No. 22-11287

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HEALTH FREEDOM DEFENSE FUND, INC., *et al.*,

Plaintiffs - Appellees,

v.

JOSEPH R. BIDEN, JR., President of the United States, *et al.*,

Defendants - Appellants.

On appeal from the United States District Court for the
Middle District of Florida

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PLAINTIFFS-APPELLEES HEALTH FREEDOM DEFENSE FUND, INC., *ET AL.*, IN SUPPORT OF AFFIRMANCE

Andrew L. Schlafly
Attorney at Law
939 Old Chester Rd.
Far Hills, NJ 07931
(908) 719-8608
(908) 934-9207 (fax)
aschlafly@aol.com

Counsel for *Amicus Curiae*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The case number for this *amicus curiae* brief is No. 22-11287, *Health Freedom Defense Fund, Inc., et al., v. Joseph R. Biden, Jr., President of the United States, et al.*

Amicus Curiae Association of American Physicians and Surgeons is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to Eleventh Circuit Rule 26.1-1(a)(1), the undersigned counsel of record certifies that the parties', including *amici*'s, list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

Association of American Physicians and Surgeons, *Amicus Curiae*

Andrew L. Schlafly, counsel for *Amicus Curiae*.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Association of American Physicians and Surgeons

Dated: August 5, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes and Rule

Other Authorities

*Authorities primarily relied upon

IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians and Surgeons ("AAPS"), is a national association of physicians. Founded in 1943, AAPS has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has been a litigant in federal courts. *See, e.g., Cheney v. United States Dist. Court*, 542 U.S. 367, 374 (2004) (citing *Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993)); *Association of American Physicians & Surgeons v. Mathews*, 423 U.S. 975 (1975). In addition, the U.S. Supreme Court has expressly made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). Over the span of more than a decade, the Fifth and Third Circuits have expressly cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Texas v. United States*, 945 F.3d 355, 369 (5th Cir. 2019); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

[1] All parties have consented to the filing of this brief by *Amicus*. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: counsel for the *Amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *Amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

AAPS members include many who object to a mask mandate on travelers. AAPS thus has direct and vital interests in the issues presented here.

PRELIMINARY STATEMENT

Without explicit congressional authorization or its specific approval of any kind, federal agencies ("government" or "CDC") assert broad, unprecedented authority to impose a mask mandate on travelers nationwide. The intrusive burden by this on nearly all Americans in their daily lives is self-evident. Travel is a fundamental constitutional right, and yet a small group of unelected officials within government agencies demand unlimited authority to substantially burden that right by requiring nearly all to wear masks, typically ineffective ones, while in transit. The CDC has not yet attempted to reinstate its mask requirement after it expired in the wake of the ruling below amid substantial public opposition to its mandate, but on appeal the CDC demands broad authorization by this Court to reinstate a mask mandate on travelers at any time and for virtually any reason. A few like-minded officials, such as in some areas of California, sporadically demand mask mandates in an on-again-off-again manner even though widely viewed outside of government as constituting an ineffective burden.

The mask mandate imposed by the CDC was intermittent for each individual because the mask is to be taken off when "eating, drinking, or taking medication," or to verify identity, or to catch one's breathe when "feeling winded," or to speak

with anyone who is hearing impaired. *Health Freedom Def. Fund, Inc. v. Biden*, No. 8:21-cv-1693-KKM-AEP, 2022 U.S. Dist. LEXIS 71206, at *55 (M.D. Fla. Apr. 18, 2022) (quoting the Federal Register). This mask mandate did not require use of an effective mask; cheap, ineffective masks incapable of blocking the tiny Covid-19 particles were commonly worn to satisfy the mandate.

The CDC rests its sweeping assertion of authority to impose masks on the statutory term "sanitation", which the government repeats 16 times in the body of its brief. Specifically, the government relies on the statutory provision that:

> the Secretary may provide for "such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."

(Govt Br. 5, quoting 42 U.S.C. § 264(a)). This plain text of the statute merely authorizes the CDC to take sanitation measures with respect to goods, not to intrusively interfere with constitutional rights to speech and travel.

The district court below found that masks at issue in this appeal do not sanitize anything.

> The context of § 264(a) indicates that "sanitation" and "other measures" refer to measures that clean something, not ones that keep something clean. Wearing a mask cleans nothing. At most, it traps virus droplets. But it neither "sanitizes" the person wearing the mask nor "sanitizes" the conveyance. Because the CDC required mask wearing as a measure to keep something clean—explaining that it limits the spread of COVID-19 through prevention, but never contending that it actively destroys or removes it—the Mask Mandate falls outside of § 264(a).

