FILED
08/02/2022
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

DA 21-0533

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 153

STAND UP MONTANA, a Montana non-profit Corporation; CLINTON DECKER; MORGEN HUNT; GABRIEL EARLE; ERICK PRATHER; BRADFORD CAMPBELL; MEAGAN CAMPBELL; and JARED ORR,

Plaintiffs and Appellants,

v.

MISSOULA COUNTY PUBLIC SCHOOLS, ELEMENTARY DISTRICT NO. 1, HIGH SCHOOL DISTRICT NO. 1, MISSOULA COUNTY, STATE OF MONTANA; TARGET RANGE SCHOOL DISTRICT NO. 23; and HELLGATE ELEMENTARY SCHOOL DISTRICT NO. 4,

Defendants and Appellees.

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

Plaintiffs and Appellants,

v.

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

Defendants and Appellees.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-21-1031
Honorable Jason Marks, Presiding Judge

District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV-21-975B
Honorable Rienne H. McElyea, Presiding Judge

COUNSEL OF RECORD:

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Submitted on Briefs: May 25, 2022

Decided: August 2, 2022

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Appellants Stand Up Montana (Stand Up) and the parents of several children attending public schools in Missoula and Gallatin Counties (Parents), appeal the orders entered by the Fourth and Eighteenth Judicial District Courts (collectively "District Courts," individually "Missoula Court" and "Gallatin Court," respectively), denying their requests for preliminary injunctions to enjoin the masking requirements of Appellees, school districts in Missoula and Gallatin Counties (collectively "School Districts" or "Districts"), which were part of policies adopted for the 2021-2022 school year by the Districts in response to the continuing COVID-19 pandemic. Though these appeals were initially filed separately, on Appellants' motion they were consolidated because of their similarity in facts and law. We restate the issues as follows:

1. *Did the District Courts manifestly abuse their discretion by denying Appellants' requests to preliminarily enjoin the School Districts' masking policies as likely to violate Parents' and students' rights of privacy and individual dignity?*

2. *Did the Gallatin Court err in its interpretation of § 40-6-701, MCA, and abuse its discretion by denying Appellants' motion for a preliminary injunction on the ground the masking policies likely do not violate Parents' rights?*

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Following the emergence of COVID-19 in the winter/spring of 2020, most of the School Districts, like many others around the state and country, utilized a hybrid educational model for the 2020-2021 school year that provided a mix of remote and in-person instruction. All of the School Districts adopted a policy of universal, or

mandatory, facial masking for students, staff, and visitors who appeared in person during this period.

¶3 In the summer of 2021, the School Districts undertook consideration of what policies to pursue to ensure a safe return to full-time, in-person learning for the 2021-2022 school year. The Bozeman District established a task force to address the issue. Consideration by the task force and boards of the other School Districts was given to national and local health data, Centers for Disease Control and Prevention guidelines, recommendations from medical organizations, and guidance from the U.S. Department of Education and city-county health departments. Extensive public comment was invited and received, both by email and in-person presentations.

¶4 While the particulars of each District's policies, including those related to masking, differed slightly from district to district, they were all broadly similar.[1] Generally, the policies provided that all students, staff, volunteers, or visitors to the schools were required to wear face coverings, either disposable or reusable, while physically inside a school or on a school bus. Various activity exceptions were provided, including while: eating or drinking; engaged in sports or recess; giving a speech, lecture, or presentation (if separated from the rest of the class by at least six feet); communicating with someone who is hearing impaired; identifying themselves; or receiving medical attention. After adoption of the policies, the School Districts continued to monitor data and guidelines, and made their

[1] In any event, neither party's arguments hinge upon any particular differences between the various policies adopted by the School Districts.

policies subject to regular review and revision as circumstances changed. It is undisputed that face coverings were made optional by the School Districts as the school year progressed.[2]

¶5 Stand Up and Parents filed complaints and motions for preliminary injunctions against the named School Districts shortly after the Districts' adoption of these policies for the 2021-2022 school year, seeking to enjoin the masking requirements. Although Appellants' complaints alleged several constitutional violations, they sought injunctive relief only on their claims based upon constitutional privacy, individual dignity, and parental rights. Hearings were held on the requests, although no witnesses were called by either party. Both District Courts issued orders denying Appellants' motions. Appellants appeal the denial of their requests for issuance of a preliminary injunction pursuant to M. R. App. P. 6(3)(e).

