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7  
8 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF KOOTENAI  
9 MAGISTRATE DIVISION

10  
11 PAUL HERNDON, ANGELO BRUNSON,  
12 and DANIEL SCHNATTER,

13 Plaintiffs,

14 v.

15 PANHANDLE HEALTH DISTRICT, an  
Idaho public agency acting through the  
16 Panhandle Health District Board of Health  
Members, JAI NELSON, R.N., MARLOW  
17 THOMPSON, MIKE FITZGERALD,  
RICHARD MCLANDRESS, M.D., WALT  
18 KIRBY, ALLEN BANKS, Ph.D., and GLEN  
BAILEY, in their official capacity as  
19 members of the Board of Health,

20 Defendants.  
21  
22  
23

CASE NO.: CV28-20-4729

**PETITION FOR DECLARATION  
THAT PANHANDLE HEALTH  
DISTRICT JULY 23, 2020  
ORDER IS NULL AND VOID**

1 Plaintiffs Paul Herndon, Angelo Brunson, and Daniel Schnatter bring this action to  
2 declare the July 23, 2020 Order regarding Face Coverings Order of the Board of Health,  
3 Panhandle Health District, State of Idaho, null and void. Plaintiffs allege as follows:

4 **I. OVERVIEW**

5 1. The Panhandle Health District Board (the “Board”) held a special meeting on July  
6 17, 2020, which tabled a discussion regarding a mask mandate until a July 23, 2020, meeting.

7 2. During the July 23, 2020, Panhandle Health District (the “District”) meeting, the  
8 Board purported to adopt an Order regarding Face Coverings which is attached hereto as  
9 Exhibit A and incorporated herein as if set forth in full (the “Order”) which purports to mandate  
10 that all persons in Kootenai County wear a “face covering...when the person is in a public  
11 place and physical distancing of 6 feet from others cannot be maintained”.

12 3. The Order purports to penalize that failure to wear a “face covering” with a fine or  
13 up to one year of imprisonment, or both.

14 4. During both the July 17, 2020 and July 23, 2020 meetings, the District restricted  
15 physical, in-person attendance by members of the public. See attached Declaration of Paul  
16 Herndon, Declaration of Mistie Gardner, Declaration of Bethany Fonda, and Declaration of  
17 Grace Bauer, all of which are attached as exhibits and incorporated herein by reference.

18 5. The District provided, in lieu of in-person attendance, a telecommunication device,  
19 Zoom Video Communications, Inc., software (“Zoom”), that utilized a telephone call-in line  
20 to conduct the meeting.

21 6. During both meetings, members of the public who attempted to attend were not  
22 able to attend either in person or by Zoom; members of the public who attended in person were  
23 unable to hear the Board’s public discussion and deliberation related to the Order; and

1 members of the Board were unable to hear other members of the Board during discussion,  
2 deliberation, and/or voting.

3 7. Evidence of the violation of open meetings laws can be viewed on a YouTube  
4 recording that is available at <https://www.youtube.com/watch?v=jS4PjuqL7OE> and  
5 incorporated herein as if set forth in full (the “Video”).

6 8. Upon information and belief, the District did not enable the Zoom recording  
7 function.

8 9. The District and the Board violated Idaho’s Open Meetings Law Act, Idaho Code  
9 § 74-201 *et seq.*, and the Order is therefore null and void.

10 **II. PARTIES**

11 10. Plaintiff Paul Herndon is a resident of Sagle, Bonner County, Idaho, who frequently  
12 travels within Kootenai County for personal and professional purposes. Plaintiff Paul Herndon  
13 owns Pleasant Meadow Creamery and is personally affected by the Order, as are his business  
14 and customers.

15 11. Plaintiff Angelo Brunson is a resident of Kootenai County, Idaho, and owner of  
16 Angelo’s Ristorante located in Kootenai County, Idaho. Plaintiff Angelo Brunson is personally  
17 affected by the Order, as are his restaurant and its customers.

18 12. Plaintiff Daniel Schnatter is a resident of Kootenai County, Idaho, and owner of  
19 The NYC Piano Bar & Restaurant located in Kootenai County, Idaho. Plaintiff Daniel  
20 Schnatter is personally affected by the Order, as are his restaurant and its customers.

21 13. Defendant Panhandle Health District is a public agency of the state of Idaho that  
22 issued the order in Kootenai County, and within the Panhandle Health District which  
23

1 encompasses the five northern counties of Idaho, and frequently meets in Kootenai County,  
2 Idaho.

3 14. Defendant Allen Banks, Ph.D., is a member of the Board of the Panhandle Health  
4 District who participated in the illegal meetings and is sued in his official capacity.

