Montana Against COVID Restrictions

November 11, 2020

Via email only

Allan Baker
277 My Way
Kalispell, MT 59901

RE: Legal challenge to Governor Bullock's COVID-19 Response

Dear Mr. Baker:

We write to discuss possible legal action by a group of Flathead County residents and businesses, including yourself; Liberty Fellowship, a Kila, Montana church; its pastor, Dr. Chuck Baldwin; and others who might wish to be included in the action as plaintiffs. We believe the restrictions implemented by Governor Bullock in his response to the COVID-19 pandemic are not constitutional, at least with respect to restrictions placed against people who are (a) not currently infected with any communicable disease and (b) not reasonably believed to have a communicable disease. In short, restrictions on healthy uninfected people, buildings and gatherings violate the Montana Constitution's provision for a separation of powers and a republican form of government. Art. III, § 1, Montana Constitution. With respect to individuals, the mask mandate also violates the Montana Constitution's fundamental rights of privacy (Article II, Section 10) and individual dignity (Article II, Section 4). We propose a declaratory judgment action in state district court to ask a judge to enjoin further enforcement and implementation of the unconstitutional portions of the Governor's response.

UNCONSTITUTIONAL DELEGATION OF PLENARY POWER TO THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

Powers of DPHHS

The "department" as referred to in Title 50, MCA, is the Department of Public Health and Human Services (DPHHS). See § 50-1-101(3), MCA. It resides within the executive branch of state government and the department head is appointed by the governor. See § 2-15-2201, MCA. DPHHS may bring a civil action as "necessary to abate, restrain, or prosecute the violation of public health laws." Section 50-1-103(1), MCA.

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DPHHS is delegated authority to "identify, assess, prevent, and ameliorate conditions of public health importance through: . . . isolation and quarantine measures." Section 50-1-202(d)(iii), MCA. Specifically, DPHHS "may adopt and enforce quarantine or isolation measures to prevent the spread of communicable disease." Section 50-1-204, MCA. "Isolation" means "the physical separation and confinement of an individual or groups of individuals who are infected or reasonably believed to be infected with a communicable disease or possibly communicable disease from nonisolated individuals to prevent or limit the transmission of the communicable disease to nonisolated individuals." Section 50-1-101(6), MCA (emphasis added). "Quarantine" means "the physical separation and confinement of an individual or groups of individuals who are or may have been exposed to a communicable disease or possibly communicable disease and who do not show signs or symptoms of a communicable disease from nonquarantined individuals to prevent or limit the transmission of the communicable disease to nonquarantined individuals." Section 50-1-101(13), MCA (emphasis added).

DPHHS has "the power to use personnel of local public health agencies to assist in the administration of laws relating to public health services and functions. Section 50-1-202(2)(a), MCA. The local health officer is authorized "to take steps to limit contact between people in order to protect the public health from imminent threats, including but not limited to ordering the closure of buildings or facilities where people congregate and canceling events." Section 50-2-118(2), MCA (emphasis added). "Imminent threats" means known or reasonably believed infection or presence of a "communicable disease." Section 50-1-101(1), MCA. "Imminent threat" does not mean that a circumstance "may possibly cause an injury at some time in the distant or uncertain future." In re F. B., 189 Mont. 229, 233, 615 P.2d 867, 869 (1980). Rather, the "danger must be fairly immediate." Id. The law requires proof that "the threat of future injury presently exists and that the threat is imminent, that is, impending, likely to occur at any moment." Id.

Implicit in the analysis, moreover, is the need for a health officer to prove an actual threat or danger to public health posed by a building or facility to be or event to be cancelled. Also implied is the requirement that a proposed measure be designed to address the threat and that the measure be shown to be effective in addressing the threat. There has to be a rational link running through the analysis. Speculation will not suffice. Sufficient evidence must exist to allow a rationale mind to conclude that the public health officer's measure addresses an imminent threat in a manner designed to and in fact does have some measurable mitigating effect against the imminent threat.

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Restrictions and Quarantines on the Uninfected

What is missing from the express powers listed in Title 50 is authority to isolate and quarantine people who are not exposed or reasonably suspected to have been exposed to a communicable disease. In other words, if someone is not suspected of being infected, or if their premises are not, then DPHHS has no power to isolate or quarantine them, or to close their premises, or to cancel their events. Yet, this is exactly what a lockdown consists of: isolating, quarantining, closing buildings and cancelling events that have no sign or reasonable suspicion, based on identifiable evidence, of being infected with a communicable disease. This is illegal. Under the statute, there is no power to isolate or quarantine the well.