Health Freedom Def. Fund, 2022 U.S. Dist. LEXIS 71206, at *17. On that basis the district court invalidated the CDC's mask mandate, resulting in this appeal.

The district court issued nationwide relief as this is inherently a national issue, affecting not only the plaintiffs in this case but nearly every American, including those with whom the plaintiffs would like to travel. The government argues on appeal that the court below should have "confine[d] any relief to the five individuals who identified themselves in this case." (Govt Br. 3) Under this view of the government, the CDC mask mandate should have been blocked with respect to only the plaintiffs, without relief to anyone else traveling with them or likewise objecting to the mask mandate as plaintiffs have.

STATEMENT OF THE ISSUES

Amicus AAPS fully adopts and incorporates herein the Statement of the Issues by Appellees. (Appellees Br. 6)

SUMMARY OF ARGUMENT

Mask mandates infringe on two fundamental rights: freedom of speech and freedom of travel. The ability to see another's demeanor while he is speaking is often as important as the content of what he says. Historically many American states and towns *prohibited* the wearing of masks, in order to avoid the harm they cause. *See, e.g.*, N.Y. Penal Law § 240.35(4) (predecessor enacted in 1845, then

reenacted in 1965, and then repealed amid Covid-19 in 2020). Determinations of credibility essential to courtroom trials are just as important in everyday life, as millions of decisions are made daily, based on not merely what one says, but on how he is perceived as saying it.

Whether and how government may impose a mask mandate on travelers is a substantial issue involving a major question, and the recent adoption by the Supreme Court of "major questions doctrine" requires affirming the decision below. On June 30, 2022, after Appellants filed their opening brief, the Supreme Court issued its ruling in the consolidated case of *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), and expressly embraced major questions doctrine for the first time. It requires invalidating agency decision-making on major questions in the absence of express congressional authorization. Such is the case here.

Mask mandates are more politics than science, and politics is to be sorted out in the halls of Congress rather than at a politically unaccountable administrative agency. Congress uses a time-proven process that includes public hearings, feedback by constituents, vigorous public debate, and political accountability. All of these elements are essential before a burden as draconian as a traveler mask mandate is imposed, and yet none of this exists for agency decision-making by the CDC. The Constitution protects against government controlling what people say, and likewise protects against government controlling

how people look when they say it. What is said with a slight smile can often mean something entirely different from what is said with clenched teeth. The CDC incorrectly insists that it should have immense unchecked power to decide what to allow on this, without any express congressional authorization.

As further explained by Justice Neil Gorsuch in his concurrence in *West Virginia v. EPA*, "major questions doctrine" is not new. Courts have rejected many prior agency attempts to grab breathtaking authority never authorized by Congress, as the CDC attempts here. Nothing in the relevant statute or its prior implementations remotely support the mandate that all travelers wear masks, let alone require ineffective mask-wearing. As a "major question" this is one for Congress to decide as part of the political process, not for agency employees to impose without hearings and meaningful public debate.

The *amicus* brief submitted by the AMA fails to cite or address a single legal authority. The *amicus* brief submitted by the Public Health *amici* cites only four legal precedents other than the decision below, one of which is a 1925 Georgia Supreme Court decision concerning the meaning of the word "sanitation", along with numerous citations to various dictionaries. All the *amici* in support of the government fail to address major questions doctrine and the long line of Supreme Court precedents that led to its formal adoption in *West Virginia v. EPA*.

Just as glaring is the failure by the government's *amici* to provide any justification for the travelers' mask mandate. Mask mandates failed to work during the 1918 flu pandemic, and yet the briefs submitted by the government's *amici* cite their unsuccessful use then as a reason to mandate them again. The medical briefs could have cast some scientific light on the matter at hand, but there is no science in support of requiring intermittent use of porous masks by travelers. In the briefing by the government *amici*, only one paragraph in each of their briefs even alludes to any general scientific support for a travelers' mask mandate, and those allusions do not survive scrutiny.

Finally, with respect to the nationwide relief, it is necessary because travel is not an isolated activity. People travel with friends and family, and it would be senseless to hold that merely one within such a group is free of an unauthorized mandate, while the others within the group must still comply with what is unauthorized. The nationwide scope of the relief below was proper.

