

IN THE SUPREME COURT OF THE  
STATE OF MONTANA

Case No. DA \_\_\_\_\_

STAND UP MONTANA, a Montana  
non-profit corporation; JASMINE  
ALBERINO, TIMOTHY ALBERINO,  
VICTORIA BENTLEY, DAVID DICKEY,  
WESLEY GILBERT, KATIE GILBERT,  
KIERSTEN GLOVER, RICHARD  
JORGENSEN, STEPHEN PRUIETT,  
LINDSEY PRUIETT, ANGELA  
MARSHALL, SEAN LITTLEJOHN, and  
KENTON SAWDY,

Plaintiffs/Appellants,

vs.

BOZEMAN SCHOOL DISTRICT NO. 7,  
MONFORTON SCHOOL DISTRICT NO. 27,  
and BIG SKY SCHOOL DISTRICT NO. 72,

Defendants/Appellees.

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***NOTICE OF APPEAL***

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On Appeal from the Montana Eighteenth Judicial District  
Court, Gallatin County, Cause No. DV 21-975  
Before Hon. Rienne H. McElyea

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For Appellees

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NOTICE IS HEREBY GIVEN that Stand Up Montana, a Montana non-profit corporation; Jasmine Alberino, Timothy Alberino, Victoria Bentley, David Dickey, Wesley Gilbert, Katie Gilbert, Kiersten Glover, Richard Jorgenson, Stephen Pruiett, Lindsey Pruiett, Angela Marshall, Sean Littlejohn, and Kenton Sawdy, Plaintiffs in Cause Number DV 21-975 in the Eighteenth Judicial District of Gallatin County, hereby appeal to the Supreme Court of the State of Montana from the following Order:

Findings of Fact and Conclusions of Law and Order dated October 20, 2021; and any final and appealable judgments that may be entered related thereto, and all proceeding that led up to the foregoing.

**THE APPELLANT FURTHER CERTIFIES:**

1. This Appeal is not subject to the mediation process required by Mont. R. App. P. 7(2)(c);

2. This appeal is not an appeal from an order certified as final under Mont. R. Civ. P. 54(b);

3. A copy of the Notice of Appeal has been contemporaneously filed in the office of the Clerk of the District Court;

4. A copy of this Notice of Appeal will be served by mailing to the Clerk of District Court and to counsel for the Appellees, or to any Appellee appearing *Pro Se*, and to any Third-Party Defendant;

5. That all available transcripts of the proceedings in this cause have not been ordered from the court reporter contemporaneously with the filing of this notice of appeal; and

6. The required filing fee for this Notice of Appeal has been paid through the Montana Courts Electronic Filing system.

DATED this 28th day of October 2021.

Respectfully Submitted,  
**RHOADES SIEFERT & ERICKSON PLLC**

By: /s/ *Quentin M. Rhoades*  
Quentin M. Rhoades  
*Attorney for Plaintiffs/Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October 2021, I have filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court

action, as follows:

Gallatin County  
Clerk of District Court  
615 S. 16<sup>th</sup> Ave.  
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/s/ Quentin M. Rhoades  
Quentin M. Rhoades

GALLATIN COUNTY CLERK  
OF DISTRICT COURT  
SANDY ERHARDT

2021 OCT 20 AM 10:37

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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT  
GALLATIN COUNTY

STAND UP MONTANA, a Montana non-profit  
corporation; JASMINE ALBERINO, TIMOTHY  
ALBERINO, VICTORIA BENTLEY, DAVID  
DICKEY, WESLEY GILBERT, KATIE  
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JORGENSEN, STEPHEN PRUIETT, LINDSEY  
PRUIETT, ANGELA MARSHALL, SEAN  
LITTLEJOHN and KENTON SAWDY,

Plaintiffs,

v.

BOZEMAN SCHOOL DISTRICT NO. 7,  
MONFORTON SCHOOL DISTRICT NO. 27, and  
BIG SKY SCHOOL DISTRICT NO. 72,

Defendants.