It is understood that the statute, on its face, allows DPHHS a great deal of authority over the life of a community. For example, § 50-1-202, MCA, provides:

> (1) In order to carry out the purposes of the public health system to protect and promote the public health, [DPHHS], in collaboration with federal, state, and local partners, shall:
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> * * *
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> (d) identify, assess, prevent, and mitigate conditions of public health importance through:
> (i) epidemiological tracking and investigation;
> (ii) screening and testing programs;
> (iii) isolation and quarantine measures;
> (iv) treatment;
> (v) abatement of public health nuisances;
> (vi) inspections;
> (vii) collecting and maintaining health information; or
> (viii) other public health measures as allowed by law;

DPHHS may also "adopt and enforce rules" regarding "the reporting and control of communicable diseases." Section 50-1-202(p)(i), MCA.

Local public health officers, if taken under control by DPHHS per § 50-1-202(2)(a), MCA, likewise enjoy practically limitless powers under the statute:

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> In order to carry out the purpose of the public health system, in collaboration with federal, state, and local partners, local health officers or their authorized representatives shall: . . .
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> (2) take steps to limit contact between people in order to protect the public health from imminent threats, including but not limited to ordering the closure of buildings or facilities where people congregate and canceling events;
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> * * *
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> (4) establish and maintain quarantine and isolation measures as adopted by the local board of health; and

Section 50-2-118, MCA.

Unconstitutional Delegation of Authority

The broad language of the statutes describing such powers could be construed to reflect a legislative intent of ceding plenary legislative power to local health officials and local health officers to regulate communicable disease in just any way they see fit. Such a reading, however, would violate Montana's constitution, and, if acted upon, would be illegal.

Here, the statute grants DPHHS, acting on its own or through local health officers, the power to lockdown and restrict the movements and activities of healthy people, close buildings that are not infected with contagious disease and cancel gatherings with no evidence of any infection, constituting a delegation of legislative power. While the legislature may constitutionally delegate its legislative functions to an administrative agency, it must provide, with reasonable clarity, limitations upon the agency's discretion and provide the agency with policy guidance. City of Missoula v. Missoula County, 139 Mont. 256, 259, 362 P.2d 539, 541 (1961).

Article III, Section 1, of the 1972 Montana Constitution (formerly Article IV, Section 1, 1889 Montana Constitution) provides:

> Separation of powers. The power of the government of this state is divided into three distinct branches-legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one

> branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

In the Petition, 2000 MT 342, ¶¶ 13-14, 303 Mont. 204, 15 P.3d 447. In Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960), the Montana Supreme Court set forth the standard for a delegation of legislative power as follows:

> The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid.

Bacus, 138 Mont. at 78, 354 P.2d at 1061 (quoting 73 C.J.S. Public Administrative Bodies & Procedure § 29).

Unlimited Discretion

Under the guidance of Bacus, a statute granting legislative power to an administrative agency will be held to be invalid if the legislature has failed to prescribe a policy, standard, or rule to guide the exercise of the delegated authority. In the Petition, ¶ 15. If the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, the statute is invalid. See Matter of Auth. to Conduct Sav. & Loan Act., etc., 182 Mont. 361, 369-70, 597 P.2d 84, 89 (1979); Douglas v. Judge, 174 Mont. 32, 38, 568 P.2d 530, 534 (1977); Plath v. Hi-Ball Contractors, Inc., 139 Mont. 263, 272, 362 P.2d 1021, 1025 (1961); City of Missoula, 139 Mont. at 259, 362 P.2d at 540-41.

This guarantee on the republican form of government has also been addressed in the context of zoning. In Shannon, for example, the Montana Supreme Court held that a lawful delegation of legislative authority "must contain standards or guidelines" to inform the propriety of the exercise of that power. Shannon v. City of Forsyth, 205 Mont. 111, 114, 666 P.2d 750, 752 (1983). When no standards or guidelines are present, the exercise of the delegated power may result in "arbitrary and capricious" actions, "dependent wholly on the will and whim" of others. Shannon, 205 Mont. at 115, 666 P.2d at 752. The existence of an appellate body with the power to consider exceptional cases, which is essential to the proper exercise of police power. Shannon, 205 Mont. at 115, 666 P.2d at 752. Unlawful delegations of legislative authority run afoul of the due process

guarantees of the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution. Shannon, 205 Mont. at 114, 666 P.2d at 752.