ARGUMENT

I. "Major Questions Doctrine" Requires Affirmance of the Decision Below.

The recent Supreme Court decision in *West Virginia v. EPA* precludes this appeal by the government. There the Supreme Court expressly embraced "major questions doctrine," which requires congressional authorization before federal

agencies decide issues of major significance. It can hardly be doubted that the issue of requiring all American travelers to wear a mask is a "major question."

As explained further in the concurrence in *West Virginia v. EPA*, a long line of precedents by the Supreme Court has been applying major questions doctrine without using that actual name. It is understandable that the government never mentions the *West Virginia v. EPA* decision because it was rendered after the filing of its brief here, but it is a telling omission that many of the similar, older precedents are likewise not addressed by the government or its *amici*. The long line of precedents on which the recent *West Virginia v. EPA* is based compels rejection of the government's arguments on appeal here.

B. The Recent Decision by the Supreme Court in *West Virginia v. EPA* Requires Affirmance.

The express adoption of "major questions doctrine" by the Supreme Court in its recent decision of *West Virginia v. EPA* precludes this appeal by the government. Chief Justice John Roberts, writing for the 6-3 Court, explained that:

> A requirement of "clear congressional authorization," *ibid.*—confirms that the approach under the major questions doctrine is distinct.
>
> As for the major questions doctrine "label[ ]," *post*, at 13, it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we. See *Utility Air*, 573 U. S., at 324, 134 S. Ct. 2427, 189 L. Ed. 2d

> 372 (citing *Brown & Williamson* and *MCI*); *King* v. *Burwell*, 576 U. S. 473, 486, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).
> …
> Under our precedents, this is a major questions case.

West Virginia v. EPA, 142 S. Ct. 2587 (2022).

The *West Virginia v. EPA* case concerned an issue comparable in significance to Covid-19: man-made climate change and the authority of the EPA to promulgate regulations under a stated purpose of combatting it. The Supreme Court decided that it is up to Congress, not a federal agency, to decide such major questions. The Court explained:

> Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York* v. *United States*, 505 U. S. 144, 187, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). ***A decision of such magnitude and consequence rests with Congress itself***, or an agency acting pursuant to a clear delegation from that representative body.

West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (emphasis added).

Likewise here: it is not plausible that Congress gave to the CDC the sweeping authority to require, without legislative hearings and a vote in the House of Representatives, that nearly all travelers and public commuters wear masks. This is too much of a political issue to have it decided anywhere else but in

Congress. Like a nationwide transition away from coal to renewable energy, this issue whether travelers must wear a mask is for Congress to decide.

Simply put, "this is a major questions case" here at bar, as it was in this recent decision of *West Virginia v. EPA*. The Court precedents on which that precedent relied are likewise fully applicable here. The invalidation of an attempt by the FDA to regulate tobacco is conceptually similar to the case at bar. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). There, as here, public health authorities insisted that their regulation would save lives. There, as here, the authorities insisted on an expansion in their power far beyond anything they had done before. There, as here, the authorities went beyond anything expressly authorized by any statute. There the Supreme Court struck down the attempt by the FDA to expand its authority, just as this Court should affirm the reining in of CDC authority by the district court below.

In a seminal precedent relied upon by the *West Virginia* decision, *Brown & Williamson*, the Court expressly acknowledged that "[t]he agency has amply demonstrated that tobacco use, particularly among children and adolescents, ***poses perhaps the single most significant threat to public health in the United States***." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S. Ct. 1291, 1315 (2000) (emphasis added). But convincing a court that the problem being solved is "the single most significant threat to public health" is not enough to

justify an asserted expansion in agency control over the American public. Vast portions of the briefing in support of the CDC here are devoted to assertions of how important Covid-19 is. But its significance is not the issue; the scope of the authority of mere federal agencies to burden every American traveler is.

As the Supreme Court explained in *Brown & Williamson*:

> no matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, post, at 31, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "'in our anxiety to effectuate the congressional purpose of protecting the public, ***we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop***.'" *United States v. Article of Drug ... Bacto-Unidisk*, 394 U.S. 784, 800, 22 L. Ed. 2d 726, 89 S. Ct. 1410 (1969) (quoting *62 Cases of Jam v. United States*, 340 U.S. 593, 600, 95 L. Ed. 566, 71 S. Ct. 515 (1951)).

Brown & Williamson, 529 U.S. 120, 161, 120 S. Ct. 1291, 1315 (2000) (emphasis added).

