No. 22-11287

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HEALTH FREEDOM DEFENSE FUND, 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, Tampa Division
(Case No. 8:21-cv-01693) (Judge Kathryn Kimball Mizelle)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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August 8, 2022

Health Freedom Defense Fund, et al. v. Joseph R. Biden, Jr., et al.
No. 22-11287

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus curiae Washington Legal Foundation certifies under Eleventh Circuit Rule 26.1.1 that, besides those identified in Appellants', Appellees', and other *amici*'s certificates of interested persons, the following are interested persons:

Andrews, Cory L. (counsel for *amicus*);

Masslon II, John M. (counsel for *amicus*); and

Washington Legal Foundation (*amicus*).

Washington Legal Foundation is a nonprofit, tax-exempt corporation organized under § 501(c)(3) of the Internal Revenue Code; it has no parent corporation, issues no stock, and no publicly held company enjoys a 10% or greater ownership interest.

Dated: August 8, 2022

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STATEMENT OF THE ISSUES

1. Whether the Centers for Disease Control and Prevention exceeded its statutory authority in response to the COVID-19 pandemic.

2. Whether the CDC's mask mandate for public transportation is arbitrary and capricious.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has appeared as *amicus* to oppose agency overreach during the COVID-19 pandemic. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022) (*per curiam*).

WLF's Legal Studies Division has also published papers by outside experts on the government's need to comply with constitutional requirements during a pandemic. *See* Wendy Lumish et al., *Preserving Fair-Trial Rights in the Time of COVID and Beyond*, WLF LEGAL

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

BACKGROUNDER (Mar. 4, 2021). WLF believes that the Constitution does not disappear in times of crisis. Rather, constitutional protections are most important when leaders are tempted to transform the United States into a nation whose citizens have only paper rights.

INTRODUCTION

Sometimes, silence speaks louder than words. *See Geowaste of Georgia, Inc. v. Tanner*, 875 F. Supp. 830, 833 (M.D. Ga. 1995). What goes unsaid in the government's brief speaks louder than the brief itself. The government could have filed a 13,500-word opening brief. *See* Fed. R. App. P. 32(a)(7)(B). But the brief it filed here is a mere 7,100 words. *See* Gov't Br. at 35.

Why would the government forgo nearly half its word limit in a case of this importance? The answer is simple: this appeal is less about correcting the District Court's alleged errors and more about giving President Biden and the CDC political cover. If the goal were to win reversal, the Department of Justice's highly skilled Civil Appellate attorneys would have launched a full-fledged assault on the District Court's order. But like the Allies' ruse at Pas de Calais before the D-Day

invasion, Civil Appellate's attack on the District Court's order is a mere decoy.

It's no surprise that the government has not dedicated significant resources to this battle. The Supreme Court's recent decisions about the limits of federal power during the COVID-19 pandemic confirm that there is no authority for the CDC's actions. So why waste resources on a case like this one when there are other important matters in which the government at least has a chance at winning?

The arguments made in the government's brief are not sanctionable. But that is the point. Civil Appellate's staff could muster only half of the government's permitted word count without crossing that line. This Court should not only reject the government's specious arguments, it should try to prevent further government actions that lack any basis in law or fact. Otherwise, citizens will have to continue to litigate to fight these illegal actions, and the federal judiciary will have to intervene to maintain the rule of law. The Court should do more than just affirm; it should discourage future government overreaches.

STATEMENT OF THE CASE

In late 2019 or early 2020, COVID-19 crossed the Pacific and arrived in America. *See* Spencer Kimball & Nate Rattner, *Two years since Covid was first confirmed in U.S., the pandemic is worse than anyone imagined*, CNBC (Jan. 21, 2022), https://cnb.cx/3c97saR. At first, there was little concern about this new illness. *See id.* But in March 2020, things turned on a dime. Soon, people were afraid of contracting the virus and began changing their day-to-day behavior. *See, e.g.*, David Close et al., *NBA suspends season after Jazz center Rudy Gobert tests positive for coronavirus*, CNN (Mar. 21, 2020), https://cnn.it/3IBmzGi. Then the government got involved.