Cause No. DV-21-975B

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW and  
ORDER

On October 5, 2021, the Court held a hearing on Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs appeared by their counsel Quentin Rhoades, and Defendants were represented by Elizabeth Kaleva and Kevin Twidwell. The parties did not call any witnesses but provided oral argument on the legal issues in this matter. The Court has considered those arguments as well as the briefing and affidavits submitted by the parties and makes the following findings of fact, conclusions of law, and order.

## **FINDINGS OF FACT**

1. Plaintiffs include Stand Up Montana, a non-profit corporation, and 15 individual parents of minor students who attend Defendant School Districts.
2. Defendants are three Gallatin County School Districts, namely Bozeman School District No. 7 (BSD7), Big Sky School District No. 72, and Monforton School District No. 27 (“School Districts”).
3. Plaintiffs’ Complaint alleges mask mandates for students imposed by Defendants are not scientifically justified or effective and infringe upon parental and/or student rights to due process, equal protection, privacy, human dignity, freedom of expression, and create a cause of action under SB 400.
4. Defendants contend their policies are supported by scientific research and are not in violation of Plaintiffs’ constitutional rights.
5. BSD7 began the 2020-2021 school year in a hybrid model with all students attending in-person classes part-time and attending remotely part-time. Pre-kindergarten through fifth grade students moved to full-time in-person learning on November 2, 2020. Sixth grade through eighth grade students moved to full-time in-person learning on February 1, 2021. Highschool students remained in a modified hybrid schedule with four days of in-person learning and one day of remote learning beginning January 27, 2021.
6. BSD7 required masks for students, staff, and visitors in district facilities for the 2020-2021 school year. The masking policy expired in June 2021 when BSD7’s declaration of emergency ended.

7. In December 2020, BSD7 established a Covid advisory task force that monitored health data, CDC guidelines, Gallatin County health data and specific BSD7 COVID data in making decisions on how the District should respond to COVID-19. The task force met on July 8, 2021, to consider recommendations for the 2021-2022 school year and again on August 11, 2021, due to new and updated guidance being issued and rising community COVID-19 transmission. Upon the recommendation of the task force and the superintendent, the Board of Trustees approved masking Policy No. 1905 on August 23, 2021.

8. The rule allows the superintendent to establish or lift mask requirements based on multi-week trends in associated grade band COVID-19 transmission using the “high” rate of transmission as defined by the CDC. The policy continues to require face coverings for all students, staff and visitors. The policy provides exemptions for masks when:

- a. Consuming food or drink;
- b. Engaging in strenuous physical activity;
- c. Communicating with someone who is hearing impaired;
- d. Identifying themselves;
- e. Receiving medical attention;
- f. Precluded from safely using a face covering due to a medical or developmental condition;
- g. Giving a speech or class presentation or course lesson; and
- h. Conducting a performance if there is at least six feet of distance from the gathering, class or audience.

9. In making the recommendations to the BSD7 Trustees, the task force considered and provided the following to the Trustees:

- a. Data collected and maintained by BSD7, including but not limited to COVID-19 transmission data;
- b. Data collected and maintained by the Gallatin County Health Department regarding community COVID-19 transmission as well as state-wide COVID-19 transmission through the Montana Department of Public Health and Human Services;
- c. Guidance issued by the CDC regarding masking for K-12 schools;