Requiring everyone to wear a mask in interstate travel is far beyond any legitimate authority delegated to an agency. Even if such a mandate were justified – and it is not – then it would be up to Congress to consider enacting it. Congressional hearings would be held on the issue as part of that process, and the many valid objections to mask mandates would thereby be heard. The advocates of mask mandates would be properly questioned about their evidence and

reasoning. Congress can act very quickly and decisively as exigencies may require.

Allowing a small group of unaccountable administrators to require every American in interstate travel to wear a mask is neither democratic nor beneficial. The mask mandate was never justified by the Covid-19 pandemic, and did not bring the pandemic to an end as predicted. Many high-profile advocates of mask mandates, such as Dr. Anthony Fauci and President Joe Biden, caught Covid-19 anyway. Many who generally eschewed wearing a mask, such as Donald Trump, also caught Covid-19 but quickly recuperated as tens of millions of other Americans have. Imposition of a national mask mandate is for Congress alone to consider and decide.

B. Controlling Precedents Prior to *West Virginia v. EPA* Likewise Require Affirmance.

Justice Gorsuch recounted the many historical and compelling reasons for requiring more of an authorization from Congress than we have here, before a federal agency imposes a draconian burden such as the travelers' mask mandate. Justice Gorsuch, joined by Justice Alito, concurred in *West Virginia* as follows:

> So, for example, in *MCI* this Court rejected the Federal Communication Commission's attempt to eliminate rate regulation for the telecommunications industry based on a "subtle" provision that empowered the FCC to "'modify'" rates. 512 U. S., at 231, 114 S. Ct. 2223, 129 L. Ed. 2d 182. In *Brown & Williamson*, the Court rejected the Food and Drug Administration's attempt to regulate cigarettes based a "cryptic" statutory

> provision that granted the agency the power to regulate "drugs" and "devices." 529 U. S., at 126, 156, 160, 120 S. Ct. 1291, 146 L. Ed. 2d 121. And in *Gonzales*, the Court doubted that Congress gave the Attorney General "broad and unusual authority" to regulate drugs for physician-assisted suicide through "oblique" statutory language. 546 U. S., at 267, 126 S. Ct. 904, 163 L. Ed. 2d 748.

West Virginia v. EPA, 142 S. Ct. 2587, 2622-23 (2022) (Gorsuch, J., concurring).

In language particularly apt here, Justice Gorsuch observed that "an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority." *Id.* at 2623 (Gorsuch, J., concurring). Congress, not a federal agency acting without congressional authorization, should be crafting a response to the Covid-19 pandemic. Reliance on an archaic reference to "sanitation" in a statute enacted in 1944, nearly 80 years ago, is not enough to bootstrap authority today for a federal agency to impose unprecedented mask mandates.

As Justice Gorsuch wrote:

> [C]ourts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. As the Court puts it today, it is unlikely that Congress will make an "[e]xtraordinary gran[t] of regulatory authority" through "vague language" in "'a long-extant statute.'" *Ante*, at 18-20 (quoting *Utility Air*, 573 U. S., at 324, 134 S. Ct. 2427, 189 L. Ed. 2d 372). Recently, too, this Court found a clear statement lacking when OSHA sought to impose a nationwide COVID-19 vaccine mandate based on a statutory provision that was adopted 40 years before the pandemic and that focused on conditions specific to the workplace rather than a problem faced by society at large. See *NFIB* v. *OSHA*, 595 U. S., at

> ___, 142 S. Ct. 661, 211 L. Ed. 2d 448 (GORSUCH, J., concurring) (slip op., at 3).

West Virginia v. EPA, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring).

This concurrence by Justice Gorsuch, as joined Justice Alito, emphasized that:

> "[O]blique or elliptical language" will not supply a clear statement. ...; see *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U. S. 119, 139, 125 S. Ct. 2169, 162 L. Ed. 2d 97 (2005) (plurality opinion) (cautioning against reliance on "broad or general language").

West Virginia v. EPA, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring).

The government and its *amici* fail to cite these cases, let alone distinguish them. Arguably, the government has waived this issue of major questions doctrine by failing to address the substance of the doctrine, after the district court expressly relied on it. See *Health Freedom Def. Fund, Inc. v. Biden*, 2022 U.S. Dist. LEXIS 71206, at *30 ("But there is an independent bar to the government's invocation of *Chevron*: the major questions doctrine.").