While some European countries let the virus run its course, American public health officials decided to "flatten the curve" by asking people to stay at home for two weeks. *See* Judy Ward, *Two weeks to flatten the curve turned into 52 and counting*, PennLive (Mar. 17, 2021), https://bit.ly/3z3OP18. The public health experts insisted that masks did not work and implored Americans to "STOP BUYING MASKS!" Deborah Netburn, *A timeline of the CDC's advice on face masks*, L.A. Times (July 27, 2021), https://lat.ms/3PtiI05. These same experts also told Americans

to rarely leave home. Some state and local governments made it a crime to leave home in most cases. *See* Jennifer Kates, *Stay-At-Home Orders to Fight COVID-19 in the United States: The Risks of a Scattershot Approach*, Kaiser Family Found. (Apr. 5, 2020), https://bit.ly/3aBxinF.

Soon, however, the public health officials changed their tunes. They decreed that masking was necessary in public; it did not matter whether you were walking alone along a vacant shoreline at the beach or in a crowded room, everyone had to wear a mask. *See* Netburn, *supra*. The CDC, whose guidance has shifted more times since March 2020 than anyone can count, then mandated masks on public transportation. It issued this order despite lacking statutory authority to do so. After the order was extended many times, Plaintiffs sued. The District Court set aside the order and the government now appeals.

SUMMARY OF ARGUMENT

I.A. For 235 years, the Executive Branch's first inclination during times of emergency has been to grab power to deal with the emergency. Sometimes, that meant setting aside constitutional provisions that interfered with the government's aims. The Supreme Court, however, often rebuffed those attempts. The Court has repudiated the few cases

that let the government suspend constitutional rights during emergencies.

B. Throughout the COVID-19 pandemic, the CDC ignored the bounds of its statutory authority. Rather than limit its directives to what Congress authorized, the CDC issued directives regulating every part of our nation's economy. The Supreme Court has recently rejected these attempts at circumventing the Constitution's requirements and began enjoining the unconstitutional government actions.

II. Even if the CDC had statutory authority to order masks on public transportation, its order was arbitrary and capricious. The science shows that mask mandates do not work. Rather than force people to wear well-fitting N95 masks at all times, the order allows people to wear poor-fitting cloth masks just some of the time. That is why those areas with mask mandates saw no decrease in COVID-19 transmission compared to localities without mask mandates.

This fits with the previous science. Even before the COVID-19 pandemic, there was substantial research into the effectiveness of mask mandates in stopping the spread of respiratory illnesses. Nearly all those

studies found that mask mandates don't work. So it comes as no surprise that the COVID-19 mask mandates failed.

ARGUMENT

I. EMERGENCIES DO NOT PAUSE CONSTITUTIONAL REQUIREMENTS.

A.1.i. During times of emergency, the Constitution's requirements do not disappear. In April 1952, President Truman "issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). The government argued "that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers." *Id.*

The Court soundly rejected that attempt at suspending constitutional requirements during an emergency. As it said, "[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice." *Youngstown Sheet & Tube*, 343 U.S. at 589. In other

words, the Founders did not put a clause in the Constitution that suspends its protections during emergencies.

The government once again asks this Court to ignore the Constitution's separation of powers and reverse the District Court's decision. As in *Youngstown Sheet & Tube*, the Constitution is clear about who makes laws—Congress. It has declined to empower the CDC to issue orders like the one at issue here. This Court should follow the Supreme Court's lead and reject this latest attempt at ignoring the Constitution's requirements.

ii. More recently, after the September 11 attacks, the government detained a United States citizen as an enemy combatant. When his father petitioned for a writ of habeas corpus on his behalf, the government argued that he was not entitled to normal due-process protections. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (citation omitted). The Court soundly rejected that argument.