The Montana Supreme Court has also struck down several other statutes and ordinances outside the context of zoning as unconstitutional delegations of legislative authority. See, e.g., In the Petition to Transfer Territory, 2000 MT 342, 303 Mont. 204, 15 P.3d 447 (holding that a statute giving a superintendent the authority to grant or deny petitions to transfer territory among school districts was an unconstitutional delegation of legislative power because the superintendent's broad discretion was "unchecked by any standard, policy, or rule of decision"); Ingraham v. Champion Int'l, 243 Mont. 42, 793 P.2d 769 (1990) (deeming a workers' compensation statute an unconstitutional delegation of legislative power because it granted the insurer "absolute discretion" as to what terms, under what circumstances, and in what amounts a lump-sum conversion payment could occur); In the Matter of Savings & Loan Activities, 182 Mont. 361, 597 P.2d 84 (1979) (declaring a statute granting the Department of Business Regulation the power to approve or disapprove applications for the merger of savings and loan associations was an unconstitutional delegation of legislative power because it lacked guidelines or substantive criteria); Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977) (holding unconstitutional a statute authorizing the Department of Natural Resources and Conservation to make loans to farmers and ranchers who proposed "worthwhile" renewable resource development projects because the statute lacked adequate parameters).

Here, the statute's delegation of power is unconstitutional because it gives DPHHS unfettered discretion in determining whether and to what extent healthy people, places and gatherings will be subject to restrictions and quarantines. Further, the statute's sole directive is that the restrictions on healthy people and places must be made "to carry out the purposes of the public health system." Not only is this directive unlimited in its breadth, it is indecipherably vague. Moreover, the statute fails to provide any checks on the discretion of DPHHS in deciding whether and to what extent to impose restrictions on healthy people, places, and gatherings. The legislature has provided no criteria for balancing the effects felt by uninfected people subject to restrictions and quarantines. Instead, the decision is left solely to the whim of the local county health departments.

In Bacus, the Montana Supreme Court instructed that "the standard must not be so broad that the officer or board will have unascertainable limits within which to act." Bacus, 138 Mont. at 81, 354 P.2d at 1062. If the legislature had limited county health departments and their officers to the role of fact finder or if the legislature had set forth the specific criteria to be weighed when deciding to impose restrictions on the healthy, the legislature's delegation of such authority may have conformed to constitutional

requirements. Since the legislature failed to do so, any effort by the DPHHS to impose restrictions on the uninfected is unconstitutional.

No Appeal or Review

The second failure that results in an unconstitutional delegation of authority is the lack of appeal or review. Williams v. Bd. of Cnty. Comm'rs, 2013 MT 243, ¶ 45, 371 Mont. 356, 308 P.3d 88. The statute creates no appellate body with the power to consider exceptional cases, which is essential to the proper exercise of police power. The statute lacks a provision for review by a legislative body with the power to consider exceptional cases, "which is essential to the proper exercise of police power." Id., ¶ 53. Without a legislative bypass provision, a health officer is granted absolute discretion to make the ultimate determination concerning the public's best interests with no opportunity for review.

Thus, there are two separate bases of infirmity in the broad grant of discretion to DPHHS that renders restrictions or quarantines on uninfected people, places and gatherings unconstitutional. First, the delegation of authority is too broad and too vague. Second, there is no provision for either review of a health board or officer decision, or consideration of special cases.

UNCONSTITUTIONAL INFRINGEMENT UPON FUNDAMENTAL RIGHTS

Restrictions and impositions on the movements of people who do not have a communicable disease and are not reasonably believed to have a communicable disease is an illegal infringement upon fundamental constitutional rights of individuals. For example, the Governor's "Directive implementing Executive Orders 2-2020 and 3-2020 and providing for the mandatory use of face coverings in certain settings" (July 15, 2020) (Mask Order) compels well individuals to wear face masks in all business, government offices and other indoor spaces open to the public. The directive requires private businesses, individuals and government agencies to enforce this rule through means of the law of trespass. If private individuals who are not infected with a communicable disease, and not reasonably believed to be infected, choose to exercise their right to make their own private health-care choices by declining to use a face covering, they are barred from the use of indoor public accommodations.

The Mask Order implicates the right of individual privacy guaranteed by Article II, Section 10. Under Gryczan v. State, 283 Mont. 433, 942 P.2d 112 (1997) and Armstrong v. State, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, the Montana Supreme Court holds that medical care choices are protected by the right of individual privacy. Quoting from Armstrong: "the personal autonomy component of this right 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 the interference of the government . . . ." Armstrong, ¶ 75. See Baxter v. State, 2009 MT 449, ¶ 65, 354 Mont. 234, 224 P.3d 1211 (Nelson, J., concurring).