II. The Mask Mandate Is Unjustified Scientifically.

Like the government's brief they support, the two *amicus* briefs by the American Medical Association (AMA) and the Public Health and Public Health Law Experts fail to confront the basic issue: mask mandates on travelers have not limited the spread of Covid-19, for obvious reasons that neither the government nor its *amici* ever come to terms with. Intermittent use of masks, which is how

travelers use them, is useless because the virus spreads while travelers eat, drink, and otherwise take off their masks. Moreover, the masks commonly used are porous to the Covid-19 virus, as Dr. Fauci implicitly concedes. *See infra* p. 23.

The burden is on the government on this appeal to provide some justification for the travelers' mask mandate, and yet the government and its *amici* fall short of satisfying their burden. Without any justification presented to this Court by Appellants' for the travelers' mask mandate, it cannot possibly be upheld as a rational or reasonable exercise of the CDC's authority.

A. The Government's Brief Completely Fails to Support the Mask Mandate.

The Court need not do a deep dive into science to conclude that the government has not satisfied its burden on appeal for its traveler's mask mandate. In its brief the government repeats the word "spread" 32 times, yet never justifies its bald assertion that a mandate for intermittent use of porous masks somehow blocks the spread of Covid-19 in any significant way. People have always been free to wear industrial-grade masks to protect themselves, and what the government fails to show is that requiring a reluctant traveler to intermittently wear a porous mask confers any benefit on those around him. The uncomfortable traveler inevitably takes off his mask to eat, drink, breathe, and communicate, and thereby transfers into the surrounding air whatever germs he has. Moreover, the

mask mandate never required the wearing of an industrial-grade mask that would block the transmission of the sub-microscopic Covid-19 virus particles. The CDC mask mandate lacked medical justification, and cannot withstand a merely cursory logical or scientific analysis.

In each of the 32 references to "spread" in its appellate brief, the government fails to cite support for its assertion that a wear-any-type-of-mask and take-it-off to eat, drink, or breathe mandate has any helpful effect on the existence of a sub-microscopic virus in the surrounding air. The CDC compares its mask mandate to the practice of surgeons wearing masks in an operating room, but in that situation the surgeons do not take their masks off to eat, drink, or breathe. Once that is done, presumably the benefits of mask-wearing are lost. The government misplaces reliance on the 5-4 decision upholding mandatory vaccination of health care workers, which is a context nothing like ordinary Americans engaging in routine travel. *See Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) ("[U]nprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have," in that case requiring vaccination of health care workers.).

Proper judicial deference is not blind deference, and to be successful on appeal the government has do more than merely argue, in essence, "because the CDC said so." Where, as here, there are strong political overtones – candidate

Biden supported mask mandates while candidate Trump opposed them – the need for the CDC to justify a draconian burden is heightened. A political agenda should not be allowed to result in a senseless infringement by a federal agency on constitutional rights. On an appeal, the appellant bears the burden of doing more than merely making superficial assertions without support. Unscientific pronouncements by the CDC that infringe on constitutional rights – here the rights to free speech and travel – are not worthy of any deference by a court of law.

The government does not cite to a single relevant medical or scientific authority in its brief, and its less than a dozen citations to secondary sources include dictionaries, CNN, a turtle and other irrelevant regulations, and circular citations back to the CDC itself. Several of the government's own citations actually weigh against the CDC's mask mandate. For example, the government relies on an article in Yale Medicine entitled, "Why Doctors Wear Masks," *Yale Medicine*, for the proposition that "doctors have been wearing ***medical-grade N95 or surgical masks*** ... during surgeries or patient interactions as part of their daily routines, for many decades." (Govt Br. 14, emphasis added)[2] But the CDC's mask mandate for travelers does not require continuous use of effective masking as done in surgery, and instead requires only intermittent use of ineffective porous masks.

[2] Why Doctors Wear Masks, *Yale Medicine* (Sept. 1, 2020) https://perma.cc/TE77-8PBH (viewed July 28, 2022).

The government further cites as an authority *CNN*, which asserted that "the United States ... led the world in mask wearing" to prevent the spread of the 1918 flu pandemic. (*Id.*, citing Paul French, "In the 1918 Flu Pandemic, Not Wearing a Mask Was Illegal in Some Parts of America. What Changed?" *CNN* (Apr. 4, 2020)).[3] In fact, as widely acknowledged today, even by vocal supporters of mask mandates, the wearing of masks did ***not*** prevent the spread of the 1918 pandemic:

> Experts reviewing evidence from 1918 concluded that flu masks failed to control infection.