As the Court said, even "the circumstances of war" cannot justify suspending the Constitution's requirements. *Hamdi*, 542 U.S. at 530. In other words, the existence of an emergency does not mean that constitutional rights disappear. Rather, it is during times of emergency

that constitutional rights are most important because that is when the government is most likely to exercise arbitrary and capricious power. This Court should not suspend the separation of powers here.

2. Protecting the separation of powers is as important as protecting civil liberties. "The ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 714 (D.C. Cir. 2008) (Kavanaugh, J. dissenting), *rev'd*, 561 U.S. 477 (2010) ("[T]he separation of powers protects not simply the office and the officeholders, but also individual rights."). In other words, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

Here a decision reversing the District Court's well-reasoned opinion would erode civil liberties. Once the Executive Branch can act as a legislature, it can exercise that power to trample on individual rights. This includes freedom of speech, freedom of religion, and the right to be free from unreasonable searches and seizures. That is what the

government tried to do in *Hamdi*. This Court should not bless the government's COVID-19 overreach. Rather, it should affirm the District Court's well-reasoned opinion setting aside the CDC's mask mandate.

3.i. True, the Supreme Court has made mistakes in the past. During World War I, it affirmed convictions for distributing flyers that advocated against the war and military conscription. *See generally Schenck v. United States*, 249 U.S. 47 (1919). In rejecting the defendants' First Amendment challenge, the Court said that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.* at 52. In other words, the Court held that there are lesser constitutional rights during wartime than in peacetime.

Fifty years later, the Court retreated from *Schenck*'s holding. An Ohio defendant was convicted for similar advocacy and lower courts affirmed the conviction, relying on *Schenck*-era decisions. This time the Court reversed the conviction and held that government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless

action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (footnote omitted). Notably absent from this holding are any caveats about times of emergency or war. In other words, the Court retreated from treating rights differently in wartime than in peacetime.

ii. The Court made the same mistake in *Korematsu v. United States* by holding that a "grave[and] imminent danger to the public safety" could "justify" depriving Japanese Americans of their constitutional rights and ignoring separation-of-powers principles. 323 U.S. 213, 218 (1944). The Court said it could not "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal" Japanese Americans. *Id.* (quotation omitted). It did so despite recognizing that "[c]ompulsory exclusion of large groups of citizens from their homes" was "inconsistent with our basic governmental institutions." *Id.* at 219-20.

Four years ago, the Supreme Court recognized "what [wa]s already obvious: *Korematsu* was gravely wrong the day it was decided, [and] has been overruled in the court of history." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Although only in dicta, the Supreme Court expressed its

view that *Korematsu* is no longer good law. So unsurprisingly the Court has returned to ensuring that the Constitution is not suspended during times of emergency.

Both *Schenck* and *Korematsu* were decided in wartime. We are not currently in a declared state of war. So both decisions are distinguishable on that ground. More importantly, however, the Court has recognized that both *Schenck* and *Korematsu* were wrongly decided. This Court should thus follow the Supreme Court's peacetime precedent and more recent decisions holding that the Constitution must be respected—even during crises.

B.1. The CDC imposed a nationwide eviction moratorium during the COVID-19 pandemic. It argued that its director has "broad authority to make and enforce any regulations that in his judgment are necessary to prevent the spread of disease." *Ala. Ass'n of Realtors v. United States Dep't of Health & Hum. Servs.*, 539 F. Supp. 3d 211, 214 (D.D.C. 2021) (cleaned up). The district court held that the CDC's interpretation of the Public Health Service Act did violence to the act and that the CDC lacked statutory authority to pause evictions throughout the country. *See id.* But the court then stayed its injunction pending appeal and the D.C. Circuit

refused to lift that stay. *See Ala. Ass'n of Realtors v. United States Dep't of Health & Hum. Servs.*, 2021 WL 2221646 (D.C. Cir. June 2, 2021) (*per curiam*).