- d. Guidance issued by the American Academy of Pediatrics (AAP);
  - e. Recommendation by the Montana Chapter of the American Academy of Pediatrics for universal masking for students and staff members dated July 26, 2021;
  - f. Letter from Governor Greg Gianforte issued on July 28, 2021;
  - g. Guidance issued by the U.S. Department of Education on reopening schools, which recommended “[m]ask-wearing and distancing where possible in non-fully vaccinated communities and school settings, in line with CDC K-12 guidance.”<sup>1</sup>;
  - h. Letter from Governor Gianforte and Montana Superintendent of Public Instruction Elsie Arntzen on August 6, 2021;
  - i. Guidance received from Gallatin City-County Health Department Health Officer Lori Christenson and local pediatrician, Dr. Kristen Day;
10. The BSD7 Trustees and Superintendent received and considered hours of public comment and received hundreds of emails regarding the mask policy.
11. The Big Sky School District began the 2020-2021 school year in a hybrid model with all students attending in-person classes part-time and attending remotely part-time. By the end of the 2020-2021 school year, all students in the district were able to attend in-person classes full-time.
12. The Big Sky School District required all students, staff, and visitor to wear masks in its facilities for the 2020-2021 school year.
13. For the 2021-2022 school year, the Superintendent of the Big Sky School District recommended to the Board of Trustees that it adopt a face covering policy. At the August 24, 2021 Trustees meeting, the Board considered public comment that included comments made during the meeting as well as comments provided by email prior to the meeting. The Board adopted a revised Policy 1905 at that meeting.
14. Under the Big Sky Policy, all staff members, volunteers, visitors, and students aged five (5) and older are required to wear a disposable or reusable mask that covers the nose and mouth

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<sup>1</sup> <https://sites.ed.gov/roadmap/landmark1/>

to protect colleagues and peers while present in any school building. Masking is not required when an individual is:

- a. Consuming food or drink;
- b. Engaged in physical activity;
- c. Communicating with someone who is hearing impaired;
- d. Receiving medical attention; or
- e. Has a medical or developmental condition precluding use of a mask.

15. In making the recommendation to the Trustees, the Superintendent considered the recommendations from the CDC and the recommendation from the Gallatin City-County Health Department made to school districts within the county to follow CDC guidance regarding masking.

16. The Monforton School District was open for full-time, in-person instruction for the entire 2020-2021 school year.

17. Students, staff, and visitors were required to wear masks for the 2020-2021 school year.

18. For the 2021-2022 school year, the Monforton School District adopted a re-opening plan for full-time, in-person instruction five days per week. The Board of Trustees voted to transition to an optional face covering policy for staff, students, and visitors after hearing public comment that favored optional face covering.

19. The school year began on August 26, 2021, and the Superintendent observed that about 20-25 percent of the middle school students wore face coverings on the first day of school, but this decreased to less than 10 percent within two days. He observed a similar trend for the elementary school students.

20. Seven individuals (students and staff) in the middle school tested positive for COVID-19. In addition, several additional students left during the school day exhibiting COVID-19 symptoms.

21. On September 1, 2021, the District decided to move all sixth and seventh grade students, one classroom of second grade students, and one classroom of fifth grade students to remote learning, temporarily shutting down in-person learning for these students. The second grade students returned to in person instruction on Sept. 6, 2021. The students in fifth, sixth, and seventh grades engaged in remote learning until Sept 13, 2021.

22. The District lacked adequate staffing to continue in-person instruction. In total, nearly 150 sixth and seventh grade students were impacted by the need to shut down the in-person instruction for the two-week period. Thirty students in fifth grade were impacted by remote learning and 20 second grade students could not attend in-person instruction for several days.

23. The Trustees held an emergency meeting on September 7, 2021, at which time the Superintendent recommended that the District re-institute a face covering mandate. In making the recommendation to the Trustees, the Superintendent considered:

- a. A face covering mandate would provide an added layer to mitigate the risks of COVID-19 for students and staff members;
- b. The Gallatin City-County Health Department and CDC recommended the use of face coverings;
- c. By requiring face coverings, the Gallatin City-County Health Department and CDC advised that contract tracing among students could be reduced to a radius of those other individuals within three feet instead of the six feet recommended where no face coverings were worn<sup>2</sup>.
- d. Concern about the lack of available support staffing that would enable the District to provide in-person instruction if the teacher was quarantined or isolated without additional mitigation strategies;
- e. Local data on COVID-19 transmission issued by the Gallatin City-County Health Department. The District also reviewed regular media reports regarding the impacts of COVID-19 on school districts throughout Montana;
- f. The surveillance data from the Gallatin City-County Health Department on September 3, 2021 and September 10, 2021, indicated that the District's middle

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<sup>2</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

school ranked second in Gallatin County for the numbers of positive cases behind only Montana State University.<sup>3</sup>

- g. Gallatin County had also moved from “substantial” transmission to “high” transmission from the time the optional masking rule was adopted on August 17, 2021, to September 2021. The seven-day average of positive cases had increased in that same period from moderate to high as well.