E. Thomas Ewing, "Flu Masks Failed In 1918, But We Need Them Now," *Health Affairs Forefront* (May 12, 2020).[4] The utter failure of mask mandates to work in 1918 cannot in any way support an imposition of a mask mandate by the CDC now.

Perhaps the reason why the government fails in its brief to cite any substantive justification for a public mask mandate is that the evidence stands against it. Sweden rejected mask mandates (and lockdowns) and fared better than the United States with respect to Covid-19. "[T]he pandemic wasn't as bad [in Sweden] as it was in other regions, such as California." Madeleine Brand, "Sweden refused to lock down during the pandemic. How is the country faring

[3] https://perma.cc/WL95-2WDF (viewed July 28, 2022).
[4] https://www.healthaffairs.org/do/10.1377/forefront.20200508.769108/ (viewed July 16, 2022).

now?" *KCRW* (Apr. 15, 2021).[5] Indeed, Sweden has performed very well in addressing Covid-19, ranking as only 56th in the world in Covid mortality per capita, while the wealthy United States is 17th highest in mortality per capita with all of its mask mandates.[6]

Multiple recent articles about public mask mandates in the United States confirm that they do not work. Eric Ting, "Do mask mandates work? Bay Area COVID data from June says no," SFGATE (June 29, 2022).[7] Based on another review of data, "Philadelphia to lift mask mandate less than a week after it was reinstated."[8] As concluded by the Editorial Board of the *Raleigh News & Observer*, "whether we like it or not, mask mandates are not really working. People take them off to eat and keep them off, whether on planes or at a restaurant." The Editorial Board, "A sensible shift away from COVID mask mandates," *Raleigh News & Observer* (Apr. 28, 2022).[9] Moreover, as the latter

---

[5] https://www.kcrw.com/news/shows/press-play-with-madeleine-brand/edu-coronavirus-crime-food/sweden-covid (viewed July 28, 2022).

[6] https://www.worldometers.info/coronavirus/ (viewed July 6, 2022).

[7] https://www.sfgate.com/coronavirus/article/bay-area-mask-mandate-results-17271294.php (viewed July 28, 2022).

[8] Elizabeth Wolfe, "Philadelphia to lift mask mandate less than a week after it was reinstated," CNN (Apr. 22, 2022). https://www.cnn.com/2022/04/22/us/philadelphia-rescinds-mask-mandate/index.html (viewed July 28, 2022).

[9] https://www.newsobserver.com/opinion/article260672382.html#storylink=cpy (viewed July 28, 2022).

article observed about a video that went viral, "The crowd cheered" when told by a JetBlue pilot that they did not have to wear masks on the airline.[10]

Without citing any justification for a travelers' mask mandate, the government is on no firmer ground than if it argued for the authority to prohibit every American from speaking, in order to stop spreading germs. Just as such an unjustified mandate should fail in court, the government's mask mandate was appropriately vacated below.

B. The *Amicus* Briefs Likewise Fail to Support the Mask Mandate.

The two *amicus* briefs submitted in support of the government do not fill in this gap of no justification for the travelers' mask mandate. Both briefs overuse the term "spread" and talk about how masking was used for the 1918 pandemic, but fail to recognize that the masking was unsuccessful then, as it has been today. "Mask mandates and use are not associated with slower state-level COVID-19 spread during COVID-19 growth surges," concluded a major study of the first year of the pandemic. Damian D. Guerra, Daniel J. Guerra, "Mask mandate and use efficacy in state-level COVID-19 containment," medRxiv (May 18, 2021).[11]

Amicus American Medical Association (AMA) fails to address the copious evidence against any effectiveness of mask mandates. Instead, the AMA relies on

[10] *Id.*

[11] https://www.medrxiv.org/content/10.1101/2021.05.18.21257385v1.full (viewed July 25, 2022).

a mere modeling study, based on hypothetical scenarios rather than observed data, to argue that universal uninterrupted use of N95 or other airtight masks can help reduce infection by an airborne virus: "Data from modeling studies have further demonstrated that 'universal masking is the most effective method for limiting airborne transmission of SARS-CoV-2,'" the AMA asserts. (AMA Br. 9, quoting Gholamhossein Bagheri et al., *An Upper Bound on One-to-One Exposure to Infectious Human Respiratory Particles*, 118 PNAS e2110117118, at 7 (2021)).

But that hypothetical study (not observed data) failed to factor in what travelers actually do. Travelers obviously take off their masks to eat, drink, breathe, speak, adjust their masks, and simply enjoy a break from the nuisance. Travelers do not behave as surgeons do in highly regimented operations having brief duration. Moreover, the porous masks intermittently worn by travelers are typically not the effective masks worn in studies cited by the AMA.