The plaintiffs then sought relief from the Supreme Court. Four justices voted to grant the application. Justice Kavanaugh agreed with them that the CDC "exceeded its existing statutory authority by issuing a nationwide eviction moratorium." *Ala. Ass'n of Realtors v. United States Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320, 2320 (2021) (Kavanaugh, J., concurring). But he voted to deny the application "[b]ecause the CDC plan[ned] to end the moratorium in only a few weeks." *Id.* at 2321. Justice Kavanaugh thus warned that "clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31." *Id.*

The CDC ignored this warning. It extended the eviction moratorium past July 31. In essence, it dared the Court to act. When the plaintiffs returned to the Supreme Court, the CDC argued that it had "broad authority to take whatever measures it deems necessary to control the spread of COVID-19, including issuing the moratorium." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021)

(*per curiam*). The Court soundly rejected that argument. As it explained, the statute limits the CDC's "authority by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles." *Id.* Missing from this list was anything like an eviction moratorium.

The same is true for mask mandates on public transportation. As ably described in the District Court's opinion, nothing in the Public Health Service Act remotely suggests that the CDC may require masks on public transportation. Mask mandates are not a type of "sanitation" that the CDC has the power to order. So as with the eviction moratorium, the CDC lacked the statutory authority to require masks on public transportation.

2. Unfortunately, the government did not take to heart the need to comply with constitutional requirements during the COVID-19 pandemic. After the Supreme Court's decision in *Alabama Association of Realtors*, the Occupational Safety and Health Administration issued an emergency temporary standard requiring all workers receive a COVID-19 vaccine or face harsh penalties.

The Supreme Court held that it was likely that OSHA "lacked authority to impose the mandate." *NFIB*, 142 S. Ct. at 665. As the Court explained, "[a]dministrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *Id.* In *NFIB*, the Court held that Congress had not provided OSHA with the statutory authority to impose the mandate. OSHA may regulate only "occupational hazards," and COVID-19 is not one. *Id.*

Again, the same is true here. The CDC is a statutory creature and may exercise only those powers Congress gives it. Although the CDC may disagree with Congress's decision not to authorize it to impose a mask mandate on public transportation, that does not mean it can exceed its authorizing statutes. As with the CDC's eviction moratorium and OSHA's vaccine mandate, no statute authorizes the CDC's sweeping order here. This Court should follow *Alabama Association of Realtors* and *NFIB* and affirm the District Court's order while stopping the government's continued constitutional violations.