In Armstrong, the plaintiffs challenged a state law prohibiting certified physicians' assistants from performing abortions. The Montana Court struck down the law because it infringed on an individual's personal autonomy protected by the right to privacy. Armstrong, ¶ 75. The Court concluded in Armstrong that the right to health care is a fundamental privacy right. Subsequently, the Court in Wiser v. State, 2006 MT 20, ¶ 16, 331 Mont. 28, 129 P.3d 133 clarified that "the right to privacy is certainly implicated when a statute infringes upon a person's ability to obtain or reject a lawful medical treatment." Mont. Cannabis Indus. Ass'n v. State, 2012 MT 201, ¶ 27, 366 Mont. 224, 232, 286 P.3d 1161 (emphasis added). The Armstrong decision was adamant on this point. To quote the Court at length:

> Similarly, in the broader context of one's right to choose or refuse medical treatment, we must likewise conclude that these sorts of decisions are protected under the personal autonomy component of the individual privacy guarantees of Montana's Constitution. And properly so.
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> Few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health. Joel Feinberg, a philosophy professor at the University of Arizona, describes the interrelationship between privacy and personal or "bodily" autonomy as follows:
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> > After all, we speak of "bodily autonomy," and acknowledge its violation in cases of assault, battery, rape, and so on. But surely our total autonomy includes more than simply our bodily "territory," and even in respect to it, more is involved than simple immunity to uninvited contacts and invasions. Not only is my bodily autonomy violated by a surgical operation ("invasion") imposed on me against my will; it is also violated in some circumstances by the withholding of the physical treatment I request (when due allowance has been made for the personal autonomy of the parties of whom the request is made). For to say that I am sovereign over my bodily territory is to say that I, and I alone, decide (so long as I am capable of deciding) what goes on there. My authority is

> a discretionary competence, an authority to choose and make decisions.

3 Joel Feinberg, Harm to Self 53 (1986). See also Fisk, at 326-27.

Indeed, medical treatment decisions

> are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease. It is the individual making the decision, and no one else, who must undergo or forego the treatment. And it is the individual making the decision, and no one else, who, if he or she survives, must live with the results of that decision. One's health is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature.
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> . . . The decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one's economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death.
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> Recognition of these inherent rights to make medical judgments affecting one's bodily integrity and health and the right to choose and to refuse medical treatment are certainly not creatures of recent invention, however. Rather, like America's historical legal tradition acknowledging the fundamental common law right of self-determination, acceptance of the right to make personal medical decisions as inherent in personal autonomy is a long-standing and an integral part of this country's jurisprudence.

Armstrong, ¶¶ 52-55 (emphasis added). Thus, forcing people to wear medical devices on their faces invades their fundamental right of privacy.

Meanwhile, "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States--exceeding even that provided by the federal constitution." Armstrong, ¶ 34. Privacy is "one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects

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Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." Id. (quoting Gryczan, 283 Mont. at 455, 942 P.2d at 125) (emphasis added). "For this reason, legislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny analysis--i.e., the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest. " Id. (string cite omitted).

"Under the strict scrutiny standard, the State has the burden of showing that the law, or in this case the policy, is narrowly tailored to serve a compelling government interest." Snetsinger v. Montana University System, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445 (emphasis added). Thus, it falls solely on the State to prove that both the legislation is "justified by a compelling state interest" and that it is "narrowly tailored to effectuate only that compelling interest." Id.; Gryczan, 283 Mont. at 449, 942 P.2d at 122; State v. Pastos, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994). Furthermore, it is important to remember that unless two fundamental rights are in opposition (e.g., the right to privacy versus the right to know), strict scrutiny does not involve a balancing test. Only the less stringent "middle-tier scrutiny" involving rights not deemed "fundamental" allows the State to prevail if it can demonstrate an interest in a law which "outweighs the value of the right to an individual." Powell v. State Compensation Ins. Fund, 2000 MT 321, ¶ 18, 302 Mont. 518, 15 P.3d 877 (emphasis on "outweighs" added).

Under the strict scrutiny standard, as the threshold issue, DPHHS must first prove it has a compelling state interest before moving to the narrowly tailored / least restrictive means test. Montana Human Rights Div. v. City of Billings (1982), 199 Mont. 434, 649 P.2d 1283. In the Montana Human Rights Division, for example, the question was whether—in investigating claims of employment discrimination—the Montana Human Rights Commission ("HRC") could lawfully subpoena private and personnel information of employees who had neither consented to disclosure nor complained of discrimination. Id.; 199 Mont. at 443-45, 649 P.2d at 1288-89. Before ever reaching the question of what steps should be taken to protect the private information sought to be disclosed, the Court first determined that there was a compelling state interest at stake. It decided that the State had a compelling interest in investigating illegal discrimination.