"Put simply, if an infected person wears a mask, it reduces their ability to infect others," the AMA baldly asserts without any reference to a data-based study to confirm this with respect to travelers, the types of masks they wear, and the inevitable interruptions to that mask-wearing. (AMA Br. 9) Actual studies show the opposite of what the AMA asserts.[12]

[12] Johns Hopkins medical school Professor Marty Makary M.D., M.P.H. and Florida Department of Health consulting epidemiologist Tracy Beth Høeg M.D.,

The *amici* brief by Public Health *et al.* fails to provide what the AMA brief lacks. The Public Health brief relies heavily on the Supreme Court decision to terminate the CDC's moratorium on evictions, but that decision was based on the same reason that the travelers' mask mandate is invalid: Congress did not authorize it. "If a federally imposed eviction moratorium is to continue, ***Congress must specifically authorize it***." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (emphasis added).

As to the imaginary effectiveness of travelers' mask mandates, the Public Health *amici* cite in a circular manner back to the AMA, the CDC, and the World Health Organization. "[T]he epidemiologic support for masking's efficacy in minimizing COVID-19 infections in crowded spaces is extensive," the Public Health *amici* declare. But a close look at the two articles cited by the Public Health *amici* reveals they are inconclusive. Their first citation reviewed merely 6 studies in 4 countries, and could only conclude that "that wearing a mask ***could*** reduce the risk of COVID-19 infection." Yanni Li et al., "Face Masks to Prevent

---

Ph.D., recently wrote about mask mandates for schools: "First, the [federal agencies] demanded that young children be masked in schools. On this score, the agencies were wrong. Compelling studies later found schools that masked children had no different rates of transmission. And for social and linguistic development, children need to see the faces of others." Makary & Høeg, "U.S. Public Health Agencies Aren't 'Following the Science,' Officials Say," *Common Sense* (July 14, 2022) https://www.commonsense.news/p/us-public-health-agencies-arent-following (viewed July 25, 2022).

Transmission of COVID-19: A Systematic Review and Meta-Analysis," 49 Am. J. Infection Control 900 (2021) (emphasis added). That "could" speculation hardly justifies requiring everyone to wear intermittently porous masks. Scrupulous wearing of an N95 mask by an individual may protect the mask-wearer against catching the virus, but that says nothing about requiring everyone to wear masks that are predominantly not of the expensive, high-quality N95 type. It was not until January 2022 that the CDC began recommending that people wear N95 masks,[13] and in July 2022 Dr. Fauci began stressing the importance of that compared with the porous masks typically worn:

> Right now, we are very, very clear that masks do work in prevention of acquisition and transmission. ***But you've got to get a well-fitted mask that is of a high quality***. And the two we know are high quality are N95 and KN95.[14]

These effective, but impractical, masks were never mandated for travelers.

The second article cited by the Public Health *amici* is, alas, authored by an official at CDC itself, whose order is at issue here, and was published in the journal of the AMA, which filed an *amicus* brief on the side of the government. *See John*

---

[13] *Reuters*, "CDC recommends Americans wear 'most protective mask you can'" (Jan. 15, 2022) https://www.jpost.com/breaking-news/article-692575 (viewed July 28, 2022).

[14] Robby Soave, "Anthony Fauci Says If We Could Do It Again, COVID-19 Restrictions Would Be 'Much, Much More Stringent'" (July 25, 2022) https://reason.com/2022/07/25/anthony-fauci-interview-covid-restrictions-masks/ (emphasis added, viewed July 28, 2022).

T. Brooks et al., Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2, 325 JAMA 998 (2021).[15] This is akin to citing oneself as an authority. The article defectively refers to an extensive study in Denmark about masking that was "inconclusive", while additional studies included in the table in that AMA-published article are riddled with flaws. The studies focus on the benefits of mask-wearing on the person who wears the mask, not on benefits of mask-wearing to others which is the premise of the travelers' mask-wearing ban. In the first study cited in the article's table, only half of the mask-wearing visitors to a hair salon, where encounters are briefer than on an airplane flight and thus not indicative of traveling, were followed up on. School settings, as discussed further below, are far more indicative of traveling scenarios and the school studies show no benefit to mask-wearing.

