 many of the world's very poor countries, vaccines haven't
17 arrived in sufficient numbers or they don't have the
18 distribution channels to distribute them. So they -- these
19 doctors and scientists wanted to get some hard data on using
20 masks and have found it very effective, so much so that
21 they're expanding this to Southeast Asia.

22 So these violations plaintiffs have made about
23 international law don't state a cause of action here. As a --
24 our federal courts aren't bound by some vague body of
25 international law. And to say that, well, it's not a

1 particular international law; it's more of an international
2 standard, and it violates the standards of decency to require
3 someone to wear a mask is, I think, an absurd argument.

4 So I would submit, Your Honor, that plaintiffs' due
5 process claim is not grounded in any sound legal theory, and
6 it should be dismissed now at the pleading stage.

7 The -- you know, it's not lost on me and I'm sure on
8 the Court that the Court itself has its own mask mandate,
9 General Order 411, and that was renewed by Your Honor just
10 last week. And that contains the Court's policies and
11 procedures developed with CDC guidance and a local
12 epidemiologist. The City of Hailey also relied on CDC
13 guidance. And because we are in a stage red alert at the
14 Boise courthouse, obviously today now we are appearing by
15 Zoom. And regardless of the stage -- whether it be red,
16 yellow, or green -- the Court requires coverings of the face
17 to appear in court and to be worn at all times in the
18 courthouse.

19 THE COURT: You're saying that to a judge who's not
20 wearing a mask.

21 MS. FERGUSON: Well, you -- I don't see any staff or
22 anyone close by. I'm sure you're social distancing.

23 THE COURT: That's exactly right.

24 MS. FERGUSON: You know, on the Court's website there
25 is a link to a chart recently published in the *Wall Street*

1 *Journal* that speaks to the very strong effectiveness of some
2 sorts of masks, the N95 masks, to present -- to prevent the
3 spread of COVID. And I think -- I would imagine that's there
4 as a link to help educate the public in the science behind
5 these masking protocols and help them make an educated
6 selection of the type of mask they should wear.

7 So if the Court were to find that there was a
8 fundamental right during a global pandemic to be mask free in
9 public places, then the plaintiffs -- then the Court's own
10 policy would have to be abandoned here, because it would then
11 also be unconstitutional if it was found to be violating a
12 fundamental right. And that would rob the court of the
13 authority to protect its staff and the public from the
14 transmission of what we know to be a very highly contagious
15 disease.

16 And I would end to say COVID has already killed over
17 5,000 Idahoans, and according to my most recent check with the
18 Idaho COVID state-managed website, over 400,000 Idahoans have
19 become infected. So there is no real end in sight, and the
20 new variant is still ranging among us. So these safety
21 measures and protocols remain as important as ever. Thank
22 you.

23 THE COURT: Thank you. I am going to say for the
24 record that I believe -- I understand the argument about the
25 effectiveness of masks and mask mandates, but in my mind

1 that's really secondary to the question today of legal
2 authority, and it's legal authority that I'm going to be
3 looking at. We don't need to get into the effectiveness of
4 the mask mandate.

5 Mr. Shoff, you may go ahead. I do have a couple of
6 starting questions for you, if I may.

7 MR. SHOFF: Certainly, Your Honor.

8 THE COURT: Ms. Ferguson gave us cases saying that
9 there's no standing and there's no fundamental right. Do you
10 have any cases that say the opposite? Because I couldn't find
11 any.

12 MR. SHOFF: Not particularly with regard to a mask
13 mandate, no, Your Honor. Our basis is on the overall -- the
14 general Supreme Court jurisprudence with regard to standing as
15 well as the standing in instances of fundamental rights. We
16 cited specifically to the free exercise case -- I'm going to
17 mispronounce this -- with the Church of Lukumi Babalu Aye,
18 Incorporated, which --

19 THE COURT: I'm glad you said that.

20 MR. SHOFF: I gave it my best shot, Your Honor. But
21 I found that one particularly interesting in this situation,
22 especially with regard to something that defendants have said
23 in these oral arguments, which is that plaintiffs may always
24 just change their behavior to avoid requirements. They could
25 just not go into the town of Hailey, just not be -- you know,

1 run their businesses or participate in social or public life.

2 And one could say that the City of Hialeah in Florida
3 could have said the same thing to practitioners of that
4 religion, Santeria, which is the religion at issue in that
5 instance, where the City was upset that the practitioners of
6 the religion were pursuing animal sacrifices, so they banned
7 that explicitly. And the Court said you can't. They had
8 standing simply by virtue of their fundamental right, in this
9 case their free exercise of religion. And you can't just go
10 in and say, well, they could just change their religion and it
11 would no longer affect them.

12 In a similar way, Your Honor, we would say that the
13 plaintiffs have that fundamental right, which I can address
14 later, regarding -- under both the theory of personal autonomy
15 as well as the theory of bodily integrity. And to say, well,
16 they could just forgo those fundamental rights to enjoy life
17 in the city strikes me as violative of that effect.

18 But I'd be happy to answer any additional questions
19 the Court may have before proceeding, Your Honor.

20 THE COURT: Go ahead. I may come up with some as
21 you're talking, and if I do, I'll interrupt.

22 MR. SHOFF: Certainly, Your Honor. So addressing
23 more specifically standing, the three elements at issue here,
24 the first and arguably the most detailed is the issue of a
25 legally protected interest. In this particular matter the

1 courts have said that you can have tangible or intangible
2 injuries, and an intangible injury can nevertheless be
3 concrete.