> We do not find that the HRC has failed to establish a compelling state interest by failing to contact and obtain the permission of those employees and ex-employees of the City and County whose files they seek. The practical realities of the situation, and the greater importance of the protection from discrimination convince us that the HRC has made a sufficient showing of a compelling state interest, and that the disputed files and materials must be made available to the HRC.

Id.; 199 Mont. at 446, 649 P.2d at 1289 (emphasis added). Thus, the right of privacy came in conflict with—and in the circumstances was required to yield to—the fundamental right of due process. But only after such holding did the Court then turn to what protections should be in place to reasonably ensure that private material was protected from public disclosure. Had there been no compelling state interest, however, there could have been no public disclosure—regardless of the amount of security.

As to the Mask Order, the compelling state interest at stake could be construed as the control of a pandemic in which the death rate of those affected is .63% (7 out of every 1,000 infected). This issues, standing alone, cannot satisfy the compelling state interest prong. The evaluation requires consideration of the context and facts.

The first question is, then, does the Mask Order actually serve that interest? According to the U.S. Centers for Disease Control (CDC), the "filtration, effectiveness, fit, and performance of cloth masks are inferior to those of medical masks and respirators." Id.[1] "Despite common use of cloth masks in many countries in Asia, existing infection control guidelines do not mention their use." Id. More important, the CDC now, as of October 2020, admits: "To our knowledge, only 1 randomized controlled trial has been conducted to examine the efficacy of cloth masks in healthcare settings, and the results do not favor use of cloth masks." Id. (citing Chughtai, A. A., Seale, H., & Macintyre, C. (2020). Effectiveness of Cloth Masks for Protection Against Severe Acute Respiratory Syndrome Coronavirus 2. Emerging Infectious Diseases, 26(10), 1-5. https://dx.doi.org/10.3201/eid2610.200948).[2] So, the only scientific study ever done on this subject indicates against the use of cloth masks. The most CDC will say about masks worn by the general public is that they "may" provide some protection. Yet, the recommendation is supported with no evidence, much less "scientific consensus."

Finally, even if the wearing of masks were held to serve a compelling state interest, the policy is not narrowly tailored to serve that interest by the means least restrictive to the fundamental right at issue. DPHHS could work at identifying the vulnerable, who due to co-morbidity issues are more likely to suffer severe complications, and target them for special attention and assistance, leaving the low-risk population to the exercise of their fundamental right to choose their own health-care strategies. This strategy of "Focused Protection," as stated in the recent Great Barrington Declaration, authored by three preeminent epidemiologists and signed by scientists from around the world, would be consistent with the right of privacy:

[1] https://wwwnc.cdc.gov/eid/article/26/10/20-0948_article

[2] https://bmjopen.bmj.com/content/5/4/e006577.responses#covid-19-shortages-of-masks-and-the-use-of-cloth-masks-as-a-last-resort

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> The most compassionate approach that balances the risks and benefits of reaching herd immunity, is to allow those who are at minimal risk of death to live their lives normally to build up immunity to the virus through natural infection, while better protecting those who are at highest risk. We call this Focused Protection.
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> Adopting measures to protect the vulnerable should be the central aim of public health responses to COVID-19. By way of example, nursing homes should use staff with acquired immunity and perform frequent PCR testing of other staff and all visitors. Staff rotation should be minimized. Retired people living at home should have groceries and other essentials delivered to their home. When possible, they should meet family members outside rather than inside. A comprehensive and detailed list of measures, including approaches to multi-generational households, can be implemented, and is well within the scope and capability of public health professionals.
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> Those who are not vulnerable should immediately be allowed to resume life as normal. Simple hygiene measures, such as hand washing and staying home when sick should be practiced by everyone to reduce the herd immunity threshold. Schools and universities should be open for in-person teaching. Extracurricular activities, such as sports, should be resumed. Young low-risk adults should work normally, rather than from home. Restaurants and other businesses should open. Arts, music, sport and other cultural activities should resume. People who are more at risk may participate if they wish, while society as a whole enjoys the protection conferred upon the vulnerable by those who have built up herd immunity.[3]

In sum, imposing the universal health care choice of wearing a cloth mask on all Montanans is a violation of their fundamental constitutional right of privacy. It is therefore illegal. The illegal conduct is subject to preliminary and permanent injunctive relief. E.g., Butte Cmty. Union v. Lewis, 219 Mont. 426, 435, 712 P.2d 1309, 1314 (1986). In other words, the remedy is a civil declaratory judgment action against DPHHS and Governor Bullock to have the Mask Order declared null and void.

[3] https://gbdeclaration.org/