STANDARD OF REVIEW

¶6 "We review a district court's grant or denial of a preliminary injunction for a manifest abuse of discretion." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386 (citing *Davis v. Westphal*, 2017 MT 276, ¶ 10, 389 Mont. 251, 405 P.3d 73). "A district court abuses its discretion when it 'acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason, resulting in substantial

[2] The Monforton School District did not begin the 2021-2022 school year with a universal masking policy, but after several students and faculty became ill with COVID-19, it adopted a mandatory policy and switched some classes to exclusively remote learning, in part due to shortages in staffing.

injustice.'" *Mont. State Univ.-Northern v. Bachmeier*, 2021 MT 26, ¶ 26, 403 Mont. 136, 480 P.3d 233 (quoting *Gendron v. Mont. Univ. Sys.*, 2020 MT 82, ¶ 8, 399 Mont. 470, 461 P.3d 115). A manifest abuse of discretion is one that is "'obvious, evident, or unmistakable.'" *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4 (quoting *Davis*, ¶ 10). If, however, the district court's decision on a preliminary injunction is based on legal conclusions, we review those conclusions de novo to determine if the district court correctly interpreted the law. *Driscoll*, ¶ 12 (citing *City of Whitefish v. Bd. of Cty. Comm'rs of Flathead Cty.*, 2008 MT 436, ¶ 7, 347 Mont. 490, 199 P.3d 201). "Finally, '[i]n considering whether to issue a preliminary injunction, neither the [d]istrict [c]ourt nor this Court will determine the underlying merits of the case giving rise to the preliminary injunction, as such an inquiry is reserved for a trial on the merits.'" *Driscoll*, ¶ 12 (quoting *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 7, 395 Mont. 160, 437 P.3d 142); *see also Benefis Healthcare v. Great Falls Clinic, Ltd. Liab. P'ship*, 2006 MT 254, ¶ 19, 334 Mont. 86, 146 P.3d 714 ("[O]ur analysis below is not intended to express and does not express any opinion about the ultimate merits of the individual issues or of the case . . . . Our task is not to resolve the substantive matters of law . . . it is to inquire whether the [d]istrict [c]ourt manifestly abused its discretion.").

DISCUSSION

¶7 A preliminary injunction may be granted upon a party's demonstration of at least one of five enumerated subsections of § 27-19-201, MCA. While Appellants did not specify under which subsection they based their motions for preliminary injunction, the Missoula Court concluded their motion was based on § 27-19-201(2), MCA, while the

Gallatin Court concluded their motion was based on both § 27-19-201(1) and (2), MCA. Appellants do not dispute these conclusions on appeal, and we therefore limit our analysis to these subsections, which provide that a preliminary injunction may be granted:

> (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; [or]
>
> (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.

Section 27-19-201(1), -(2), MCA.

¶8 District courts have broad discretion to grant a preliminary injunction pursuant to § 27-19-201, MCA, but the court must exercise that discretion "only in furtherance of the limited purpose of preliminary injunctions to preserve the status quo and minimize the harm to all parties pending final resolution on the merits." *Davis*, ¶ 24 (citing *Porter v. K & S P'ship*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981)).

¶9 "In the context of a constitutional challenge, an applicant for preliminary injunction need not demonstrate [unconstitutionality] beyond a reasonable doubt, but 'must establish a prima facie case of a violation of its rights under' the constitution." *Weems*, ¶ 18, (quoting *City of Billings v. Cty. Water Dist. of Billings Heights*, 281 Mont. 219, 227, 935 P.2d 246, 251 (1997)). "Prima facie is defined as 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Driscoll*, ¶ 15 (quoting *Weems*, ¶ 18); *see also prima facie, Black's Law Dictionary* (10th ed. 2014). When considering a preliminary injunction granted under § 27-19-201(2), MCA, the loss of a constitutional right constitutes an

irreparable injury. *Driscoll*, ¶ 15 (citing *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161) (*MCIA I*).