4 I point to the *Friends of the Earth, Incorporated*,
5 which is a Supreme Court case in which the Court found that
6 sworn statements that adequately document injury in fact --
7 which some of them were the members no longer felt safe to
8 picnic on the banks of the river or bird-watch or wade because
9 they were in the vicinity of a plant that was allegedly
10 producing toxins or pollutants put into the water. There was
11 no showing from my review of that case by any of these sworn
12 statements that the individuals had any personal physical or
13 psychological symptoms aside from the inability to enjoy the
14 area.

15 And so this is a -- in the words of the *U.S. v.*
16 *Students Challenging Regulatory Agency Procedures* (1973),
17 it's -- an identifiable trifle was sufficient to grant
18 standing under the injury in fact analysis. And just to point
19 out some of the examples of concrete tangible or intangible
20 harms in the complaint that the plaintiffs have already
21 alleged occur, again, we are in a motion to dismiss, and as
22 the Court is aware, the standard --

23 (Reporter interruption.)

24 MR. SHOFF: Thank you, ma'am. The Court may affirm a
25 dismissal only if it is clear that no relief could be granted

1 under any set of facts that could be proved consistent with
2 the allegations. And that was *Abboud v. INS*, a Ninth Circuit
3 case from 1998.

4 So some examples of the concrete both tangible and
5 intangible harms as alleged by plaintiffs include a particular
6 child of a declarant experiences joint inflammation due to
7 oxidative stress from wearing masks. A requirement to mask
8 was damaging interpersonal contact, which is essential to a
9 coaching business within the City of Hailey; that an
10 individual suffered breathing problems; that wearing the mask
11 causes depressive symptoms, felt suffocating, gave them
12 headaches and dizziness.

13 THE COURT: But doesn't the exemption or the
14 exception of -- if you have a medical condition, you can wear
15 a face mask, a glass or plastic mask, instead of the cloth
16 mask. Doesn't that account for that?

17 MR. SHOFF: To the extent that one has a condition
18 that -- or one has a doctor's note. The way that my
19 recollection is that it's written is that if you have a
20 medical condition for which the mask would be, you know,
21 intolerable, then in that case you do have an exemption. The
22 defendants pointed out in their briefing, well, it's an honor
23 system. Now, we pointed out -- or the plaintiffs pointed out
24 that the chief of police of Hailey had chastened the
25 individuals at the town for not obeying the mandate, so one

1 could call that into question whether or not it's truly
2 ultimately on the honor system if enough people avail
3 themselves of that.

4 But I think, more importantly, Your Honor, to say
5 that, oh, if you have any condition, you can just ignore the
6 mask mandate makes the mask mandate -- it becomes
7 unenforceable. It's a nebulous sort of paper law without any
8 effect. So I don't understand how the City of Hailey is
9 putting into ordinances it says are so critical and essential
10 to public health and then saying, well, you can just ignore it
11 at your leisure.

12 THE COURT: I don't think that's what it says. It
13 says if you have a medical condition, you can wear a face
14 shield instead of a face mask. And that's a whole different
15 ball game than just ignoring it.

16 MR. SHOFF: Well, Your Honor, and so even given --
17 say the face shield would be tolerable. In that instance,
18 there would still be the issues with facial contact, with
19 children being set apart from their peers in those sort of
20 situations. And so that would be -- those are just some of
21 the actual and concrete issues.

22 In regard to -- there's the second aspect of this
23 plank, which is, in addition to actual and imminent, there's
24 also -- it's not conjectural or hypothetical, but we're
25 talking imminent, so in other words future harm that could

1 happen. It doesn't mean that -- *Spokeo, Incorporated, v.*
2 *Robins*, which is a 2016 Supreme Court case, talked about this,
3 and it says the risk of real harm can indeed satisfy the
4 requirement of concreteness just so long as it's not a general
5 conjecture or hypothetical.

6 And it's in that instance, Your Honor, that
7 plaintiffs feel that the detailed declarations and the
8 statements point to that aspect of it as well, that there's
9 the very real risk of harm, as outlined by the experts in
10 their declarations. So in addition to both actual issues
11 they're experiencing, now there's also the imminent physical
12 and psychological harms they're facing additionally to that.

13 THE COURT: And I go back to where we started. If
14 that's the case, why haven't other courts found standing?

15 MR. SHOFF: I think in -- and the plaintiffs did
16 address a number of those cases, specifically *Forbes, Zinman*
17 *was one of them, Oberheim, and Alan v. Ige* -- I apologize, I
18 don't know how to pronounce that particular one -- address
19 those at length. And several of those cases were motions for
20 preliminary injunction, which would be a different standard
21 than this present case. The District of Hawaii case, the *Alan*
22 *v. Ige*, was a truly bizarre non sequitur that the Court said
23 there's nothing pled here.

24 The allegations pled here in this present matter are
25 very specific and are related to specific fundamental rights

1 rather than a general attempt to bring in -- some of these
2 attempt to use the Fourth Amendment. They brought general
3 arguments attempting to imply or bring other federal laws into
4 their argument, and so they were dissimilar and
5 distinguishable because of the specific arguments made in this
6 case.

7 Moving on to the other two aspects of standing, the
8 traceable to the challenged action, just as a practical
9 matter, the city of Hailey is substantially larger than the
10 other towns in Blaine County. It's about seven times larger,
11 if memory serves, than Sun Valley. It's three or so times
12 larger than Ketchum. It is the heart -- the social, economic,
13 and recreational heart -- of the valley. And the plaintiffs,
14 many of them have alleged that they live in Hailey, that they
15 work in Hailey, that they run businesses in Hailey. And so
16 the injury of, for example, them going into one of these other
17 towns would be ameliorated by the fact that they generally are
18 living their lives in the city of Hailey.