24. The Monforton Board of Trustees adopted a face covering requirement at its September 7, 2021, meeting after hearing from the public.

25. The Board adopted the requirement that all staff, volunteers, visitors, and school-aged students wear a face covering, mask, or face shield while present in any school building, regardless of vaccination status. Face coverings are also required for any outdoor school activity with fifty (50) or more people where physical distancing is not possible or is not observed.

Students, staff, volunteers, and visitors are not required to wear face coverings when:

- a. Consuming food or drink;
- b. Engaged in strenuous physical activity;
- c. Giving a speech, lecture, class presentation, course lesson, or performance when separated by at least six feet of distance from the gathering, class, or audience;
- d. Communicating with someone who is hearing impaired;
- e. Identifying themselves;
- f. Receiving medical attention; or
- g. Precluded from safely using a face covering, mask, or face shield due to a medical or developmental condition.

26. Under the Monforton policy, staff members are permitted to remove their face coverings if students and members of the public are not present, they are at their individual workstation, and social distancing of at least six feet is maintained with other staff members.

27. The School Districts relied on CDC’s guidance which provides:

Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority . . . Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor

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<sup>3</sup> <https://www.healthygallatin.org/about-us/press-releases/>

masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.<sup>4</sup>

28. The School Districts relied on the AAP which recommends, “[a]ll students older than 2 years and all school staff should wear face masks at school (unless medical or developmental conditions prohibit use).” The AAP also “strongly advocates that all policy considerations for school COVID-19 plans should start with a goal of keeping students safe and physically present in school;”<sup>5</sup>

29. The Court takes judicial notice that the number of COVID-19 cases and hospitalizations in Gallatin County have risen significantly in the past few months and Gallatin County health officials recommend that everyone wear a face mask while in public indoor settings, regardless of vaccination status<sup>6</sup>.

30. The Court takes judicial notice that in late September the CDC issued a statement titled “Studies Show More COVID-19 Cases in Areas Without School Masking Policies” that summarized three studies that compared COVID-19 transmission rates between schools that had mask policies and those that do not.<sup>7</sup> “These studies found that school districts without a universal masking policy in place were more likely to have COVID-19 outbreaks. Nationwide, counties without masking requirements saw the number of pediatric COVID-19 cases increase nearly twice as quickly during this same period.” *Id.*

These studies continue to demonstrate the importance and effectiveness of CDC’s Guidance for COVID-19 Prevention in K-12 Schools to help districts ensure safer in-person learning and stop the spread of COVID-19. Promoting vaccination of eligible persons, mask wearing, and screening testing are all proven methods to continue to work towards the end of the COVID-19 pandemic.

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<sup>4</sup> K-12 Schools, Key Takeaways, Center for Disease Control and Prevention (August 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

<sup>5</sup> <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>.

<sup>6</sup> <https://www.healthygallatin.org/coronavirus-covid-19/>

<sup>7</sup> <https://www.cdc.gov/media/releases/2021/p0924-school-masking.html>

*Id.*

31. The Court takes judicial notice that in late September the Gallatin City County Health Department reported that local school districts without mask requirements have experienced many more positive COVID-19 cases compared to those with mask requirements.<sup>8</sup>

32. The Court takes judicial notice that on October 1, 2021, the Hon. Jason Marks, District Judge, Fourth Judicial District, issued an order denying a preliminary injunction motion in which Plaintiff Stand Up Montana and parents in Missoula brought the same claims as are present in this current action.