¶10 "When determining whether an applicant has made a prima facie showing of constitutional injury or appears to be entitled to the relief sought, a court may determine with which level of scrutiny to evaluate the challenged [policy]." *Driscoll*, ¶ 18; *see also MCIA I*, ¶ 16 (citing *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445). Strict scrutiny applies if a fundamental right is affected. *Snetsinger*, ¶ 17 (citing *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 31, 305 Mont. 462, 29 P.3d 992). Under the strict scrutiny standard, the state carries the burden of demonstrating the challenged law or policy is narrowly tailored to serve a compelling government interest and only that interest. *Snetsinger*, ¶ 17 (citing *McDermott*, ¶ 31); *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997) (citing *State v. Siegal*, 281 Mont. 250, 263, 934 P.2d 176, 184 (1997) (overruled on other grounds)). "We apply middle-tier scrutiny if the law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution's Declaration of Rights." *Snetsinger*, ¶ 18 (citing *McDermott*, ¶ 32). We apply the rational basis test when neither strict nor middle-tier scrutiny apply. *Snetsinger*, ¶ 19 (citing *McDermott*, ¶ 32).

1. *Did the District Courts manifestly abuse their discretion by denying Appellants' requests to preliminarily enjoin the School Districts' masking policies as likely to violate Parents' and students' rights of privacy and individual dignity*?

¶11 Appellants argue they made a prima facie showing their privacy and dignity rights were violated by the School Districts' masking policies, and suffered irreparable harm. The Montana Constitution contains an explicit right to privacy provision. Mont. Const.

art. II, § 10. The protection afforded by this right exceeds that provided by the federal constitution and, because it is found in the Constitution's Declaration of Rights, is a fundamental right. *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364 (citing *State of Mont. v. George Burns*, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992); *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. The Montana Constitution also contains an individual dignity provision. Mont. Const. art. II, § 4. In *Walker v. State*, 2003 MT 134, ¶¶ 72-73, 316 Mont. 103, 68 P.3d 872, this Court held that Article II, Section 4, works in tandem with Article II, Section 22 to provide individuals greater protections from cruel and unusual punishment than does the federal constitution. Appellants primarily cite *Gryczan*, *Armstrong*, and *MCIA I* in support of their privacy claim, and solely to *Walker* in support of their dignity claim, that the masking policies are unconstitutional and should be preliminarily enjoined. We first take up their privacy claim.

¶12 In *Gryczan*, this Court held that the Montana Constitution's right to privacy protects "individual or personal-autonomy privacy," including "non-commercial consensual adult sexual activity." *Gryczan*, 283 Mont. at 451, 942 P.2d at 123. In *Armstrong*, this Court held that the Montana Constitution's right of privacy "guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen healthcare provider free from the interference of the government." *Armstrong*, ¶ 75. In *MCIA I*, this Court held that, "while the right to privacy is certainly implicated when a statute infringes upon a person's ability to obtain or reject a *lawful* medical treatment, it does not follow that the right to privacy is necessarily implicated

when a statute regulates a particular medication." *MCIA I*, ¶ 27 (citing *Armstrong*, ¶ 65; *Wiser v. State*, 2006 MT 20, ¶ 20, 331 Mont. 28, 129 P.3d 133) (emphasis in original).

¶13 Central to Appellants' arguments is their characterization of face masks as medical treatment, or as the novel concept they describe as "treatment by alleged prevention." Appellants argue that whether to wear a mask involves an issue of "personal-autonomy privacy" under *Gryczan*, the right to make personal medical judgments under *Armstrong*, and the right to reject treatment referenced in *MCIA I*. Appellants contend the School Districts' masking policies violate the "right to make medical judgments affecting . . . bodily integrity and health in partnership with a chosen healthcare provider," which includes the right to "obtain or reject" treatment. *Armstrong*, ¶ 75; *MCIA I*, ¶ 27 (citing *Wiser*, ¶ 20; *Armstrong*, ¶ 65).