19 I'd also point out that both Ketchum and Sun Valley
20 in the past week or two weeks, I believe, both removed their
21 mask mandates, and so the -- by overwhelming majorities of
22 their city councils. So the idea that those cities would have
23 some sort of aspect of injury that would be traceable would no
24 longer even be applicable.

25 And then finally that is related as well to the third

1 plank, the likelihood that the injury would be redressed by a
2 favorable decision. Certainly, as defendants have just
3 stated, that were the Court to find that these are fundamental
4 rights that are being infringed, it would have knock-on
5 effects elsewhere in the state of Idaho and so would in fact
6 redress the injury.

7 And so I think it's relevant to point here before
8 moving on to the question of the causes of action
9 themselves -- or the cause of action itself is the question
10 of, as stated by defendants, that this would somehow remove
11 apparently the sole mechanism for protecting, for example,
12 courthouse employees or children in Blaine County or the
13 plaintiffs and citizens of Hailey.

14 There have been throughout this pandemic many
15 different mechanisms and measures for -- and plaintiffs
16 provided a not exhaustible but rather lengthy list of them in
17 one of our briefings of actions that can be taken, many of
18 which this Court has taken: As we are sitting here via Zoom
19 would be a good example of one of them; but social distancing,
20 contact tracing, quarantine of specific individuals; even
21 something as limited or as specific and narrowly tailored,
22 dare I say, as requiring individuals who test positive or who
23 have symptoms to wear a mask. Those would all be options that
24 would still -- again, in this hypothetical of the Court
25 granting plaintiffs' cause of action, would still be available

1 to governments and state agencies.

2 And I think the parties are in agreement that it is
3 the role of municipalities to protect and look out for the
4 public health and safety of their citizens. The plaintiffs'
5 concern in this case is that this particular measure in this
6 particular way of being implemented is maximally invasive to
7 their rights and to their personal integrity while being
8 minimally effective. And so in that way it is not -- while
9 the interest of the government may be compelling -- and again,
10 we argue that we would be under a strict scrutiny and
11 framework -- that this is not narrowly tailored to further
12 that particular interest.

13 I would like to then move to specifically the jus
14 cogen argument, because I think it is very important. And
15 this goes back, Your Honor, to your previous question
16 regarding whether or not this is -- this case is
17 distinguishable from others. To my knowledge and to my
18 review, there have been no other cases that have furthered
19 this theory particularly because it is -- it is a difficult
20 theory in terms of basing the proof and difficult in the sense
21 of reading through the case law that relates to it. That was
22 the reason for the lengthy, multipage, starting at Nuremberg
23 to the present day, describing the creation of this particular
24 jus cogens as the norm or the finding of it as an
25 international basis.

1 And so I think the parties would agree, if I recall
2 from briefing, that there's no -- there's no question that the
3 particular norm at issue here, that nonconsensual human
4 experimentation, is a jus cogens norm. We cited numerous
5 cases to that effect. I think that's widely agreed as a norm,
6 that we don't experiment on people without their consent or
7 knowledge.

8 The question is, is this experimentation? And that's
9 the question that -- again, we're at the stage of a motion to
10 dismiss. We're determining factual allegations at this point.
11 What the argument that plaintiffs are putting forward is that
12 this mask -- that the emergency use authorization, that the
13 FDA's own documentation illustrates that these masks are
14 experimental; that at the beginning of the pandemic, there was
15 a number of studies -- and even before the pandemic -- where
16 it was a wash, to put it just frankly, about whether masks
17 would be efficacious or not whether they would be useful or
18 not, whether they actually increase the risk. And it was not
19 politically necessary to be clear on that at that point,
20 because there wasn't a pandemic. But as soon as the pandemic
21 started, it had -- a decision had to be made, and they made
22 it.

23 And just because individuals and countries or states
24 have violated a jus cogens norm, again, if you're able to
25 demonstrate that they did doesn't mean that it's no longer a

1 norm. As Justice Gorsuch said in the *Roman Catholic Diocese*
2 *v. Cuomo*, in the time of a pandemic, the constitution doesn't
3 fall silent; it's still there. A jus cogens norm by virtue of
4 it of being at the level of treaties, as according to the
5 cases cited, is a fundamental right and is a fundamental
6 protection.

7 So that would be the first basis, that the mask is
8 defined as a medical device by the FDA. It is used for a
9 medical purpose: for the prevention of the transmission and
10 the infection of both the wearer and people around them. And
11 as such it is also experimental. It's not gone through -- in
12 this use, it's not gone through the full gamut of requirements
13 that the FDA has for wearing -- for selling objects or using
14 them as medical devices. And so in that way it is quite
15 experimental, and requiring individuals to wear it is a
16 violation of that norm.

17 Finally then, Your Honor, addressing the question of
18 bodily integrity and personal autonomy, plaintiffs have cited
19 the Ninth Circuit case of *Benson v. Terhune*, I believe is how
20 you pronounce that. The due process clause of the 14th
21 Amendment substantively protects a person's right to be free
22 from unjustified intrusions to the body, to refuse unwanted
23 medical treatment, to receive specific information -- or
24 sufficient information to exercise these rights intelligently.