5 15. Defendant Glen Bailey is a member of the Board of the Panhandle Health District  
6 who participated in the illegal meetings and is sued in his official capacity.

7 16. Defendant Jai Nelson, R.N., is a member of the Board of the Panhandle Health  
8 District who participated in the illegal meetings and is sued in her official capacity.

9 17. Defendant Marlow Thompson is a member of the Board of the Panhandle Health  
10 District who participated in the illegal meetings and is sued in his official capacity.

11 18. Defendant Mike Fitzgerald is a member of the Board of the Panhandle Health  
12 District who participated in the illegal meetings and is sued in his official capacity.

13 19. Defendant Richard McLandress, M.D., is a member of the Board of the Panhandle  
14 Health District who participated in the illegal meetings and is sued in his official capacity.

15 20. Defendant Walt Kirby is a member of the Board of the Panhandle Health District  
16 who participated in the illegal meetings and is sued in his official capacity.

17 **III. JURISDICTION AND VENUE**

18 19. This action arises under the Open Meetings Law of the state of Idaho, Idaho Code  
19 § 74-201 *et seq.*

20 20. Idaho Code § 74-201 establishes that as a matter of state policy in Idaho, “the  
21 formation of public policy is public business and shall not be conducted in secret.”

22 21. Idaho Code § 74-203 requires that meeting of a “governing body of a public agency”  
23 be open to the public.

1       22.     A “public agency” is defined in § 74-202(4) to include:

2     “(a) Any state board, committee, council, commission, department, authority,  
3     educational institution or other state agency created by or pursuant to statute or  
4     executive order of the governor, other than courts and their agencies and divisions, and  
5     the judicial council, and the district magistrates commission;

6     (b) Any regional board, commission, department or authority created by or pursuant  
7     to statute.”

8       23.     The Panhandle Health District is one of seven health districts created by Idaho  
9     Statute §39-414; that is, it was created by statute by the legislature of the State of Idaho. It is  
10    therefore a public agency per § 74-203, whether viewed as a single state board (definition “a”)  
11    or as regional board due to the state board being divided into seven districts (definition “b”).

12       24.     Idaho Code § 74-208(1) provides that, “If an action, or any deliberation or decision-  
13    making that leads to an action, occurs at any meeting which fails to comply with the provisions  
14    of this chapter, such action shall be null and void.”

15       25.     Idaho Code § 74-208(6) provides that, “Any person affected by a violation of the  
16    provisions of this chapter may commence a civil action in the magistrate division of the district  
17    court of the county in which the public agency ordinarily meets, for the purpose of requiring  
18    compliance with provisions of this act.”

19       26.     Hence, per § 74-208, Plaintiffs have standing.

20       27.     Section 74-202(1) defines “decision” to mean:

21     “any determination, action, vote or final disposition upon a motion, proposal,  
22     resolution, order, ordinance or measure on which a vote of a governing body is required,  
23     at any meeting at which a quorum is present, but shall not include those ministerial or

1 administrative actions necessary to carry out a decision previously adopted in a meeting  
2 held in compliance with this chapter.”

3 28. The “decision” at issue is one that requires one to wear a mask in public, under pain  
4 of fine and a jail sentence. Clearly that is an “order” or “ordinance” or “measure” under this  
5 statute.

6 29. Section 74-202(2) defines “deliberation” to mean:  
7 “the receipt or exchange of information or opinion relating to a decision, but shall not  
8 include informal or impromptu discussions of a general nature that do not specifically  
9 relate to a matter then pending before the public agency for decision.”

10 30. As detailed in this petition, the Board was engaged in discussions that the public  
11 could not hear. Those discussions preceded the vote to criminalize the non-wearing of a mask.  
12 On information and belief, those discussions constituted the “receipt or exchange of  
13 information or opinion relating to” the decision on how to vote on the mask requirement.

14 31. In summary, this Court has jurisdiction over this case and the authority to grant the  
15 requested declaratory relief and venue is proper under Idaho Code § 74-208(6).

#### 16 IV. FACTS

##### 17 A. The Board Violated the Open Meetings Law Act and the July 23, 2020 18 Order is Null and Void.

##### 19 i. The July 17, 2020 Special Meeting.

20 21. The District held a special meeting on July 17, 2020 (the “Special Meeting”). Not  
21 all Board members attended the Special Meeting in person; some attended via Zoom or  
22 telephone.

23 1. The District restricted the public’s ability to attend the Special Meeting.