### **CONCLUSIONS OF LAW**

1. This Court has jurisdiction over the parties and the subject matter.
2. Section 27-19-201, MCA, provides:

An injunction order may be granted in the following cases:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
- (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;
- (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

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<sup>8</sup> <https://www.youtube.com/watch?v=FyK4AdyZo9g> (at 8:30)

3. Preliminary injunctions may be issued by this Court when a party establishes any one of the five subsections set forth in § 27-19-201, MCA. Findings which satisfy only one subsection are sufficient to support a preliminary injunction. *Sweet Grass Farms, Ltd. v. Board of County Com'rs of Sweet Grass County*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825.
4. It appears Plaintiffs are seeking a preliminary injunction pursuant to subsections (1) and (2) of § 27-19-201, MCA.
5. An applicant for a preliminary injunction must make a prima facie showing they will suffer a harm or injury under either the “great or irreparable” injury standard of § 27-19-201(2), MCA, or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA. *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, 437 P.3d 142.
6. “For purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386.
7. “[T]he limited function of a preliminary injunction is to preserve the status quo and to minimize the harm to all parties pending full trial.” *Porter v. K & S P'ship*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981); accord *Driscoll*, ¶ 14. If a preliminary injunction will not accomplish these purposes, then it should not be issued. *Id.*; *Driscoll*, ¶ 20. A preliminary injunction does not resolve the merits of a case but rather prevents further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on its merits. *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995). “Status quo” has been defined as “the last actual, peaceable, noncontested condition which preceded the pending controversy.” *Sweet Grass Farms*, ¶ 28 (quotation and citations omitted).

## **A. Right to Privacy**

8. Plaintiffs rely on the Montana Supreme Court decision in *Armstrong* in support of their argument that mandatory masking policies infringe on their right of privacy by taking away their ability to reject medical treatment. In *Armstrong*, the Montana Supreme Court held that “Article II, Section 10 of the Montana Constitution broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference.” 1999 MT 261, ¶ 14, 296 Mont. 361, 367, 989 P.2d 364, 370 (declaring unconstitutional statutes prohibiting a physician assistant-certified from performing a pre-viability abortion).

9. For *Armstrong* to be applicable and to find that Plaintiffs’ privacy rights have been implicated by the School Districts masking policies, it must first be determined whether masking is a medical treatment. The Court finds it is not.

10. Plaintiffs offer no persuasive support for the argument that wearing a face covering constitutes a deprivation of their right to privacy by taking away their ability to reject medical treatment. Instead, in the emerging case law surrounding face covering requirements, courts have specifically and repeatedly held that requiring masks does not constitute medical treatment. *E.g.*, *Cangelosi v. Sizzling Caesars LLC*, No. 20-2301, 2021 U.S. Dist. LEXIS 16131, at \*5, 2021 WL 291263 (E.D. La. Jan. 26, 2021) (face covering requirement does not force unwanted medical treatment); *Forbes v. Cnty. of San Diego*, No. 20-cv-00998-BAS-JLB, 2021 U.S. Dist. LEXIS 41687, at \*18-19, 2021 WL 843175 (S.D. Cal. Mar. 4, 2021) (requiring an individual to wear a mask “is a far cry from compulsory vaccination, mandatory behavior modification treatment in a mental hospital, and other comparable intrusions into personal autonomy. The Court also doubts that requiring people to wear a mask qualifies as ‘medical treatment’”); *Machovec v.*



*Palm Beach Cty.*, 310 So. 3d 941, (Fla. 4th DCA 2021) (Requiring facial coverings in public settings is akin to the State’s prohibiting individuals from smoking in enclosed indoor workplaces...and mask mandate did not implicate the constitutional right to refuse medical treatment.).

11. Plaintiffs argue that face coverings are “medical devices” under the recently enacted changes to Montana’s criminal trespass law. § 45-6-203 (2021), MCA. However, the recently enacted Montana COVID-19 liability law defines face coverings as personal protective equipment, not a medical device. Senate Bill 65 states in pertinent part<sup>9</sup>, “(5) ‘Personal protective equipment’ includes protective clothing...face masks...” The definition in the COVID-19 specific statute controls here. Face coverings are personal protective equipment, not medical devices.

12. The cases Plaintiffs rely upon, including *Armstrong*, address individual health care decisions in circumstances not present here. In this case, the face covering rules were adopted as a public health measure as part of a multi-layered approach – which also includes social distancing, frequent hand washing, cleaning and disinfecting surfaces, and well-ventilated spaces<sup>10</sup>– to mitigate the spread of COVID-19 and to maintain in-person instruction.