25 The issue here -- and I find it very interesting --

1 is a number of the --

2 THE COURT: Before you move on, let's back up.
3 Before you move on to that, you're still arguing efficacy.
4 What part of the test that I'm to use weighs the reasonability
5 of the order? In other words, the question I think I have to
6 answer is, is it rationally related to the City's interest?
7 You've already said that their role is health and safety of
8 their people. So how is this order not furthering that goal?
9 Meaning, whether it's 1 percent effective, 20 percent
10 effective, or 99 percent effective, does that really matter at
11 this stage of the lawsuit?

12 MR. SHOFF: Our argument, Your Honor, would be that
13 the efficacy goes to whether or not -- for example, in your
14 example there, if it's 1 percent effective versus if it's
15 negative 5 percent effective, is it rationally related if it's
16 actually injuring people? In addition, that rational relation
17 to the governmental interest is dependent on it actually doing
18 what it's intended to do.

19 But second of all, as their -- as the declarants of
20 the plaintiffs' illustrate, for example, there is evidence in
21 the scientific study that wearing these masks at a medical
22 facility actually increased the wearers' likelihood of
23 getting -- this was -- in this case it was an influenza virus,
24 which influenza is very similar in size and structure to the
25 coronavirus, so it's a relatively good analog. And they

1 provide all sorts of reasons why. I don't know exactly why,
2 but the theory was that the moisture that was gathering helped
3 to gather particles or what have you. There was any number of
4 scientific explanations.

5 But the point, Your Honor, is that the City of Hailey
6 and Mayor Burke have implemented something that is not only
7 not efficacious but it is actually harmful. It is no longer
8 rationally related to the actions they're attempting to take.
9 And further, Your Honor, we would also argue that this case
10 would pull us into the realm of strict scrutiny because of the
11 fundamental rights that are implicated.

12 THE COURT: What fundamental rights are implicated?

13 MR. SHOFF: Well, specifically, Your Honor, that the
14 jus cogens norm is against nonconsensual human
15 experimentation, and that is at the level of a fundamental
16 right according to the jurisprudence cited in plaintiffs'
17 arguments. So that is one.

18 The second is the bodily integrity. And I find it
19 very interesting in the District Courts that have addressed
20 the issue of this particular plank, this 14th Amendment due
21 process, that the courts are always using the analogy and
22 they're saying the mask is -- its like a motorcycle helmet.
23 But the issue there is that, first of all, a motorcycle helmet
24 is narrowly tailored to a particular group of people:
25 motorcycle riders. But second of all, it's not a medical

1 device. It's not classified as such by the FDA. It's not
2 used for a medical purpose.

3 In other words, the analogies that are being used so
4 far to say that this right is more akin -- or that this
5 situation is more akin to a smoking ban or that sort of thing
6 don't contemplate the full extent that or don't take into
7 account what the mask actually is, what a mask actually is in
8 terms of how it is affecting people, how it is placed upon
9 people, what its purpose is, which is critical to defining it.
10 To say it's like a medical gown or a smoking ban is -- is
11 diminishing the reality of what it is, Your Honor.

12 So that would be our arguments that pertain to the
13 motion to dismiss at this time. Thank you.

14 THE COURT: Thank you.

15 Ms. Ferguson, any response in rebuttal?

16 MS. FERGUSON: Just very briefly, Your Honor. You
17 had referenced the medical exemption of the public health
18 order. And Your Honor is correct that it does state -- and
19 I'm going to quote from it. It's quite short: Persons who
20 cannot medically tolerate wearing a cloth face covering must
21 wear or position themselves behind a face shield. A person is
22 not required to provide documentation demonstrating that the
23 person cannot medically tolerate wearing a face cloth
24 covering. So it is very much on the honor system. And if
25 someone feels that they medically can't tolerate it, they

1 don't need any verification or a doctor's note; they simply
2 can rely on this exemption to use a clear face shield instead.

3 And I think what's lost in the mechanics a little bit
4 in some of the things that my opposing counsel said here is,
5 you know, it isn't -- the City isn't dictating to its citizens
6 and visitors the type of face mask they would wear. That's
7 entirely up to their judgment and discretion. And it doesn't
8 place them on anyone. So I think we get far afield, and it's
9 a distortion of some of these FDA mandates to look at a face
10 mask in this context, which may be just a homemade cloth mask,
11 as a medical device.

12 And while it's true the FDA does consider masks
13 medical devices, as Mr. Shoff had indicated, they consider --
14 and I highlight in my briefs so are hospital gowns. They're
15 considered medical devices. And the guidance that was issued
16 by the FDA that's been referenced in the case was guidance
17 issued and point towards manufacturers. And I think the FDA's
18 intent there was that they didn't want to create some sort of
19 manufacturing loophole where less than surgical-quality masks
20 would somehow be approved during the pandemic. But I don't
21 think it has much relevance at all to use of masks by the
22 general public which may be homemade.

23 And that's -- unless Your Honor has questions, that's
24 all I have.

25 THE COURT: No, I don't have any other questions.

1 So let's turn to the motion for preliminary
2 injunction. Mr. Shoff, that's your motion. You can go first.

3 MR. SHOFF: Yes, Your Honor. Thank you, Your Honor.
4 And this, I believe -- if memory serves, the idea here was to
5 be able to address both the motion to strike and preliminary
6 injunction, if that is permissible with Your Honor, at the
7 same time.

8 THE COURT: What I would suggest is you do your
9 preliminary injunction. Ms. Ferguson, it's her motion to
10 strike, isn't it? So let her argue that first, and then I'll
11 give you time to respond to it.