II. THE CDC'S ORDER IS ARBITRARY AND CAPRICIOUS.

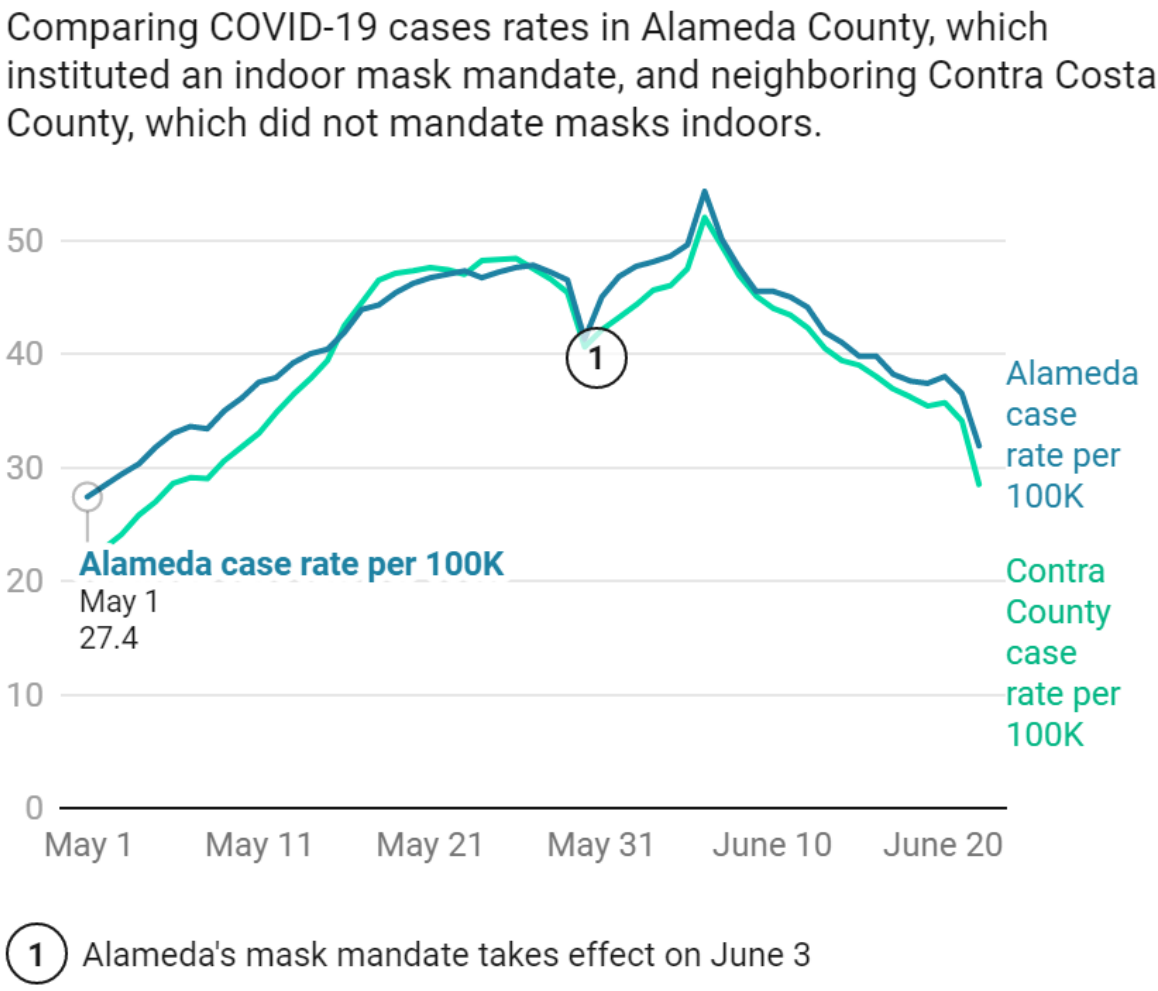
"To survive arbitrary and capricious review, an agency must "examine the relevant data and articulate a satisfactory explanation for

its action including a rational connection between the facts found and the choice made." *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1321 (11th Cir. 2021) (cleaned up). "A court will find a rule arbitrary and capricious if the agency's explanation 'runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Florida v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1307 (11th Cir. 2021) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The CDC's order conflicts with the scientific evidence and its justifications are implausible. The science is overwhelming: mask mandates don't work. As the CDC's order is a mask mandate, it is arbitrary and capricious. Thus, even if the CDC had the statutory authority to issue the order, this Court should still affirm the District Court's order setting it aside.