1        2.        Upon information and belief, fewer than eighteen (18) members of the public were  
2 permitted to attend the Special Meeting in person at any one time.

3        3.        Upon information and belief, Zoom limited attendance to a maximum of five-  
4 hundred (500) persons, including any members of the Board who used Zoom to participate in  
5 the Special Meeting.

6        4.        Upon information and belief, over one-hundred (100) members of the public were  
7 present at the location of the Special Meeting but were not permitted to attend the meeting.

8        5.        The District provided one small audio monitor for the over one-hundred (100)  
9 members of the public who were ordered to wait outside.

10       6.        The District's one (1) small monitor was not able to provide sufficient amplitude  
11 across the necessary frequency spectrum to ensure that all members of the public could hear  
12 the conduct of the Special Meeting.

13       7.        Alternative means of attendance, including closed captioning, sign language, or  
14 Braille were not available.

15       8.        Members of the public who attempted to attend the Special Meeting were unable  
16 to attend and restricted from attendance by the District and Deputy Sheriffs. See again attached  
17 Declaration of Paul Herndon, Declaration of Miste Gardner, Declaration of Bethany Fonda,  
18 and Declaration of Grace Bauer, all of which are attached as exhibits and incorporated herein  
19 by reference.

20       9.        Members of the public who attempted to attend the meeting via Zoom were unable  
21 to attend due to the five-hundred (500) person limit of the Zoom platform. No alternative  
22 telecommunications devices were available for public attendance. See again attached  
23 Declaration of Paul Herndon, Declaration of Miste Gardner, Declaration of Bethany Fonda,

1 and Declaration of Grace Bauer, all of which are attached as exhibits and incorporated herein  
2 by reference.

3 10. During the Special Meeting, the face covering mandate issue and Order was  
4 discussed and then tabled.

5 **ii. The July 23, 2020 Regular Meeting.**

6 11. The Board took up the tabled discussion and deliberation referenced in paragraph  
7 31 regarding the mask mandate and Order during the July 23, 2020 meeting (the “Regular  
8 Meeting”).

9 12. During the Regular Meeting, members of the public and members of the Board  
10 attended the meeting in person and via Zoom or telephone.

11 13. The District restricted in-person attendance to fewer than eighteen (18) members  
12 of the public and had signs stating the same posted in the meeting location at the time of the  
13 meeting.

14 14. The District utilized Zoom and telephone to accommodate the non-physical  
15 attendance of the public and members of the Board at the Regular Meeting.

16 15. One member of the Board, Jai Nelson, attended the Regular Meeting via Zoom and  
17 one member of the Board, Walt Kirby, attended the Regular Meeting via telephone.

18 16. Upon information and belief, over two-hundred (200) members of the public  
19 attempted to attend the Regular Meeting in person but were denied access. See again attached  
20 Declaration of Paul Herndon, Declaration of Misty Gardner, Declaration of Bethany Fonda,  
21 and Declaration of Grace Bauer, all of which are attached as exhibits and incorporated herein  
22 by reference.

23



1 17. The communications among the members of the Board at the Regular Meeting were  
2 not audible to the public attending the Regular Meeting in person or via Zoom. See again  
3 attached Declaration of Paul Herndon, Declaration of Miste Gardner, Declaration of Bethany  
4 Fonda, and Declaration of Grace Bauer, all of which are attached as exhibits and incorporated  
5 herein by reference.

6 18. The communications among the members of the Board at the Regular Meeting were  
7 not audible to other members of the Board attending the Regular Meeting in person, via Zoom,  
8 or telephone.

9 19. The Video shows how members and the public were not able to hear the conduct  
10 of the meeting at 1:30:20 when the Board took a recess to reconnect Walt Kirby who was  
11 apparently disconnected for an unknown period of time during discussion and deliberation of  
12 the mask mandate.

13 20. The Video shows the Board Chair having difficulty speaking into the microphone  
14 at 1:52:20.

15 21. At 2:07:30 of the Video, Board member Walt Kirby states again that he is unable  
16 to hear.

17 22. At 2:09:30 of the Video, Walt Kirby addressed the Chair of the Board and  
18 commented that the audio is so lousy that he wants to immediately move for an up or down  
19 vote. Walt Kirby was calling in via cell phone (the “cell phone”) and was not connected to any  
20 of the authorized District telecommunications devices. The cell phone was not routed to Zoom,  
21 the authorized publicly available telecommunications device, or to each individual member of  
22 the Board.

23

1 23. The Board’s deliberation was so inaudible that the Board then continues to debate  
2 what Walt Kirby’s motion actually stated for several minutes and the Board Chair had to restate  
3 Walt Kirby’s motion. See Video at 2:09:30.