12 MR. SHOFF: Thank you, Your Honor.

13 THE COURT: That way you don't have to guess what
14 she's going to argue.

15 MR. SHOFF: Certainly, Your Honor. Very good. In
16 that case, I'll be relatively brief, Your Honor. I think the
17 briefings have largely spoken, and both parties have
18 demonstrated their arguments here.

19 The arguments with regard to the preliminary
20 injunction do focus primarily around the question of efficacy
21 and the balance of harms. I think the main question with
22 regard to the balance of equities and whether the injunction
23 is in the public interest really does hinge around how this
24 Court reads and perceives the declarations provided both by
25 the plaintiffs and the defendants, because if the Court

1 accepts the declarations of the plaintiffs' experts, then
2 there is a very serious problem for the citizens and visitors
3 to Hailey. If the Court declines to accept them, then there
4 really is no particular balance of equities in favor of what
5 the plaintiffs are arguing.

6 The basis for the argument is that the masks would
7 be -- are -- again, according to the expert declarations, are
8 inefficacious and may increase the risk of harm to individuals
9 wearing them purely just by virtue of holding in and allowing
10 a proliferation of particles to somebody as well as the risk
11 of harms, specifically physiological but also psychological
12 developmental and so forth.

13 And so in terms of -- as well, the likelihood of
14 success on the merits, which of course is a major component of
15 a preliminary injunction, is also related to what the parties
16 have discussed so far. Of course, there's a different
17 standard in this standard as opposed to a motion to dismiss.
18 The Court will be delving much more deeply into the merits
19 themselves of the arguments for the fundamental nature of the
20 right at issue.

21 And so I would like, Your Honor, to save the
22 remainder of my time that's available, first answer any
23 questions that you have, but second to address any comments by
24 Ms. Ferguson. Thank you.

25 THE COURT: Thank you. I don't have any questions,

1 but I will note you filed some kind of supplemental
2 documentation two days ago. With my hearing schedule, I have
3 not read it, so I don't know anything that it says. I don't
4 intend it to be part of this hearing. But if you want to
5 treat it as a supplemental brief postargument, that's fine,
6 and then Ms. Ferguson would have an opportunity to respond to
7 that after the hearing.

8 Ms. Ferguson, you may go ahead and argue either the
9 preliminary injunction or your motion to strike that or both
10 together, whichever works best for you.

11 MS. FERGUSON: Thank you, Your Honor. I'll begin
12 with the City's opposition to the preliminary injunction. I
13 think the injunction should be denied because the likelihood
14 of success on the merits here is very unlikely. Mask mandates
15 are effective public health policies that don't implicate
16 fundamental rights, and state and local governments have great
17 latitude under their police power to protect health and
18 safety. I mean, this is in the *Jacobson* case that the U.S.
19 Supreme Court decided in 1905, and that's still good law. And
20 under that case, the Supreme Court upheld a state law that
21 required a mandatory small pox vaccination to occur in the
22 town of Cambridge, Massachusetts.

23 So I think in some ways we can look at that case and
24 say, yeah, they're not going to succeed on the merits here.
25 And we're not talking about a mandatory, forced vaccination.

1 Far from it. We're talking about a far more moderate measure
2 of a face mask or shield. And the Idaho Code, as I point out
3 in briefing, under Chapter 50-304, 50-603 empowers Hailey to
4 make regulations to preserve and protect the public's health
5 and specifically to do what is necessary to prevent contagious
6 diseases. So it is spot on in this situation.

7 Now, in opposition to the preliminary injunction, we
8 have provided the Court with the declaration -- the expert
9 declaration of Dr. David Pate. And he is a board-certified
10 physician in internal medicine, the former CEO and president
11 of Saint Luke's medical system here in Idaho, which is Idaho's
12 largest employer and employs, in fact, beyond all of their
13 other employees, 1,800 doctors.

14 And during this pandemic Dr. Pate has been the
15 adviser to our governor, a member of his task force advising
16 the citizens of Idaho about the proper response to this
17 pandemic and really -- and taking to the radio once a week in
18 an hourlong talk show to talk and field questions from the
19 public about how all things COVID. And he is a very strong
20 advocate of masks and, I think, has effectively explained to
21 the Court why and their effectiveness. So looking --
22 looking -- and I would add that Dr. Pate provided his
23 declaration and his expert testimony pro bono. He wants
24 simply to have the information out there and support these
25 kind of efforts, public health safety efforts.

1 You know, looking at some of the other factors of a
2 PI, moving on from likelihood of success of the merits,
3 there's the idea of irreparable harm. And I've never seen a
4 preliminary injunction where -- I mean, irreparable harm, here
5 we have the death of over 5,000 Idahoans and their families
6 irrevocably impacted, hundreds of children made orphans. So I
7 think all reasonable measures to prevent the spread should
8 certainly be taken up and local governments commended for
9 them.

10 This gets into the balance of harms. I would submit
11 that wearing a mask not in one's home, not in other
12 circumstances, but in public places is a minor
13 inconvenience -- and if it too much of an inconvenience, a
14 face shield is more than acceptable -- is what we're balancing
15 against, against the threat of a highly communicable disease
16 that can be fatal.

17 And this is probably the best example I've ever seen
18 of whether the public interest favors this relief. Because
19 this is precisely about the public interest, which is far more
20 important than individual preferences here. You know, as
21 Dr. Pate has said, a cry for individual freedom here really
22 misses the mark. And we have to be concerned about the
23 vulnerable members of our community and do everything we can
24 to protect the elderly and the children.