¶14 *Armstrong* addressed government regulation of a private medical decision involving an individual and healthcare provider, which we concluded was constitutionally protected from infringement by the state without a compelling state interest. *Armstrong*, ¶¶ 17-25, 39, 59. Our references to the right to "obtain or reject" medical treatment in *Wiser* and *MCIA I* were drawn from *Armstrong* and were made in the context of the regulation of medicine and medical referrals raised in those cases, likewise not at issue here. *See generally Armstrong*, ¶¶ 54-55; *Wiser*, ¶¶ 7-12, 15-16; *MCIA I*, ¶¶ 2-5, 27 (citing *Wiser*, ¶ 20). *Gryczan* concerned criminal proscription of non-commercial private sexual acts between consenting adults. *Gryczan*, 283 Mont. at 439-40, 942 P.2d at 115-16. That case stands in stark contrast to the non-criminal public-school policies at issue here, which apply to students enrolled and in attendance at schools, parents and other community members

to the extent they physically visit a school, and those employed or who volunteer on public school grounds.

¶15 Appellants' arguments largely attempt to apply principles governing private medical decisions to public prevention practices. Appellants argue that "[m]edical masks worn to mitigate the spread of medical infection are medical devices by any reasonable definition," but we note, first, that "medical masks" are not required by any of the policies—disposable or reusable face coverings are required. Assuming such masks could be considered "medical devices," no evidence has been presented that facial covering constitutes a medical treatment for COVID-19, rather than merely a protective measure to reduce the chance an individual becomes infected with or spreads the virus in a public place. Indeed, the Declaration from Appellants' expert discusses the effectiveness of masking in the context of its ability to prevent infection, not to treat an existing infection. The Missoula Court agreed with the Districts that implementing mandatory masking policies in settings with high COVID-19 levels is "no more a 'medical treatment' for virulent disease than a motorcycle helmet . . . is a treatment for a head injury." This comparison is especially apt in view of routine school policies requiring use of protective equipment for activities that present a risk of harm, such as playing football. And, when an individual is no longer engaged in the activity, the protective gear is no longer required—as with the masking policies at issue here.

¶16 Beyond the simple assertion that refusing to wear a mask is akin to rejecting medical treatment, Appellants have not yet demonstrated that schools requiring face masks to ensure the safety and health of students, visitors, and staff voluntarily on public property

during a recognized pandemic implicates the same private decisions addressed in our precedent. Appellants' arguments therefore are insufficient for us to conclude the District Courts manifestly abused their discretion by denying Appellants' request to enjoin the School Districts' masking policies on the grounds that the privacy right under Article II, Section 10 of the Montana Constitution is likely to have been violated.

¶17 Appellants' individual dignity claim is premised upon *Walker*. *Walker* involved an inmate at the Montana State Prison who suffered from a multitude of severe mental and physical disorders, including Bipolar Disorder, blindness, Hypoglycemia, and nystagmus problems. *Walker*, ¶¶ 9-12. Walker attempted suicide in prison on multiple occasions. *Walker*, ¶ 17. Due to prison staff "tir[ing]" of the poor behavior Walker displayed as a result of his illnesses, Walker was eventually transferred into a "A-block," a maximum-security unit, and repeatedly placed on special management programs. *Walker*, ¶¶ 18-20. Under these programs—which jail staff admitted were ineffective at modifying his behavior—Walker remained alone and naked in his cell with only a "suicide blanket" for days on end, forced to sleep on a concrete slab in a cell containing human waste and blood. *Walker*, ¶¶ 22-30. Walker was so deprived of basic necessities that he had to dictate his original petition to the courts to another inmate because he had no pencil or paper. *Walker*, ¶ 30.

¶18 This Court concluded that Walker's treatment constituted cruel and unusual punishment and violated his right to human dignity, relying in part on Article II, Section 4 of the Montana Constitution to hold that Montana affords greater protections against cruel and unusual punishment than the federal constitution. *Walker*, ¶¶ 73, 84. Although

Appellants fault the District Courts for "narrowly focus[ing] on the factual distinctions between this matter and *Walker*," the facts in *Walker* were critical to the holding there. *See Walker*, ¶ 84 ("[W]e hold that, reading Article II, Sections 4 and 22 together, [the management plans] and the living conditions on A-block constitute an affront to the inviolable right of human dignity possessed by the inmate."). Given this precedent, we cannot conclude the District Courts manifestly abused their discretion by determining Appellants did not establish a likelihood the Districts' masking policies for public schools would violate the Appellants' rights under Article II, Section 4, of the Montana Constitution.