13. Plaintiffs have not made a prima facie case that their privacy rights are being violated.

#### **B. Human Dignity**

14. Article II, Section 4 of the Montana Constitution provides “[t]he dignity of the human being is inviolable.” The Montana Supreme Court has held “the plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated.” *Walker v. State*, 2003 MT 134, ¶ 82, 316 Mont. 103, 68 P.3d 872.

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<sup>9</sup> <https://leg.mt.gov/bills/2021/billpdf/SB0065.pdf>

<sup>10</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

15. Plaintiffs contend their constitutional right to human dignity is violated by the imposition of the School Districts' mask mandates.

16. Plaintiffs cite *Walker* in support of their position. In *Walker*, an inmate at the Montana State Prison was housed in a cell with blood, feces, and vomit, and was served food through the same port that toilet cleaning supplies were provided. He was stripped naked and given only a small blanket for warmth, denied prescribed medication and hot food. *See Id.* ¶¶ 77-79. The School Districts' masking policies do not rise to a constitutional affront to their human dignity.

17. Plaintiffs have not made a prima facie case that their human dignity rights are implicated by the face covering rules.

**C. Senate Bill 400**

18. Senate Bill 400 (SB 400), which went into effect on October 1, 2021, provides in relevant part:

A governmental entity may not interfere with the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children unless the governmental entity demonstrates that the interference:

- (a) furthers a compelling governmental interest; and
- (b) is narrowly tailored and is the least restrictive means available for the furthering of the compelling governmental interest.

19. Plaintiffs contend that the School Districts' masking policies interfere with their right to direct their children's education, health care, and mental health.

20. As SB 400 is a new law and the language is incredibly broad, the Court reviewed the law's legislative history to provide guidance as to its intent. Based on the legislative history of SB 400, the purpose of SB 400 was to create a cause of action for parents who may be involved with the Department of Public Health and Human Services, Child Protective Services Division. In introducing SB 400 to the Senate Judiciary Committee, Senator Theresa Manzella, the bill's primary sponsor, stated the purpose of the bill was to "create a cause of action and create an

appeals process for a parent in a situation where their rights have been terminated as a parent.”  
Mont. Sen. Jud. Comm., SB 400, 67th Leg. (April 1, 2021 at 9:54:33). Plaintiffs’ action here is not the type of action originally contemplated by the legislature in enacting SB 400.

21. Montana is unique in that the Montana Constitution and its statutes provide school districts with wide latitude in determining what is best for each district. This local control is established under Article X, section 8, of the Montana Constitution, which states:

School district trustees. The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.

22. The school boards’ right of local control is set forth in § 20-9-309(2)(h), MCA, which requires the provision of a basic system of free quality public schools:

[P]reservation of local control of schools in each district vested in a board of trustees pursuant to Article X, section 8, of the Montana constitution.

23. School boards have many duties, including health related requirements for its students as set forth in § 20-3-324, MCA, and Admin. R. Mont. 10.55.701(2)(s) (requiring school districts to adopt policies addressing student health issues). Moreover, once adopted, students attending school have an obligation to comply with the rules of the school that the student attends. § 20-5-201(1)(a), MCA.

24. The Montana Constitution provides the School Districts with the authority to determine what health and safety measures are appropriate in their schools. As U.S. Chief Justice Roberts recently stated in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), the Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the states “to guard and protect.” *Id.* at 1613. When officials “undertake to act in areas fraught with medical and scientific uncertainties,” their latitude “must be

especially broad”... and should not be subject to second-guessing by the judiciary that lacks the background, competence, and expertise to assess public health. *Id.* at 1613–14.

25. SB 400 does not abrogate the School Districts’ constitutional and statutory authority.

26. Even if SB 400’s heightened strict scrutiny test applies to school face covering rules, the School Districts’ face covering rules satisfy that standard. Plaintiffs concede that controlling a pandemic and maintaining in-person schooling are compelling governmental interests. Thus, the only dispute is whether the School Districts’ masking policies are narrowly tailored to this interest. The Court finds they are.