25 So that's my response to the motion for PI, and I'd

1 like to just move right into my motion to strike the
2 declarations, if I may.

3 THE COURT: Go right ahead.

4 MS. FERGUSON: So Federal Rule of Evidence 702
5 requires that a witness be qualified in order to offer expert
6 testimony. And the burden, of course, is on the proponent of
7 the expert to prove this. The witnesses that the plaintiffs
8 have advanced in this case are all testifying on subject
9 matter outside their professions and their education, and none
10 have disclosed that they've ever served as expert witnesses.

11 I'll start with Harald Walach. He is a German
12 psychologist. He does not have a degree in medicine. He did
13 not go to medical school. He's not an MD. And he claims
14 vast -- he's not lacking in confidence. He claims vast
15 expertise in some very general, sweeping fields. He claims to
16 be an expert in medical research, in the evaluation of health
17 technology, in clinical and experimental studies of any nature
18 apparently, and research methodology. He has published two
19 COVID-related articles. Both of those publications have been
20 redacted. And he has been the subject of -- I would say
21 "ridicule" is not too strong a word -- ridicule by the
22 scientific community. He has been given an award for being a
23 pseudoscientific nuisance.

24 So he has two opinions in his conclusion of his
25 declaration. I'm just going to -- he has many more than two,

1 but I'm going to focus in on two that are rather
2 extraordinary. It is his opinion that the spread of
3 asymptomatic COVID-19 is almost entirely nonexistent. And we
4 know from Dr. Pate that according to his medical expertise and
5 his understanding of this virus, as he guides Idaho through
6 its course, that most of transmission of the disease is
7 happening among asymptomatic people, whereas Mr. Walach --
8 Dr. Walach is saying this is almost entirely nonexistent.
9 He's also claiming that wearing a mask poses a serious risk to
10 the public because they might do it wrong.

11 And I would submit that he's not only wrong, but this
12 is just -- he's dead wrong. These are dangerous opinions. So
13 because his declaration is highly unreliable, and I submit it
14 is based on junk science, it should be stricken.

15 The others -- two other opinions are -- one is from a
16 Susan Wagner, and she has a opinion on carbon dioxide
17 poisoning from masks. She is a German citizen who was trained
18 as a veterinarian, but she no longer practices veterinary
19 medicine. She now works as a freelancer in fundraising for
20 startup companies. She has not indicated that she has any
21 information on any of the plaintiffs and their carbon dioxide
22 status related to masking. She relies on studies related to
23 pregnant animals. And she has no basis to offer an expert
24 opinion on any issue that is before the Court in this case.
25 So I would submit her testimony is also highly unreliable and

1 irrelevant, and her declaration should be stricken.

2 And lastly, the -- there was a declaration provided
3 by another German citizen, Daniela Prousa. Now, she studied
4 as an undergraduate in psychology in her country, and she now
5 describes herself as a human rights activist. And she has a
6 belief that mask-wearing during a global pandemic will have a
7 fatal effect on humanity. But that opinion has nothing to do
8 with the City of Hailey's mask mandate. And for those -- all
9 of those reasons and more, her testimony is entirely
10 unreliable, and her declaration should be stricken.

11 And I urge the Court to actually strike them if the
12 case does not -- is not subject to dismissal for standing,
13 because there is a danger in letting them stand and just
14 considering them for what they're worth. And that is, the
15 Health Freedom Defense Fund has filed another action in this
16 district, in our district, the District of Idaho, against the
17 Blaine County School District. It has filed other actions in
18 California and other states. And my fear is that if the
19 declarations were allowed to stand as valid, reliable expert
20 testimony, they could bootstrap junk science into these other
21 cases and say that their testimony was heard by the Idaho
22 District Court.

23 Do you have any questions, Your Honor?

24 THE COURT: I do not. Thank you.

25 MS. FERGUSON: Thank you.

1 THE COURT: Counsel, Mr. Shoff, you may respond.

2 MR. SHOFF: Certainly, Your Honor. The Federal Rules
3 of Evidence 702 specify --

4 (Reporter interruption.)

5 MR. SHOFF: -- specify a witness qualified as an
6 expert by knowledge, skill, experience, training, or education
7 may testify if it provides for --

8 THE COURT: Counsel, did you change something on your
9 microphone? You're cutting in and out on us. Earlier you
10 were great, but now it's picking up every other word.

11 MR. SHOFF: I apologize, Your Honor. I'm not sure
12 what's going on there.

13 THE COURT: Well, right now I can hear you fine.

14 MR. SHOFF: All right. Well, I apologize. Let me
15 know, Your Honor, if there's an issue. I apologize for that.

16 But specifically I wanted to highlight in the Rules
17 of Evidence 702 that, (b) and (c), the testimony is based on
18 sufficient facts or data and that the testimony is the product
19 of reliable principles and methods.

20 And the defendants in this hearing made some bold
21 pronouncements that there was junk science, this is junk
22 science; in fact, that these documents are so dangerous that
23 they should be stricken, which is concerning both for the
24 scientific process at large, which is fundamentally a process
25 of contention and debate, but also because of the thing that's

1 missing, that is most conspicuous by absence in this
2 particular case, which is the lack of comment about the
3 literally dozens of studies with hundreds of authors between
4 themselves cited by these experts, analyzed at length, and
5 used to establish the positions. In other words, the experts
6 are merely standing as experts in their field, basing their
7 opinions on the testimony -- basing their testimony on facts
8 and data articulated by others, articulated by peer-reviewed
9 papers, and put forward to this Court to put forward what
10 their declarations are about.