¶19 Because Appellants have not demonstrated a likelihood—in other words, have not made a prima facia showing—that the masking policies implicate a fundamental right found in Article II of the Montana Constitution, the policies would be reviewed under the rational basis standard. *Snetsinger*, ¶ 19 (citing *McDermott*, ¶ 32).[3] This review asks whether the challenged policies "bear a rational relationship to a legitimate governmental interest." *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 18, 353 Mont. 265, 222 P.3d 566 (citing *Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶ 33, 294 Mont. 449, 982 P.2d 456). "In determining whether the [policy's] objective is legitimate, we examine . . . [its] purpose, whether expressly stated or otherwise." *Mont. Cannabis Indus.*

[3] As the School Boards cite in their briefing, many courts nationwide have evaluated school face covering rules under rational basis review.

Ass'n v. State, 2016 MT 44, ¶ 22, 382 Mont. 256, 368 P.3d 1131 (*MCIA II*) (citing *Satterlee*, ¶¶ 34, 37).

¶20 Regarding the government's interest here, there can be little doubt the School Districts' objective of containing the spread of COVID-19 among students and adults within the school system would be found to be a legitimate interest. Indeed, the United States Supreme Court has held that "[s]temming the spread of COVID-19 is unquestionably a *compelling* [governmental] interest." *Roman Catholic Diocese v. Cuomo*, ___U.S. ___, ___, 141 S. Ct. 63, 67 (2020) (emphasis added). Regarding rational relationship, we first note that rational basis review "is the most deferential standard of review . . . the [policy] need not be in every respect logically consistent with its aims to be constitutional" and "unless . . . the [policies] are unreasonable or arbitrary, the [governmental entity's] judgment should not be disturbed." *MCIA II*, ¶ 26 (citing *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83, 108 S. Ct. 1645, 1653 (1988); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314, 96 S. Ct. 2562, 2567 (1976); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 464, (1955); *Walters v. Flathead Concrete Prods.*, 2011 MT 45, ¶ 18, 359 Mont. 346, 249 P.3d 913) (internal quotation marks omitted).

¶21 Appellants' arguments against the rational relationship between the School Districts' masking polices and the prevention of the spread of COVID-19 are premised upon the potential ineffectiveness of masking, concerns regarding children's development, and the relatively low COVID-19 death rate among minors. Appellants' expert opined in

his Declaration that masking is not effective at preventing COVID-19, offering that several published masking studies contained flaws in their methodologies.

¶22 The School Districts' policies were adopted after consideration of a wide body of health information and recommendations from public and private sources that encouraged continuation of universal masking policies. The Districts invited and received substantial public input, and ultimately adopted masking rules with many activity exceptions, of limited duration, and subject to periodic review and revision as circumstances developed. While Appellants may be correct that the COVID-19 mortality rate among minors is low, the School Districts' safety concerns went beyond child mortality risk to include adult teachers, staff, volunteers, and visitors who may be subject to significantly higher risks, which Appellants' own data suggests. As demonstrated in the Monforton School District, minors are also susceptible to COVID-19 infection, with the accompanying interruption to learning that entails. And, beyond mortality rate, the policies would appear to bear a rational relationship to School Districts' legitimate interest in preventing infections among teachers, staff, and volunteers to ensure sufficient staffing levels are available for the schools to function properly.

¶23 It appears the challenged policies bear a rational relationship with the School Districts' legitimate interest in containing the spread of COVID-19 in the public school system, and it is likely the policies would be found to be neither unreasonable nor arbitrary. *MCIA II*, ¶ 26. We acknowledge the robust public debate about the efficacy of masking, leading even to paradoxical conclusions. *See, e.g.*, Steven Salzberg, *Masks Work. Mask-Wearing Policies Don't*, Feb. 1, 2022, Forbes; David Leonhardt, *Why Masks Work,*

but Mandates Haven't, May 31, 2022, The New York Times.[4] However, we need not further examine this debate, also reflected in the record, for purposes of this appeal. Under the governing standards, we conclude the District Courts did not manifestly abuse their discretion by concluding it was likely the School Districts' policies were rationally related to legitimate government interests.