4 24. Upon information and belief, Walt Kirby’s cell phone could not be heard by  
5 members of the public in attendance in person.

6 25. Walt Kirby’s cell phone was not continuously transmitting to Board member Jai  
7 Nelson’s Zoom.

8 26. Walt Kirby’s cell phone was not continuously transmitting to members of the  
9 public who were not permitted to attend in person over any authorized telecommunications  
10 device.

11 27. Walt Kirby’s cell phone was not continuously audible to each member of the Board.

12 28. At 2:13:00 of the Video, a man whose identity is unknown (the “man”) is sitting  
13 by Marc Lyons, District legal counsel, holding the cell phone via which Walt Kirby was  
14 attending the Regular Meeting. Upon information and belief, the Chair begins to speak but the  
15 man holding the cell phone is not close enough to the chair for Walt Kirby to hear.

16 29. The cell phone was not an effective or lawful telecommunications device and failed  
17 to pick up the entire Board’s deliberation and deliver it to the members of the Board or to the  
18 public.

19 30. The Board Chair then improperly replaced Walt Kirby’s motion, which was on the  
20 table, with District legal counsel’s motion by stating, “The motion that our attorney has drafted.”  
21 See Video at 2:14:00.

1 31. Walt Kirby then appears to state that he could not clearly hear the District legal  
2 counsel even though the cell phone was within several inches of the District legal counsel's  
3 face while counsel recited the pre-authorized motion.

4 32. The Chair of the Board asked Dr. McLandress if Dr. McLandress had a copy of the  
5 District legal counsel's motion. See Video at 2:14:00.

6 33. Dr. McLandress could not hear Walt Kirby's motion and stated that he could not  
7 hear Walt Kirby at 2:14:15.

8 34. Upon information and belief, the Chair violated the Board's procedural rules and  
9 replaced Walt Kirby's motion (that was then on the table) with Dr. McLandress's motion that  
10 was drafted by Marc Lyons, District legal counsel and was created prior to the Regular Meeting  
11 and pre-approved by the Board outside of an open meeting.

12 35. Upon information and belief, the District further violated open meeting laws when  
13 the Chair of the Board and other members of the board discussed and decided to direct Marc  
14 Lyons, District legal counsel, to draft a motion to adopt a mandate, directed Marc Lyons to  
15 draft the proposed mandate, and reviewed and approved the proposed draft mandate outside  
16 of an open meeting.

17 36. Upon information and belief, the Board further violated open meetings laws by  
18 receiving information regarding the mask mandate, and deliberating, discussing, and deciding  
19 to adopt the Order outside of an open meeting.

20 **COUNT I:**

21 **Violation of the Open Meetings Law**

22 **Idaho Code § 74-201 *et seq.***

23 37. Plaintiffs incorporate by reference all paragraphs in Sections I through IV, *supra*.

1 38. All meetings of the Panhandle Health District shall be open to the public and all  
2 persons shall be permitted to attend any meeting in person.

3 39. No statutory exception exists to restrict in-person attendance of a meeting that is  
4 not an executive session under the Open Meetings Law Act.

5 40. Telecommunications devices do not constitute presence in-person for members of  
6 the public and may only constitute presence in person for a duly elected member of the  
7 Board.

8 41. Members of the public are entitled to attend any agency meeting in person.

9 42. The Board may not restrict in-person attendance and provide for attendance  
10 through telecommunications devices in lieu of in-person attendance.

11 43. The District restricted persons from attending the Special and Regular Meetings  
12 both in person and through the use of telecommunications devices.

13 44. The District failed to provide audible communications among members of the  
14 Board.

15 45. The communications of the members of the Board were not audible to all the  
16 public attending the meeting.

17 46. These actions and failures of the District and the Board, among the other failures  
18 and breaches as plead herein and as will be discovered pursuant to discovery related to this  
19 petition, constitute violations Idaho's Open Meetings Law Act, Idaho Code § 74-201 *et seq.*,

20 47. The Order is therefore null and void.

21 48. THEREFORE, Plaintiffs respectfully pray for relief against Defendants as set  
22 forth in their prayer for relief, *infra*.

23 \\\

1 **V. PRAYER FOR RELIEF**

2 Wherefore, Plaintiffs respectfully request relief as follows:

- 3 A. That the Court declare the Order to be null and void.
- 4 B. That the Court grant such other and further relief as the Court deems equitable and
- 5 just under the circumstances.
- 6 C. Award Petitioners reasonable attorney fees pursuant to Idaho Code §§ 74-208, 12-
- 7 117, 12-120, and 12-121 or other applicable provision of law or equity.