11 In contrast, Dr. David Pate, I have no doubt -- I
12 don't know, actually, because we were not provided with his
13 CV. All we have is the information provided briefly in his
14 background that he practiced internal medicine 12 years ago,
15 if memory serves, in the state of Texas. He was never
16 licensed in the state of Idaho, but he obviously came as the
17 administrator. I imagine he served as an illustrious hospital
18 administrator before his retirement, I believe in January
19 2020. But there's nothing in his record that demonstrates
20 that he has any training, any experience, any knowledge about
21 how to read and analyze a scientific paper, a peer-reviewed
22 study, to arrive at a conclusion.

23 He would be an excellent witness to testify in
24 general as to the course of action taken by the governor or
25 how the task force worked or even how the state proceeded

1 through the pandemic. In fact, I see from his -- he gave
2 Facebook Live Q and A's. He seems like an excellent
3 individual to answer questions people have about the pandemic
4 in general on the public level, individuals who are curious.
5 He is apparently coauthoring a book about the lessons learned
6 from the pandemic. So from a policy perspective, from the
7 public policy perspective, he would seem to be an excellent
8 individual for that.

9 However, he has not and when you read his declaration
10 does not delve at all into the science. He doesn't go -- he
11 didn't offer alternative statements. He doesn't argue that
12 Professor Dr. Harald Walach, for example, in his reading of
13 the studies -- in fact, directly contravening the studies that
14 Dr. Pate relies upon -- he doesn't explain how Dr. Walach's
15 reading of it is inaccurate.

16 Professor Dr. Walach doesn't have one but two Ph.D.s,
17 first in psychology but second in the philosophy and history
18 of science. He's written more than 200 papers, 100 book
19 chapters. He has -- his career is as wide-ranging as his
20 experience is. He served on staff at hospitals, as a
21 lecturer, as a visiting professor at three universities, a
22 researcher in a department of epidemiology. He has broad
23 experience but very specifically in reading a scientific
24 paper, understanding the statistics and the methodology,
25 understanding how conclusions are derived at, and then drawing

1 out those conclusions.

2 Now, defendants seem to make hay out of the fact that
3 Dr. Walach and Ms. Prousa have both had papers that were
4 rejected during this pandemic. Now, I can't speak exactly to
5 the reasons because generally, aside from the public reasons,
6 we don't see why papers were rejected or for what reason. But
7 further, I'd like to point out that throughout this pandemic,
8 papers have made -- or scientific journals, medical journals
9 have made the decision to forgo the usual long, drawn-out peer
10 review process to have information go out as quickly as
11 possible. That's because they wanted to address the pandemic
12 quickly and to get important information out to be seen and to
13 be debated in public. But the effect of that has been that
14 that peer review process which would normally be internal has
15 been externalized. It's now very public.

16 So it's disingenuous to draw attention to retracted
17 papers and say, oh, well, that means that this person isn't
18 credible in the scientific community. Rather, what that means
19 is we don't know for sure which papers would be retracted
20 internally, would be reworked, would be edited and revised
21 elsewhere. So I think that, from that perspective, that's a
22 moot point.

23 Going back to Walach in particular, he cites 19
24 independent papers through his declaration, scientific
25 studies, peer-reviewed articles and papers. Some are them are

1 in opposition to his final point. And that's the critical
2 thing here, is that Professor Dr. Walach speaks from the broad
3 scientific perspective. What -- are masks efficacious or not?
4 Are they harmful or not? Do they increase or reduce the risk
5 of harm? He takes a look at studies, including several
6 actually that Dr. Pate cites without analysis, and he draws
7 his conclusions from his deep understanding of the scientific
8 method and of how to read a paper.

9 So he provides for you -- for Your Honor testimony
10 based in sufficient facts or evidence, using reliable
11 scientific principles, and manages in his analysis and then
12 applying them to the facts at issue with regard to masks. So
13 from that regard, Professor Dr. Walach is an appropriate
14 expert for providing for the Court that useful information
15 that will help the trier of fact to understand the evidence or
16 the facts at issue.

17 Regarding Dr. Wagner, I -- I truly don't understand
18 where defendants' issue comes from in regards to her
19 background, but I'll endeavor to address it. Defendants
20 stated that she's not a toxicologist, that she's just trained
21 as a veterinarian and hasn't worked as one for a while. But
22 plaintiffs have provided her CV. She has made a career for a
23 substantial amount of time in the scientific research and
24 medical product field.

25 The fundamental reason for this and the reason why an

1 animal research -- why would we care about what happens to
2 animals is because it is simply unethical to test something
3 like, well, how toxic is too toxic for this particular
4 chemical or compound. Medical ethics boards would never allow
5 this to happen at the preliminary level on humans, so it's
6 done on animals.

7 And Dr. Wagner's whole career has been the creation
8 of medicines, understanding that critical interaction between
9 how does a medicine affect an animal and then how is that
10 scaled, because a rat, a mouse, what have you, has a very
11 different physiology, has a different scale of how chemicals
12 affect them. Dr. Wagner's specific declaration points out
13 that most of the studies that we have regarding carbon dioxide
14 toxicity are related to animals specifically and then have to
15 be scaled. And she is the perfect expert to illustrate why
16 these studies matter because she has that experience that life
17 experience. She also further cites 27, by my count, unique
18 scientific studies or articles in her paper.