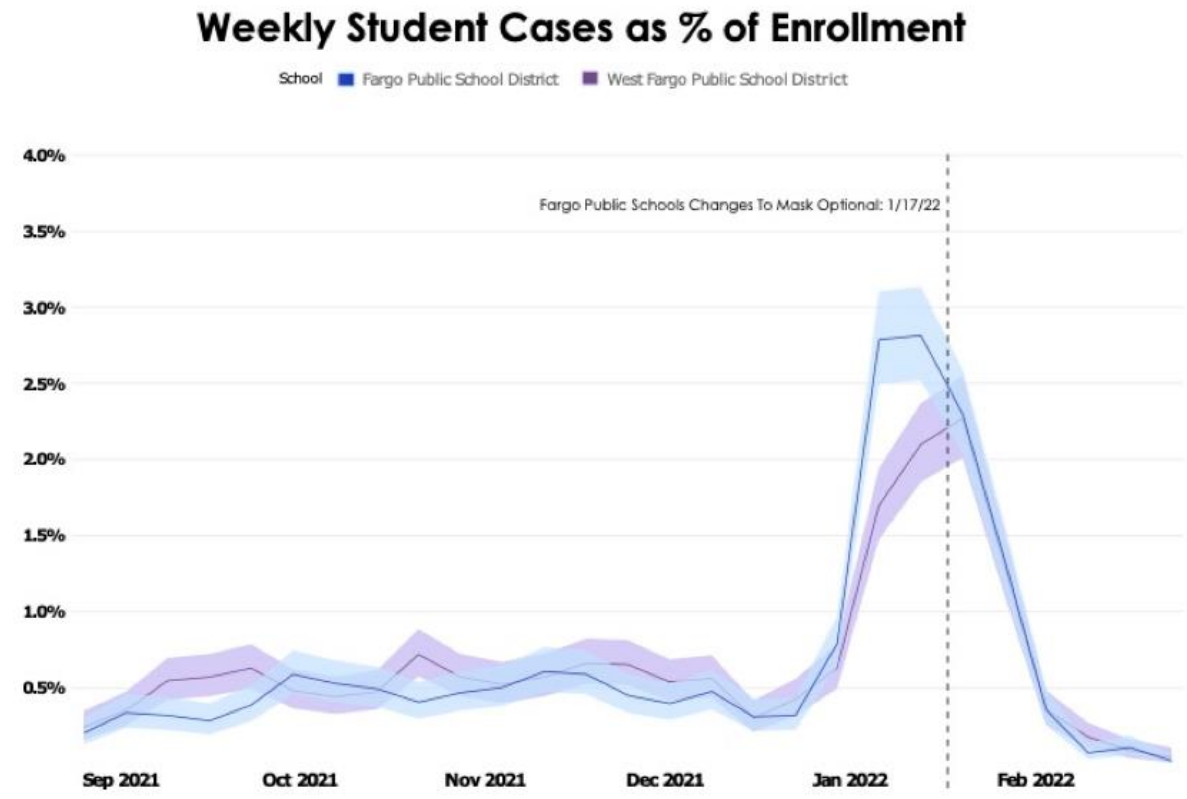
A. A recent natural experiment shows just how ineffective mask mandates are. In June 2022, Alameda County was the only county near San Francisco to reimpose a mask mandate. Its health director said, "Putting our masks back on gives us the best opportunity to limit the

impact of a prolonged wave on our communities." Eric Ting, *Do mask mandates work? Bay Area COVID data from June says no*, SFGate (June 29, 2022), https://bit.ly/3O7wGnt. But the data shows that did not happen. As the graph below shows, there was no difference between the spread of COVID-19 in Alameda County and in neighboring counties without mask mandates.



Unsurprisingly, other natural experiments reached the same conclusion. In North Dakota, two neighboring school districts had

different mask policies before they adopted the same policy. The study showed that there was "no significant difference between student case rates while the districts had differing masking policies . . . nor while they had the same mask policies." Neeraj Sood et al., *Association between School Mask Mandates and SARS-CoV-2 Student Infections: Evidence from a Natural Experiment of Neighboring K-12 Districts in North Dakota* (July 1, 2022), https://bit.ly/3uMdvZk. Again, a picture is worth a thousand words.



Even mask mandate supporters must admit that they simply don't work. Dr. Bob Wachter for example, concedes that the mask mandate in

Alameda County failed. *See* Ting, *supra*. His colleague Dr. Jeanne Noble, another mask-mandate proponent, also admits that they simply don't work. *See id.* She said that "[m]ask mandates may create a false sense of reassurance to those who truly need the extra protection." *Id.* In other words, it's all eyewash.