8 Respectfully submitted this 31st day of July, 2020

9 By: BOYLES LAW, PLLC

10 /s/ D. Colton Boyles

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# Exhibit A



# Panhandle Health District

*Healthy People in Healthy Communities*

**Public Health**  
Prevent. Promote. Protect.

**Panhandle Health District**

## ORDER OF THE BOARD OF HEALTH, PANHANDLE HEALTH DISTRICT, STATE OF IDAHO

Order regarding Face Coverings

### RESTRICTION:

Individuals in Kootenai County, Idaho

THE DISTRICT BOARD OF HEALTH FOR PANHANDLE HEALTH DISTRICT HEREBY FINDS AND DECLARES AS FOLLOWS:

1. The virus that causes Coronavirus 2019 Disease ("COVID-19") has been shown to create a significant risk to the health and safety of the elderly population and other vulnerable members of the population.
2. COVID-19 is easily transmitted, especially in group settings, and it is essential that the spread of the virus be slowed to protect the ability of public and private health care providers to handle the influx of new patients and safeguard public health and safety.
3. Kootenai Health, the principal health system in Kootenai County is reporting an increase in hospital admissions for patients diagnosed with COVID-19, and has expressed concern for the hospital's ability to provide appropriate levels of care for all patients if the upward trend continues at the current rate.
4. Protection of the public health and the slowing of transmission of COVID-19 disease during the effective period of the Order would be facilitated by the use of face coverings in public places where others are present and physical distancing of 6 feet cannot be maintained.
5. An immediate danger to the public health, safety and welfare of the people of the Panhandle Health District and in particular, Kootenai County, requires the imposition of this emergency Order, which is authorized by Idaho Code§ 56-1003(7), IDAPA 16.02.10.065.09, Idaho Code§ 39-415, and Idaho Code§ 67-5247.

### ORDER AND RESTRICTIONS

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE BOARD OF HEALTH FOR THE PANHANDLE HEALTH DISTRICT:

1. That every person in Kootenai County is required to wear a face covering that completely covers the person's nose and mouth when the person is in a public place and physical distancing of 6 feet from others cannot be maintained.

A. "Public place" shall mean any place open to all members of the public without specific invitation, including but not necessarily limited to, retail business establishments, government offices, medical, educational, arts and recreational institutions, public transportation, including taxi cabs and ridesharing vehicles, outdoor public areas, including but not limited to public parks, trails, streets, sidewalks, lines for entry, exit, or service, when a distance of at least six feet cannot be maintained from any non-household member.

B. Facial coverings are not required to be worn under the following circumstances:

a. Where the individuals are immediate family members or household occupants.

b. Children under the age of two (2).

c. Persons with medical conditions, mental health condition, or disability that prevent them from wearing a face covering. A person is not required to provide documentation demonstrating that the person cannot tolerate wearing a face covering.

d. Persons who are communicating with a person who is deaf and hard of hearing, where the ability to see the mouth is essential for communication.

e. Persons, including on-duty law-enforcement officers, for whom wearing a face covering would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines.

f. Persons who are obtaining a service involving the nose, face, or head for which temporary removal of the face covering is necessary to perform the service.

g. Persons who are eating or drinking at a restaurant or other establishment that offers food or beverage service, so long as they are seated at a table and able to maintain a distance of 6 feet from persons who are not members of the same household or party. This exemption does NOT apply to entry, exit, or other movement through the facility.

h. Persons incarcerated in a jail or related facility.

i. When necessary to confirm a person's identity.

j. When local, state or federal law prohibits wearing a face covering or requires removal of a face covering.

2. This Order shall become effective immediately, and will continue to be in effect until rescinded, superseded, or amended in writing by the Board of Health.

3. Please read this Order carefully. Violation of or failure to comply with this Order could constitute a misdemeanor punishable by fine, imprisonment, or both. Idaho Code § 56-1003(7)(c).

4. If any provision of this Order or its application to any person or circumstance is held to be invalid, then the remainder of the Order, including the application of such part or provision to other persons or




circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.

5. Kootenai County and each city within must promptly provide copies of the Order as follows: (1) by posting the Order on its website, (2) by posting the Order at the Kootenai County courthouse and each city hall in Kootenai County, and (3) by providing a copy to any member of the public requesting it. The Order will also be posted on the website of Panhandle District Health.

DATED this 23rd day of July 2020

PANHANDLE HEALTH DISTRICT  
BOARD OF HEALTH

  
Chairman of the Panhandle Health  
District Board of Health