C. Studies Show that Mask Mandates Do Not Work.

"Our findings contribute to ***a growing body of literature*** which suggests school-based mask mandates ***have limited to no impact on the case rates of COVID-19*** among K-12 students." Neeraj Sood, Shannon Heick, Josh Stevenson, Tracy Høeg, "Association between School Mask Mandates and SARS-CoV-2 Student Infections: Evidence from a Natural Experiment of Neighboring K-12

[15] https://jamanetwork.com/journals/jama/fullarticle/2776536 (viewed July 28, 2022).

Districts in North Dakota" *Research Square* (July 1, 2022) (emphasis added).[16] Led by a University of Southern California researcher, the "study took advantage of a unique natural experiment of two adjacent K-12 school districts in Fargo, North Dakota, one which had a mask mandate and one which did not in the fall of the 2021-2022 academic year." *Id.* There was no difference in impact from the use of a mask mandate in one of the schools compared with its non-use in the adjacent school district.

An eminent infectious diseases physician with the Australian National University, Professor Peter Collignon, points out that Covid-19 is contagious through exposure of eyes, and thus there is a lack of justification for mask mandates, which continue to exist in Australia but are widely ***unenforced***. "Your eyes are also a good portal for introducing infection into your respiratory tract," Prof. Collignon observed.[17] Similarly, Dr. Monica Gandhi of the University of California, San Francisco (UCSF) recommended that mask mandates be eliminated throughout the United States. "Most well-done studies evaluating mask mandates

[16] https://www.researchsquare.com/article/rs-1773983/v1 (viewed July 20, 2022).
[17] Peter Vincent, "Top Australian professor says it's unlikely mask mandates work to stop the spread of the Omicron Covid variant - and explains how you can protect yourself from the virus," *Daily Mail* (June 30, 2022) https://www.dailymail.co.uk/news/article-10967731/Covid-19-Australian-professor-Peter-Collignon-says-mask-mandates-DONT-work-stop-Omicron.html (viewed July 28, 2022).

do not show an association between mask mandates and the containment of spread or hospitalizations," she observed.[18]

D. Mask Mandates Are Political, Not Scientific, and Thus Should Be Addressed by Congress Rather than by a Federal Agency.

The inherently political nature of mask mandates is obvious from a glance at which jurisdictions have prohibited them: "Several states, including Florida, Iowa, Montana, Tennessee and Texas, have moved via legislation or executive action to prevent local governments and school districts from doing so."[19] These states share common views about freedom, which underscores how this issue of travelers' mask-wearing is more a political one for Congress than for an agency.

III. The Nationwide Scope of the Relief Should Be Affirmed, or the Issue Declared Moot.

This issue does not lend itself to piecemeal litigation. The constitutional rights of freedom of speech and travel include rights to hear and be visited.

The government proposes limiting the relief from the decision below to only the plaintiffs in this case. But these plaintiffs have family members and friends, and there are many others who should not continue to be subjected to an unjustified mask mandate while the plaintiffs' constitutional rights to free speech

---

[18] *Id.*

[19] AARP, "State-by-State Guide to Face Mask Requirements" https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html (emphasis added, viewed July 28, 2022).

and travel are restored. Once a traveler's right not wear a mask is recognized, it is inherent in that ruling that the traveler has the right to receive unrestrained communications from other travelers preferring not to wear a mask.

Just as a full internet experience requires protecting the right of nearly everyone to access it, likewise for a full travel experience. Moreover, the decision by government not to extend its own objectionable rule arguably renders the scope of the relief moot, as its scope is no longer a live controversy suitable for adjudication on appeal. If and when government ever attempts to revive its mask mandate, only then should the scope of the relief entered against it be considered a justiciable element of this case or controversy.

CONCLUSION

For the foregoing reasons and those stated in Appellees' brief, the decision below should be affirmed.

Respectfully submitted,

/s/ Andrew L. Schlafly

Andrew L. Schlafly
Attorney at Law
939 Old Chester Rd.
Far Hills, NJ 07931
Phone: (908) 719-8608
Fax: (908) 934-9207
Email: aschlafly@aol.com

Dated: August 5, 2022

Counsel for Amicus Curiae Association of American Physicians & Surgeons

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32 because:

1. This brief has been prepared using Times New Roman 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This brief complies with FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains a total of 6,454 words, excluding material not counted under Rule 32(f).

Dated: August 5, 2022

s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amicus Curiae Association of American Physicians and Surgeons

CERTIFICATE OF SERVICE

I hereby certify that, on August 5, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amicus Curiae Association of American Physicians and Surgeons