19 And I wanted to draw attention to a particular
20 comment the defendant made -- defendants made in the last
21 brief filed, the reply to the opposition to the motion to
22 strike, saying there is no scientific support that Wagner
23 provided for the statement that masks dramatically increase
24 the levels of carbon dioxide and respired air. Yet the Court
25 can note in Docket 18-3, page 8, Dr. Wagner cites five

1 independent studies with several dozen authors, if memory
2 serves, between them that have all tested with sensors and
3 various different positions with different types of masks the
4 amount of carbon dioxide that's respired or retained in the
5 mask over various time periods. And in fact, Dr. Wagner
6 provided that information in a table on page 9 -- it's called
7 Table 1 in the declaration -- that specifically looks at this
8 question and identifies the increase above background normal.

9 So again, Dr. Wagner's purpose in the declaration is
10 to illustrate that link between the toxicity of carbon dioxide
11 and the issue with masks retaining carbon dioxide and what we
12 could expect to see in terms of physiological harm. So in
13 that case as well she's very clearly, looking at her CV, an
14 expert in that particular field of understanding that scale
15 and understanding the link and applying it.

16 Finally, Ms. Prousa, Daniela Prousa, I don't
17 understand why defendants have cherry-picked the CV. They
18 only mention her work in advocacy as -- as her sole work, that
19 she has an undergraduate degree and she's just an advocate.
20 But her CV indicates that she's provided psychology and
21 psychotherapy services to multiple institutions, over
22 something like an 11- or 12-year career thus far, in
23 residential homes, a district hospital, a clinic, a pediatric
24 center, a Catholic youth care facility; and even the German
25 pension and insurance program, where she in particular focused

1 on stress management, which is of a special import here
2 because stress is -- chronic stress is one of the dangerous
3 conditions that wearing a mask repeatedly does that
4 Dr. Wagner's research pointed to, which was that inhaling
5 carbon dioxide even at relatively low levels but for a long
6 period of time -- say, for instance, being required to wear a
7 mask within the city of Hailey -- could cause serious stress
8 reactions which have both physiological and psychological
9 symptoms. But again, Ms. Prousa cites to an additional 14
10 studies beyond -- and that's actually beyond her own which she
11 cites.

12 And so finally, Your Honor, from that perspective the
13 plaintiffs would argue that each of these experts were picked
14 in particular, were spoken with. And similarly to
15 defendants', they also provided their services, to my
16 knowledge, to be pro bono as well, because they are concerned
17 about the effects of masks on individuals and they're
18 concerned that there will be long-term developmental delays,
19 that there could be long-term psychological issues.

20 And so the basis for the preliminary injunction and
21 the reason why the plaintiffs felt it appropriate to approach
22 the Court with this was because in the balance of the
23 equities, the question is not -- there's this false dichotomy
24 that's been set up that if we disallow masks, well, it's
25 implied that these deaths would skyrocket, the 5,000 deaths in

1 Idaho, whereas masks would somehow stop this or reduce it.
2 Whereas plaintiffs' experts have demonstrated from dozens of
3 scientific studies -- again, contravened essentially not at
4 all by defendants' expert, who did not address any of them or
5 any of their particular arguments about specific studies in
6 detail -- that the masks themselves could very likely cause
7 ongoing chronic issues into the future.

8 And that will be, again, the basis of the plaintiffs'
9 argument here, Your Honor. I'd be happy to answer any
10 questions if you have them.

11 THE COURT: Well, the one question I have I probably
12 shouldn't ask, so I won't.

13 Ms. Ferguson, any response in closing?

14 MS. FERGUSON: No, Your Honor. Unless you have a
15 question for me, I'll decline.

16 THE COURT: All right. Counsel, I am going to ask
17 this one. I think this one is highly appropriate, and this
18 would be for Mr. Shoff. The defendants cite in their briefing
19 WHO, CDC, Mayo. Those are pretty reputable sources, aren't
20 they?

21 MR. SHOFF: Yes, they are, Your Honor. And
22 Dr. Walach himself also cites to WHO, World Health
23 Organization, studies as well and in fact a meta study where
24 they compiled several dozen, if memory serves, and
25 demonstrated that there's no appreciable benefit and

1 potentially a risk from masks. So plaintiffs' experts have
2 addressed these contentions and have addressed many of the
3 studies the CDC is relying on to come to this conclusion.

4 THE COURT: Counsel, I appreciate the arguments that
5 have been made and the briefs that have been written. I know
6 we've got a bit of a time-sensitive matter here. The last
7 thing I want to have happen is have my order come out after
8 the mask mandate goes away. That doesn't help anybody. So
9 we'll take this under advisement. I'll get a decision out as
10 quickly as I can.

11 Is there anything else that needs to be discussed
12 today?

13 MR. SHOFF: Not from the plaintiffs, Your Honor.

14 MS. FERGUSON: Not from the defendants.

15 THE COURT: Okay. Thank you. Court will be in
16 recess.

17 (Proceedings concluded at 4:11 p.m., February 16, 2022.)
18
19
20
21
22
23
24
25

C E R T I F I C A T E

1
2
3 I, ANNE BOWLINE, a Registered Merit Reporter and
4 Certified Realtime Reporter, do hereby certify that I reported
5 by machine shorthand the proceedings contained herein on the
6 aforementioned subject on the date herein set forth, and that
7 the foregoing 45 pages constitute a full, true and correct
8 transcript.

9 Dated this 25th day of March, 2022.

10
11
12
13 /s/ Anne Bowline

14 ANNE BOWLINE
15 Registered Merit Reporter
16 Certified Realtime Reporter
17
18
19
20
21
22
23
24
25