2. Did the Gallatin Court err in its interpretation of § 40-6-701, MCA, and abuse its discretion by denying Appellants' motion for a preliminary injunction on the ground the masking policies likely do not violate Parents' rights?

¶24 The Gallatin County District Court addressed Senate Bill 400 (SB 400), effective October 1, 2021, and codified as § 40-6-701, MCA.[5] Stand Up and Parents argued that § 40-6-701, MCA, applied to void the masking policies as "interfer[ing] with the fundamental right of parents" to direct their children's upbringing and health. The District Court reviewed the legislative history of SB 400 and concluded the bill's purpose 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 situations where parental rights have been terminated. Appellants, and Amicus Montana Legislators, argue this interpretation is erroneous, and that SB 400 instead provides a cause of action whenever a parent's fundamental rights regarding their children are infringed upon by the government. We agree with Appellants and Amicus that the District Court's interpretation

[4] https://www.forbes.com/sites/stevensalzberg/2022/02/01/masks-work-mask-wearing-policies-dont/?sh=533428a61b5c; https://www.nytimes.com/2022/05/31/briefing/masks-mandates-us-covid.html.

[5] The Missoula Court did not address this statute; it was not in effect at the time its order was issued.

of the statute was incorrect, but conclude this error does not require reversal of its denial of a preliminary injunction.

¶25 When interpreting statutes, the role of courts is "'simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.'" *Comm'r of Political Practices for Mont. v. Mont. Republican Party*, 2021 MT 99, ¶ 7, 404 Mont. 80, 485 P.3d 741 (quoting § 1-2-101, MCA). In other words, courts are to first attempt to construe statutes "according to the plain meaning of their language." *Mont. Republican Party*, ¶ 7 (quoting *Comm'r of Political Practices for Mont. v. Wittich*, 2017 MT 210, ¶ 19, 388 Mont. 347, 400 P.3d 735) (internal quotation marks omitted). "When the plain language of the statute is clear, no other means of interpretation are necessary or proper. . . . Only when the language of the statute is ambiguous do we resort to the statute's legislative history." *State v. Hicks*, 2013 MT 50, ¶ 19, 369 Mont. 165, 296 P.3d 1149 (citations omitted).

¶26 Section 40-6-701, MCA, provides, in relevant part:

> (1) 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.
>
> (2) This section may not be construed as invalidating the provisions of Title 41, chapter 3, or modifying the burden of proof at any state of the proceedings under Title 41, chapter 3.

> (3) When a parent's fundamental rights protected by this section are violated, a parent may assert that violation as a claim or defense in a judicial proceeding.

¶27 The intent of this section is clear from a plain reading: it prohibits the government from interfering with the fundamental parental rights listed in subsection (1) unless the government demonstrates the interference "furthers a compelling governmental interest [and] is narrowly tailored and is the least restrictive means available" to further that interest. Section 40-6-701(1), MCA. The District Court therefore erred by resorting to legislative history to guide its interpretation and, moreover, its interpretation was incorrect because the statute contains no language limiting its application to "a cause of action for parents who may be involved with the Department of Public Health and Human Services." *See Hicks*, ¶ 19.

¶28 However, the fundamental right of a parent to make decisions regarding the care of their children, including, among other things, the "upbringing, education, health care, and mental health of their children" referenced in § 40-6-701, MCA, is likewise protected under both the federal and Montana constitutions.[6] *See Troxel*, 530 U.S. at 65-66, 120 S. Ct. at 2060 (collecting cases) (stating that the "liberty" protected by the Due Process Clause includes the right of parents to control their children's education, direct their upbringing, and make decisions concerning their care); *In re A.J.C.*, 2018 MT 234, ¶ 31, 393 Mont. 9,

[6] We would note § 40-6-701, MCA, does not reference the entirety of recognized parental rights. For example, it does not mention parents' fundamental right to the care and custody of their children. *See Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 2060 (2000) (collecting cases); *Polasek v. Omura,* 2006 MT 103, ¶ 14, 332 Mont. 157, 136 P.3d 519.