27. Students, staff, and visitors to the School Districts’ facilities are required to wear masks while indoors. However, there are a number of exceptions where masks are not required to be worn, including for those who have a medical or developmental reason which precludes them from safely wearing masks. Further, the School Districts are continuing to monitor the Covid-19 metrics within Gallatin County and their respective districts, and their policies are subject to review and amendment based on changes in the metrics. As far as mitigating the risk of spreading Covid-19, wearing masks creates minimal interference to children’s education compared to fully remote learning or even a hybrid education model of learning. While Plaintiffs challenge the science and efficacy of requiring students to mask, Plaintiffs’ position is not uncontested. In drafting and implementing the face covering policies, the School Districts considered the recommendations of the CDC, the AAP, and the Gallatin City/County Health Department. The School Districts’ policies are narrowly tailored, based on the recommendations of the CDC, the AAP, and the Gallatin City/County Health Department, to further the compelling state interest of controlling the spread of Covid-19 of keeping students in school.

#### **D. Science/Irreparable Harm/Status Quo**

28. Plaintiffs argue that the opinion of their statistician that masks do not work is unrebutted in the record and the Court is constrained to find that students are being harmed by the mask mandates because there is no nexus to the rule and the efficacy of masking.

29. The School Districts have demonstrated through the affidavits of the Superintendents that their decisions to implement face covering rules were based on recommendations from numerous reputable sources, including the Montana Medical Association, the CDC, the American Academy of Pediatrics, the Montana Chapter of the American Academy of Pediatrics. Further, the School Districts have presented recent CDC studies that concluded that pediatric Covid-19 cases rose 3.5 times faster in counties without school mask requirements than those with universal school masking. The Gallatin City County Health Department made similar findings and recently shared data demonstrating that area school districts without mask requirements have experienced more positive COVID-19 cases compared to districts with mask requirements. The Monforton School District experienced this first-hand. The District started the school year with an optional masking policy but quickly made masks mandatory after COVID-19 infections caused the schools to temporarily halt in-person instruction only days after school started.

30. While the loss of a constitutional right constitutes an irreparable harm, Plaintiffs have failed to demonstrate that they are likely to prevail on their constitutional challenges. Thus, as there is no finding of a constitutional violation, the alleged constitutional violations cannot form the basis of Plaintiffs' alleged irreparable harm.

31. As the Court has determined that Plaintiffs have failed to establish that they are likely to succeed on the merits of their constitutional challenges or that they will suffer irreparable harm if

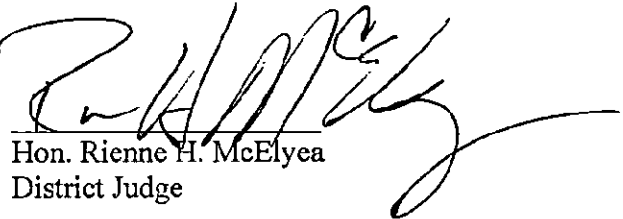
the masking policies remain in effect, the Court finds the status quo is continuing to allow the School Districts to set their policies, including masking policies.

**ORDER**

The Court finds that Plaintiffs have not met their burden of making a prima facie case of any constitutional violation or demonstrated a likelihood of irreparable harm in the absence of preliminary relief.

Plaintiffs' Motion for Preliminary Injunction is **DENIED**.

DATED this 20 day of October 2021.

  
Hon. Rienne H. McElyea  
District Judge

c:     Quentin M. Rhoades  
       Elizabeth A. Kaleva  
       Kevin A. Twidwell  
       Elizabeth A. O'Halloran

} emailed  
10/20/21

## **CERTIFICATE OF SERVICE**

I, Quentin M. Rhoades, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 10-28-2021:

Elizabeth A. Kaleva (Attorney)

1911 S. Higgins Ave.

Missoula MT 59801

Representing: Bozeman School District No. 7, Monforton School District No. 27, Big Sky School District No. 72

Service Method: eService

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Electronically signed by Lauren Towsley on behalf of Quentin M. Rhoades

Dated: 10-28-2021