The experts' opinions that mask mandates don't work make sense. The CDC's order—and all other mask mandates to date—have exceptions. For example, under the CDC's order you need not wear a mask on a plane if you are actively eating or drinking. The current variants of COVID-19 are contagious enough that the virus easily spreads when someone pulls their mask down for a shot of whiskey. *See* David Leonhart, *Why Masks Work, but Mandates Haven't*, N.Y. Times (May 31, 2022), https://nyti.ms/3c2uXCk. And this all assumes that high-quality masks are being worn.

Of course, most people do not wear N95 masks and do not wear their masks correctly. *See* Leonhart, *supra*. They do the bare minimum to comply with the mask requirement. This means a loose-fitting cloth facemask that does little to stop the spread of COVID-19. *See* Faye Flam,

Mask Mandates Didn't Make Much of a Difference Anyway, Bloomberg (Feb. 11, 2022), https://bloom.bg/3O0Eyac.

B. It's unsurprising that mask mandates have been ineffective in stopping the spread of COVID-19. For over a decade, scientists have investigated whether mask mandates can stop the spread of respiratory diseases that are less contagious than COVID-19. These studies show that mask mandates are not effective at stopping the spread of even mild respiratory illnesses.

In 2008, some Japanese health care workers were randomly assigned to two groups, one that wore face masks and one that did not. The results showed that wearing a facemask provided no benefit in terms of getting the cold or reducing the severity of cold symptoms. *See generally* Joshua L. Jacobs, *Use of surgical face masks to reduce the incidence of the common cold among health care workers in Japan: a randomized controlled trial*, 37 Am. J. Infection Control 417 (2009).

Meta-analyses have confirmed the ineffectiveness of mask mandates in stopping the spread of respiratory illness. One meta-analysis looked at ten studies examining mask efficacy. All ten studies showed that the masks did not help stop the spread of respiratory

illnesses. *See generally* Benjamin J. Cowling et al., *Face masks to prevent transmission of influenza virus: A systematic review*, 138 Epidemiology & Infection 449 (2010). Another meta-analysis of seventeen studies reached the same result. *See generally* Faisal bin-Reza, *The use of masks and respirators to prevent transmission of influenza: a systematic review of the scientific evidence*, 6 Influenza & Other Respiratory Viruses 257 (2012); *see also* Vittoria Offeddu et al., *Effectiveness of Masks and Respirators Against Respiratory Infections in Healthcare Workers: A Systematic Review and Meta-Analysis*, 65 Clinical Infectious Diseases 1934, 1937 (2017) ("[e]vidence of a protective effect of masks or respirators against" respiratory illnesses "was not statistically significant").

In short, the evidence before the COVID-19 pandemic and from natural experiments during the pandemic show that mask mandates don't stop the spread of airborne disease. Yet the CDC pressed ahead and ordered all travelers and workers to wear masks on public transportation. As the evidence did not support the CDC's order, it was arbitrary and capricious.

* * *

The CDC doesn't think that the Constitution or Administrative Procedure Act governs its conduct. Rather than follow the Constitution's careful separation of powers, the agency continues to issue orders without statutory authority. But even if it had that statutory authority, the orders are arbitrary and capricious because mask mandates do not work. It is time for this Court to affirm that—even during a pandemic—the CDC is not above the law.

CONCLUSION

This Court should affirm and put an end to the government's circumvention of the Constitution because of COVID-19.

Respectfully submitted,

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August 8, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,912 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it uses 14-point Century Schoolbook font.

Dated: August 8, 2022 /s/ John M. Masslon II
John M. Masslon II

CERTIFICATE OF SERVICE

I certify that on August 8, 2022, I served a copy of this Brief on all counsel via the Court's CM/ECF system.

Dated: August 8, 2022 /s/ John M. Masslon II
John M. Masslon II