427 P.3d 59 ("It is beyond dispute that the right to parent one's children is a constitutionally protected fundamental liberty interest protected by Article II, section 17 of the Montana Constitution and by the Due Process Clause of the Fourteenth Amendment to the United States Constitution."). This fundamental right is enforceable by various causes of action, including within the context of public education, and strict scrutiny is commonly applied—the standard referenced in § 40-6-701(1)(a), (b), MCA—which requires the government to demonstrate the statute or rule in question "justified by a compelling state interest and [is] . . . narrowly tailored to effectuate only that compelling interest." *Armstrong*, ¶ 34 (citing *Gryczan*, 283 Mont. at 449, 942 P.2d at 122).[7]

¶29 The District Court, despite an initially incorrect interpretation of § 40-6-701, MCA, nonetheless alternatively applied a strict scrutiny framework to the challenged masking polices. Appellants do not contend the District Court erred in this alternative analysis, nor present an argument regarding how Parents' rights to control their children's health and upbringing are violated in the context of Parents exercising that right by enrolling their children in the public schools, a legal issue commonly at center in challenges to masking policies. *See generally Fortuna v. Town of Winslow*, No. 1:21-cv-00248-JAW, 2022 U.S. Dist. LEXIS 104678, at *37-38 (D. Me. June 13, 2022) ("Once his child is in school,

[7] While the statute's phrase "least restrictive means" is not explicitly used in most formulations of strict scrutiny review, it is nonetheless understood as part of the consideration of whether a government action is "narrowly tailored." *See e.g., Roman Catholic Diocese*, ___ U.S. at ___, 141 S. Ct. at 67 ("[I]t is hard to see how the challenged regulations can be regarded as 'narrowly tailored.' They are far more restrictive than any COVID-related regulations that have previously come before the Court . . . there are many other less restrictive rules that could be adopted to minimize the risk.").

Mr. Fortuna's parental rights must be measured against the equal rights of other parents to control their children and the duty of the school to provide a safe environment for all children, not just Mr. Fortuna's child, and for others who work or volunteer in the school.") (citations omitted); *Doe v. Dall. Indep. Sch. Dist.*, 194 F. Supp. 3d 551, 562 (N.D. Tex. 2016) ("[T]he right to choose what sort of school a child will attend and the right to have input on [discrete school policies] . . . are cut from different cloth. The former is almost self-evidently a fundamental decision about the child's education, while the latter is, at best, a 'component of the educational process' that Doe is attempting to 'mask . . . with the trappings of a fundamental right and then elevate . . . to the status of a fundamental right.'") (citations omitted); *Bentonville Sch. Dist. v. Sitton*, 643 S.W.3d 763, 771 (Ark. 2022) ("Parents do have a liberty interest in shaping their child's education . . . . [But] the District's [masking] policy is not, 'beyond all question, a plain, palpable' violation of the parents' constitutional rights to care for their children." (internal citations omitted); *see also Doe v. Franklin Square Union Free Sch. Dist.*, 568 F. Supp. 3d 270 (E.D.N.Y. 2021).

¶30 Appellants argue instead that, under § 40-6-701, MCA, "the only thing the statute requires is for the School Districts to offer a compelling governmental interest, which they have still yet to do." However, as mentioned above, the United States Supreme Court has held that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese*, ___ U.S. at ___, 141 S. Ct. at 67. Appellants acknowledge in their briefing that "the only reason mask mandates were enacted was to address . . . the spread of COVID-19," which comes within the compelling interest the United States Supreme Court has defined. Beyond this, Appellants do not provide a basis for error.

CONCLUSION

¶31 Appellants have not demonstrated either that "it appears that [they] are entitled to the relief demanded" or that "the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant," under § 27-19-201(1) and (2), MCA. And, while Appellants do not make any arguments regarding preservation of the status quo, universal masking policies were in place during the 2020-2021 school year without any challenge known to this Court. "The status quo is the last actual, peaceable, non-contested condition which preceded the pending controversy." *Driscoll*, ¶ 14 (internal quotations, citations omitted). The District Courts did not manifestly abuse their discretion by denying the preliminary injunctions, and their orders are affirmed. *See Driscoll*, ¶ 12.

/S/ JIM RICE

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR