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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* PUBLIC HEALTH AND PUBLIC HEALTH LAW EXPERTS IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1, *amici curiae* state that the following persons and entities have an interest in the outcome of this case:

1. Abromowitz, Maren
2. Alexander, Melissa Ballengee
3. American Public Health Association (APHA)
4. Ansorg, Henning
5. Arons, Paul
6. Ashe, Marice
7. Association of American Medical Colleges (AAMC)
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33. Byrnes, Maureen
34. Casadevall, Arturo
35. Catalanotti, Jillian
36. Ceminara, Kathy L.
37. Center for Public Health Law Research at Temple University

38. Cetron, Martin S.
39. Chaisson, Richard E.
40. Chandler, G. Thomas
41. ChangeLab Solutions
42. Chemerinsky, Erwin
43. Cohen, Alan B.
44. Convertino, Victoria L.
45. Council of State and Territorial Epidemiologists (CSTE)
46. Crockett, Landis
47. Cronin, Chrysan
48. Crooke, Elliott
49. Curran, James
50. Dart, Bruce
51. Davillier Law Group, LLC
52. Daynard, Richard A.
53. Daza, Ana Carolina
54. DeBruin, Debra
55. Deitchman, Scott
56. del Rio, Carlos
57. Douglas, Jr., John M.

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59. Duchin, Jeffrey
60. Dzau, Victor
61. Ebright, Richard H.
62. Eliasson, Gwyneth M.
63. El-Mohandes, Ayman
64. El-Sadr, Wafaa
65. Emanuel, Ezekiel J.
66. Engle, Kim
67. Epilepsy Foundation
68. Esvelt, Kevin
69. Evans, Dabney P.
70. Fairchild, Amy Lauren
71. Fentiman, Linda C.
72. Field, Robert I.
73. Fischl, Margaret A.
74. Fishbein, Dawn
75. Flores, George R.
76. Foege, William
77. Francis, Leslie

78. Frankford, David M.
79. Freeman, Lori Tremmel
80. Freidah, Andrew F.
81. Fried, Linda P.
82. Frieden, Tom
83. Gable, Lance
84. Galea, Sandro
85. Galpern, Emily
86. Gareau, Sarah
87. Gatter, Robert
88. Gebo, Kelly
89. Gerardi, Michael J.
90. Gerberding, Julie
91. Gerontological Society of America (GSA)
92. Glied, Sherry
93. Godwin, Hilary
94. Goldenberg, Jacqueline
95. Goldman, Lynn R.
96. Goldstein, Harold
97. Goldstein, Melissa M.

98. Goodman, Jesse
99. Gostin, Lawrence O.
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101. Grogan, Colleen M.
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104. Hadaway, PLLC
105. Hale, Peter
106. Halfon, Neal
107. Hamburg, Margaret
108. Handberg, Roger B.
109. Harrington, Mark
110. Harrison, Lisa Macon
111. Hayden, Frederick G.
112. Health Freedom Defense Fund, Inc.
113. Heinrich, Janet
114. Heise, Georgia
115. Heisler, Michele
116. Heller, Jonathan
117. Hoffman, Allison K.

118. Hoffman, Sharona

119. Hoke, Kathleen

120. Horton, Katherine

121. Hoss, Aila

122. Huberfeld, Nicole

123. Hughes, Keith E.

124. Infectious Diseases Society of America (IDSA)

125. Islas, Genoveva

126. Jackson, Richard J.

127. Jacobson, Peter D.

128. Jani, Asim

129. Jeffries, Pamela R.

130. Jirmanus, Mary

131. Johns Hopkins Center for Health Security (JHCHS)

132. Johnson, Richard O.

133. Jones, Antwan

134. Jost, Timothy Stoltzfus

135. Juliano, Chrissie

136. Kassaye, Seble G.

137. Kee, Diane

138. Kelley, Edward
139. Kershner, Stacie
140. Kertanis, Jennifer
141. Khalik, Faith
142. Kilkenny, Michael E.
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158. Lu, Michael C.

159. Lushniak, Boris

160. Lyon, Michael

161. Mahan, Charles S.

162. Manookian, Leslie

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164. Mariner, Wendy K.

165. Markus, Anne R.

166. Marsom, Matthew

167. Mason, Diana J.

168. Matthews, Gene W.

169. McDonnell, Karen A.

170. McElrath, Julie

171. Merzel, Cheryl

172. Michaels, David

173. Mishori, Ranit

174. Mizelle, Honorable Kathryn Kimball, U.S. District Court Judge

175. Mohapatra, Seema

176. Mokotoff, Eve

177. Moore, John P.

178. Moreno, Jonathan D.

179. Nash, Denis

180. National Association of Chronic Disease Directors (NACDD)

181. Network for Public Health Law

182. O'Neill Institute for National and Global Health Law, Georgetown University Law Center

183. Oberlander, Jonathan

184. Ojserkis, Rebecca A.

185. Okoh, Michele

186. Ompad, Danielle C.

187. Orenstein, Walter

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192. Parmet, Wendy E.

193. Parsonnet, Julie

194. Pathak, Elizabeth

195. Perreira, Krista M.

196. Peterson, Mark A.

197. Petruzzi, Liana
198. Pezzi, Stephen M.
199. Phelan, Alexandra L.
200. Piatt, Jennifer
201. Pollack, Harold
202. Pope, Sarah
203. Porcelli, Honorable Anthony E., U.S. Magistrate Judge
204. Powderly, William G.
205. Public Health Accreditation Board (PHAB)
206. Public Health Advocacy Institute (PHAI)
207. Public Health Law Center
208. Public Health Law Watch
209. Pyra, Maria
210. Raifman, Julia
211. Ratzan, Scott C.
212. Recht, Jim
213. Reeves, Philip
214. Reiss, Dorit Rubinstein
215. Relman, David A.
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230. Schuster, Mark A.
231. Seiler, Naomi
232. Sékaly, Rafick
233. Sharma, Anjali
234. Shlay, Judith C.
235. Silberman, Pam
236. Silver, Diana

237. Silverman, Ross D.

238. Siminoff, Laura A.

239. Simon-Ortiz, Sophia

240. Sinha, Michael S.

241. Skinner, Daniel

242. Slifkin, Becky

243. Smith, Karen L.

244. Solomon, Caren

245. Springer, Brian J.

246. Stave, Gregg M.

247. Stop TB USA

248. Stutz, Aaron

249. Sullivan, Patrick

250. Sumner, Kevin G.

251. Suter, Sonia

252. Swartz, Katherine

253. Task Force for Global Health

254. Terry, Nicolas P.

255. Thorpe, Jane

256. Tien, Phyllis C.

257. Tobia, Kevin

258. Tobin-Tyler, Liz

259. U.S. Centers for Disease Control and Prevention

260. U.S. Department of Health and Human Services

261. Ulrich, Michael R.

262. United States of America

263. Vaishampayan, Julie

264. Vermund, Sten H.

265. Vertinsky, Liza

266. Vohra, Rais

267. Vyas, Amita N.

268. Walensky, Rochelle P.

269. Walker, Johnny H.

270. Walter-McCabe, Heather A.

271. Washington, Raynard

272. Wasserman, Alan G.

273. Waterman, Alexandra

274. Wells, Katherine

275. Wentz, Jr., George Robinson

276. Westmoreland, Timothy M.

277. Wood, Betsy

278. Worsham, Dennis

279. Yang, Y. Tony

280. Youngner, Stuart J.

Amici further state that the APHA, AAMC, ASAN, Center for Public Health Law Research at Temple University James E. Beasley School of Law, ChangeLab Solutions, CSTE, Epilepsy Foundation, GSA, IDSA, JHCHS, NACDD, Network for Public Health Law, O'Neill Institute for National and Global Health Law, Georgetown University Law Center, PHAB, PHAI, Public Health Law Center, Public Health Law Watch, RWJF, Stop TB USA, and Task Force for Global Health are nonprofit organizations with no parent companies and no publicly traded stock.

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Pursuant to Federal Rules of Appellate Procedure 27 and 29, *amici curiae* public health and public health law experts respectfully move this Court for leave to file the attached brief in support of Defendants-Appellants. Defendants-Appellants consent to the filing of this brief. Plaintiffs-Appellees advised that, while they do not consent to the filing of this brief, they do not oppose this motion.

I. Identities and Interests of *Amici Curiae*

1. The list of proposed *amici* includes many of the nation's preeminent leaders in public health and public health law, both as individuals and nonprofit organizations. The list reflects broad concern from across the public health community about the grave consequences that the decision below, if upheld, would have on our nation's ability to prevent and contain infectious diseases.

2. The individual *amici* include **Seven Former Federal Agency Leaders** who have overseen the Centers for Disease Control (six) or the Food and Drug Administration (one). These seven Former Agency Leaders, during their decades of combined service, have led the nation's response to all recent health emergencies, ranging from XDR TB to SARS, MERS, Zika, Influenza H1N1, and Ebola. They are in a unique position to understand the health challenges the nation faces, along with the tools the CDC needs to curb the international importation and interstate spread of novel infectious diseases.

3. The individual *amici* also reflect **224 Deans, Chairs, Scholars, Public Health Professionals, and COVID-19 Response Leaders**, all appearing in their individual capacities. Many of these individuals have had major governmental public health experience at the federal, state, local, territorial, or tribal levels. They include many of the nation's leading scholars and research experts in public health, health policy, and law. *Amici curiae* include 24 Deans and seven Department Chairs from leading schools of public health, medicine, nursing, and law throughout the United States. In addition, 193 Scholars and Public Health Practitioners have signed the brief. These Scholars and Practitioners include current and retired health agency leadership from state, local, territorial, and tribal government agencies on the frontlines of our nation's COVID-19 response. These Scholars and Public Health Practitioners include scholars who have spent decades studying public health law, as well as governmental and non-governmental leaders who helped create the backbone of public health prevention and protection during the COVID-19 pandemic. These *amici* also include medical professionals working directly with individuals and communities who are at high-risk for death or long-term disability from COVID-19. The full list of individual *amici curiae* is reflected in an appendix to the proposed brief.

4. The **Association of American Medical Colleges (AAMC)** focuses on transforming health care in four primary mission areas: medical education; patient

care; medical research; and diversity, inclusion, and equity in health care. The improvement of medical education is the core purpose of AAMC, but its mission includes biomedical research that underpins medical education, the health care system that reaps its benefits, and the management of medical schools and teaching hospitals. During the COVID-19 pandemic, AAMC has published numerous resources for the medical field including clinical guidance repositories and guides to COVID tests and testing.

5. The **American Public Health Association (APHA)** is a 150-year-old organization of nearly 22,000 public health professionals that champions the health of all people and all communities, strengthens the profession of public health, shares research and information, promotes best practices, and advocates for public health issues and policies grounded in scientific research. As a non-governmental organization, APHA has led the nation to mobilize effective responses to the COVID-19 epidemic by sharing science-based information with the public and speaking out for outbreak response funding and support. For example, APHA has co-hosted 22 educational webinars with the National Academy of Medicine to bring the latest scientific and epidemiologic knowledge to the public health workforce and to medical care practitioners. APHA has testified before Congress and published numerous letters to elected officials regarding our nation's COVID-19 response. In addition, APHA has partnered with public health and medical care organizations

throughout our nation to educate the public and to counteract misleading and harmful information related to masking, vaccinations, and other science-based COVID responses. Finally, APHA has championed transparency of information related to our nation's COVID response and is committed to ensuring that our nation furthers health equity in all its policies, communications, and responses related to COVID.

6. The **Autistic Self Advocacy Network (ASAN)** is a nonprofit organization run by and for autistic people that seeks to advance the principles of the disability rights movement with regard to autism and to ensure autistic people are included in policymaking so that laws and policies meet the needs of the autistic community. During the COVID-19 pandemic, ASAN has worked to ensure that all COVID resources are fully accessible to keep the autistic community apprised of changes in COVID-related guidance on the progression of the disease.

7. The **Center for Public Health Law Research at Temple University James E. Beasley School of Law** supports the effective use of law for public health through research and training. It develops and teaches public health law research and legal epidemiology methods, and communicates and disseminates evidence to facilitate innovation. The Center's COVID-19 resources include a broad array of expert analyses, evidence, and research; policy briefings, commentary, and analysis; and selected media contributions related to COVID-19 legal responses.

8. **ChangeLab Solutions** is a nonpartisan nonprofit organization that uses the tools of law and policy to advance health equity. It partners with communities across the nation to improve health and opportunity by changing harmful laws, policies, and systems. ChangeLab Solutions believes that governments and businesses must take action to ensure that equity is front and center in their policy responses to COVID-19. Their interdisciplinary legal and policy team has created practical tools and resources to offer immediate solutions for communities and local governments that wish to prioritize health equity in their COVID-19 response including information about the legal requirements related to social distancing, isolation, and quarantine.

9. The **Council of State and Territorial Epidemiologists (CSTE)** is a nonprofit membership organization of states and territories that uses the power of epidemiology to fight the spread of COVID-19 and other diseases and conditions of public health significance. CSTE works to advance public health policy and increase epidemiologic capacity. It provides information, education, training, and developmental support of practicing epidemiologists related to COVID-19 and diseases and conditions of public health importance, such as outbreak investigation and reporting, and addressing gaps in public health reporting of race and ethnicity data.

10. The **Epilepsy Foundation** advocates on behalf of 3.4 million Americans with epilepsy, leading the fight to overcome the challenges of living with epilepsy and accelerating therapies to stop seizures, find cures, and save lives. Epilepsy is a "family" of many different disorders that lead to seizures. While available data suggests that having epilepsy alone does not increase the risk of getting COVID-19 or increase the severity of COVID-19, some people with epilepsy, regardless of seizure control, have other health conditions and/or may be taking medications that affect their immune system—putting them at higher risk from COVID-19. Public health expertise and guidance have been critical in helping slow the spread of COVID-19.

11. The **Gerontological Society of America (GSA)** is the oldest and largest interdisciplinary organization devoted to research, education, and practice in the field of aging. The mission of GSA is to advance innovation in aging by fostering scientific collaboration between researchers, clinicians, educators, and policymakers. GSA formed a COVID-19 Task Force to keep policymakers and gerontologists apprised of the new research and scientific findings related to the impact of COVID on older persons who are at highest risk from disease.

12. The **Johns Hopkins Center for Health Security (JHCHC)** at the Bloomberg School of Public Health has a mission to protect people's health from epidemics and disasters and to ensure that communities are resilient to major

challenges. JHCHC focuses on global health security, emerging infectious diseases and epidemics, medical and public health preparedness and response, deliberate biological threats, and opportunities and risks in the life sciences. It has produced a broad array of actionable tools and resources contributing to the nation's understanding of COVID-19, including Congressional reports and testimony, as well as fact sheets and in-depth analyses to inform the public and brief policymakers to guide responses, improve care, and save lives.

13. The **Infectious Diseases Society of America (IDSA)** is a nonprofit membership organization with over 12,000 physicians, scientists, and public health experts who specialize in infectious diseases, with a purpose to improve the health of individuals, communities, and society by promoting excellence in patient care, education, research, public health, and prevention related to infectious diseases. ISDA hosts a real time learning network with a broad array of expertly curated and timely resources for the frontline health care community.

14. The **National Association of Chronic Disease Directors (NACDD)** is a member-based nonprofit that improves the health of the public by strengthening state-based leadership and expertise for chronic disease prevention and management. NACDD's core membership is composed of 58 state and territorial health department chronic disease directors and their staff. They protect the health of the public through primary and secondary prevention efforts and work "upstream" on

root causes of chronic conditions. NACDD has prepared extensive resources to assist State Health Department Chronic Disease Units and other public health professionals as they respond to COVID-19 on pressing topics such as "Long-COVID," working with faith-based leaders, and the impact of COVID-19 on cancer screenings and results.

15. The **Network for Public Health Law** provides visionary leadership in the use of law to protect, promote, and improve health and health equity. It provides non-partisan legal technical assistance and resources, collaborating with a broad set of partners across sectors to expand and enhance the use of practical legal and policy solutions. For more than ten years, the Network has helped build the capacity of local, state, tribal, and national public health agencies and organizations around the country to effectively develop, implement, and enforce evidence-based, equitable laws and policies. The Network is committed to using public health law and policy to improve the conditions, as well as strengthen the services and systems, that make our communities safer, healthier, stronger, and more equitable. During COVID-19, the Network for Public Health Law has kept abreast of COVID-related litigation at the federal, state, and local levels, and has produced multiple resources analyzing detailed areas of the law including liability standards, data privacy, and emergency declarations. The views expressed in this brief are solely those of Network staff and

may not represent those of any affiliated individuals or institutions, including funders and constituents.

16. The **O'Neill Institute for National and Global Health Law, Georgetown University Law Center** produces cutting-edge work, and its experts contribute to solving critical health challenges in the United States and around the world by engaging with policymakers, academics, and journalists on research and advocacy to end pandemics, ensure human rights, and build the right to health around the world. Throughout the COVID-19 pandemic, the O'Neill Institute has issued reports analyzing the law, advised governmental health agencies, briefed Congress members, issued op-eds informing policymakers and the public, and tracked COVID-19 related policies and news from across the world.

17. The **Public Health Advocacy Institute (PHAI) at Northeastern University School of Law** is committed to research in public health law and policy development, legal technical assistance, and collaborative work at the intersection of law and public health. It focuses its efforts on tobacco control, worker health and safety, gun violence prevention, obesity prevention, and the use of litigation to help those affected by public health problems.

18. The **Public Health Accreditation Board (PHAB)** is a nonprofit organization dedicated to advancing the continuous quality improvement of Tribal, state, local, and territorial public health departments. PHAB is committed to

strengthening health departments' capacity to deliver essential public health services and believes that accreditation and innovation ensure that health departments are continually improving in line with national public health standards while building health and equity. Throughout the COVID epidemic, PHAB has supported state and local health departments with tools and resources related to best practices for health agencies, contact tracing, emergency preparedness, and innovation.

19. The **Public Health Law Center** at Mitchell Hamline School of Law collaborates with local and state governments, Tribal leaders, national health advocacy organizations, and federal agencies to reduce chronic disease and advance health equity by strengthening the law in dozens of policy areas, ranging from commercial tobacco control to healthy food access to environmental justice. During the COVID pandemic, the Public Health Law Center focused special attention on the deadly connection between COVID-related disease and commercial tobacco use.

20. **Public Health Law Watch** is a project of the George Consortium, a nationwide network of over eighty public health law scholars, academics, experts, and practitioners who are dedicated to advancing public health through law. During the COVID-19 pandemic, Public Health Law Watch has produced dozens of COVID-19 Law & Policy Briefings with national experts discussing late-breaking legal challenges raised during the pandemic. In addition, it published two volumes

of legal recommendations, *COVID-19 Policy Playbook I and II*, to guide the nation's legal response to the pandemic.

21. The **Robert Wood Johnson Foundation (RWJF)** is the nation's largest philanthropy dedicated solely to health. It supports efforts to build a national Culture of Health rooted in equity that provides every individual with a fair and just opportunity for health and well-being. RWJF works with others to identify, understand, confront, and remove the structural barriers to health and well-being. These include racism, powerlessness, discrimination, and their consequences, which have resulted in historic health inequities across generations, and have been starkly illustrated of late by the pandemic's disproportionate burden on many communities.

22. **Stop TB USA** is an independent nonprofit organization that was founded in 1991. Like COVID-19, Tuberculosis (TB) is an airborne infectious disease. Since the COVID-19 pandemic has devastated TB control efforts, Stop TB USA is dedicated to sharing TB/COVID-specific resources, news, reports, and peer-reviewed publications on its website to inform medical providers, policy makers, and anyone interested in preventing TB.

23. The **Task Force for Global Health** is an international, nonprofit organization that works to improve the health of people most in need, primarily in developing countries. The Task Force partners to eliminate diseases that have plagued humanity for centuries and to protect the health of populations by helping

countries build strong health systems so that all people can realize their right to living a healthy life. During the COVID-19 pandemic, the Task Force for Global Health has worked in more than 70 countries to strengthen their capacity for outbreak response and 35 countries to support vaccine roll-out; trained 19,000+ field epidemiologists; and donated more than 9,000,000 items of Personal Protective Equipment to health facilities across the world.

II. The Proposed *Amicus* Brief Is Desirable and Relevant to the Court's Disposition of this Case

24. "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court." Fed. R. App. P. 29 advisory committee's note to 1998 amendments (quoting Sup. Ct. R. 37.1).

25. The proposed *amicus* brief reflects the unique and important perspective of these *amici*, who are academics with considerable expertise in public health history and law, as well as individuals who and organizations that have worked extensively at, with, and outside of the CDC to stop the introduction and spread of infectious diseases, including COVID-19.

26. In the proposed *amicus* brief, the *amici* show that the CDC's Mask Mandate is a valid exercise of the Agency's core regulatory powers. In particular, the brief describes the CDC's historical and current role in preventing the introduction and spread of contagious diseases in interstate transportation. *Amici*

draw on the legislative history of the Public Health Service Act (PHSA) to demonstrate that Congress sought to give the CDC and its predecessors great flexibility in combatting new infectious diseases like COVID-19.

27. Furthermore, the proposed *amicus* brief relies on *amici*'s public health and public health law expertise to explain how masking is an effective "sanitation" practice authorized by the PHSA. Contrary to the District Court's narrow reading of that statute, *amici* identify extensive historical and scientific support for using preventative health measures like masking as forms of sanitation—a shared understanding in the public health community, as well as the lay community, at the time of the PHSA's enactment.

28. Finally, *amici* highlight that the PHSA's "other measures" catchall provision further validates the CDC's broad power to respond to unforeseen health threats by taking steps such as the measure at issue in this litigation.

CONCLUSION

For these reasons, *amici curiae* respectfully ask this Court for leave to file the attached brief as *amici curiae* public health and public health law experts in support of Defendants-Appellants.

June 7, 2022

Respectfully submitted,

/s/ Robert A. Braun

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** Admitted only in Md. and N.Y.; Practicing in D.C. under the supervision of Robert Braun*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with Fed. R. App. P. 32(g) and Fed. R. App. P. 27(d)(2)(A) because the relevant portions of the motion contain 2,816 words.

I further certify that per Fed. R. App. P. 27(d)(1)(E), this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced font in Microsoft Word using 14-point Times New Roman.

Date: June 7, 2022

Respectfully submitted,

/s/ Robert A. Braun

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all counsel in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: June 7, 2022

Respectfully submitted,

/s/ Robert A. Braun

No. 22-11287

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Amici further state that the APHA, AAMC, ASAN, Center for Public Health Law Research at Temple University James E. Beasley School of Law, ChangeLab Solutions, CSTE, Epilepsy Foundation, GSA, IDSA, JHCHS, NACDD, Network for Public Health Law, O'Neill Institute for National and Global Health Law, Georgetown University Law Center, PHAB, PHAI, Public Health Law Center, Public Health Law Watch, RWJF, Stop TB USA, and Task Force for Global Health are nonprofit organizations with no parent companies and no publicly traded stock.

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INTEREST OF *AMICI CURIAE*[1]

The appendix to this brief includes the full list of individual *amici*. They appear in their personal capacities.

The individual *amici* include **Seven Former Federal Agency Leaders** of the Centers for Disease Control (six) or the Food and Drug Administration (one). They have led the nation's response to health emergencies, ranging from XDR TB to SARS, MERS, Zika, Influenza H1N1, and Ebola. With decades of experience, they are in a unique position to understand the health challenges the nation faces, along with the tools the CDC needs to curb the international importation and interstate spread of novel infectious diseases.

The individual *amici* also include **224 Deans, Chairs, Scholars, Public Health Professionals, and COVID-19 Response Leaders** who have expertise in public health, medicine, health policy, and law. *Amici* include 24 Deans and seven Department Chairs from leading schools of public health, medicine, nursing, and law from throughout the United States. The 193 Scholars and Public Health Practitioners include current and retired health agency leadership from federal, state, local, territorial, and tribal government agencies on the frontlines of our nation's

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person beyond *amici curiae* or their counsel contributed money intended to fund preparing and submitting this brief.

COVID-19 response. They also reflect scholars who have spent decades studying public health law, as well as governmental and non-governmental leaders who helped create the backbone of public health prevention and protection during the COVID-19 pandemic. Moreover, many are medical professionals working directly with individuals and communities who are at high-risk for death or long-term disability from COVID-19.

The **American Public Health Association (APHA)** is a 150-year-old organization of nearly 22,000 public health professionals. APHA champions the health of all people and all communities, strengthens the profession of public health, shares research and information, promotes best practices, and advocates for public health issues and policies grounded in scientific research.

The **Association of American Medical Colleges (AAMC)** is a nonprofit dedicated to improving health through medical education, health care, medical research, and community collaborations. Its members comprise: all 155 accredited U.S. and 16 accredited Canadian medical schools; approximately 400 teaching hospitals and health systems; and more than 70 academic societies.

The **Autistic Self Advocacy Network (ASAN)** is a nonprofit organization run by and for autistic individuals that provides public education and promotes public policies that benefit autistic individuals and individuals with developmental or other disabilities.

The **Center for Public Health Law Research at Temple University James E. Beasley School of Law** supports the effective use of law for public health through research and training.

ChangeLab Solutions is a nonpartisan nonprofit that uses the tools of law and policy to advance health equity. It partners with communities across the nation to improve health and opportunity by changing harmful laws, policies, and systems.

The **Council of State and Territorial Epidemiologists (CSTE)** is a nonprofit membership organization of states and territories. CSTE uses the power of epidemiology to fight the spread of diseases and conditions of public health significance. CSTE works to advance public health policy and increase epidemiologic capacity.

The **Epilepsy Foundation** is an advocacy organization leading the fight to overcome the challenges of living with epilepsy and accelerating therapies to stop seizures, find cures, and save lives. In collaboration with community and network partners, the Foundation facilitates connections and promotes education, policy, research, and systemic change.

The **Gerontological Society of America (GSA)** is the oldest and largest interdisciplinary organization devoted to research, education, and practice in the field of aging. The mission of GSA is to advance innovation in aging by fostering

scientific collaboration between researchers, clinicians, educators, and policymakers.

The **Infectious Diseases Society of America (IDSA)** is a nonprofit membership organization with over 12,000 physicians, scientists, and public health experts who specialize in infectious diseases with a purpose to improve the health of individuals, communities, and society by promoting excellence in patient care, education, research, public health, and prevention related to infectious diseases.

The **Johns Hopkins Center for Health Security (JHCHS)** has a mission to protect people's health from epidemics and disasters and to ensure that communities are resilient to major challenges. JHCHS focuses on global health security, emerging infectious diseases and epidemics, medical and public health preparedness and response, deliberate biological threats, and opportunities and risks in the life sciences.

The **National Association of Chronic Disease Directors (NACDD)** improves the health of the public by strengthening state- and territorial-based leadership and expertise for chronic disease prevention and management. NACDD's members protect the health of the public through primary and secondary prevention efforts and work "upstream" on root causes of chronic conditions.

The **Network for Public Health Law** provides nonpartisan legal technical assistance and resources, collaborating with a broad set of partners across sectors to

expand and enhance the use of practical legal and policy solutions to make our communities safer, healthier, stronger, and more equitable. The views expressed in this brief are solely those of Network staff and may not represent those of any affiliated individuals or institutions, including funders and constituents.

The **O'Neill Institute for National and Global Health Law, Georgetown University Law Center** contributes to solving critical health challenges in the United States and across the globe by engaging with policymakers, academics, and journalists on research and advocacy to end pandemics, ensure human rights, and build the right to health around the world.

The **Public Health Accreditation Board (PHAB)** is a nonprofit organization dedicated to advancing the continuous quality improvement of Tribal, state, local, and territorial public health departments.

The **Public Health Advocacy Institute (PHAI) at Northeastern University School of Law** is a nonprofit legal research and advocacy center focused on public health issues. PHAI is committed to research in public health law and policy development, legal technical assistance, and collaborative work at the intersection of law and public health.

The **Public Health Law Center**, a nonprofit public interest legal center at the Mitchell Hamline School of Law, helps community leaders nationwide reduce

chronic disease and advance healthy equity by strengthening the law in dozens of policy areas.

Public Health Law Watch is a project of the George Consortium, a nationwide network of over 80 public health law scholars, academics, experts, and practitioners who are dedicated to advancing public health through law.

The **Robert Wood Johnson Foundation (RWJF)** is the nation's largest philanthropy dedicated solely to health. It supports efforts to build a national Culture of Health rooted in equity that provides every individual with a fair and just opportunity for health and well-being.

Stop TB USA is an independent nonprofit organization that is dedicated to sharing resources, news, reports, and peer-reviewed publications on TB and other respiratory diseases like COVID-19.

The **Task Force for Global Health** is an international, nonprofit organization that partners to eliminate diseases that have plagued humanity for centuries and to protect the health of populations by helping countries build strong health systems so that all people can realize their right to living a healthy life.

STATEMENT OF THE ISSUE

Whether the District Court incorrectly vacated the Centers for Disease Control and Prevention's (CDC) masking requirement for public transportation ("Mask Mandate"), which was intended to minimize the spread of COVID-19.

INTRODUCTION AND SUMMARY OF ARGUMENT

The CDC's masking requirement for transportation was an exercise of its core regulatory powers to stop the spread of communicable diseases through international and interstate transportation. Among Congress's primary motivations in delegating authority to federal public health agencies (which came to include the CDC) was to enable them to act where states alone could not—including to limit infectious disease spread due to travel between jurisdictions. To accomplish this purpose, Congress granted the CDC flexibility to design measures to combat new contagious diseases. The CDC's Mask Mandate is not only a proper exercise of that authority; it is precisely the type of federal action for which the CDC was established.

As such, the Mask Mandate fits comfortably within the plain text of Section 361 of the Public Health Services Act (PHSA), codified at 42 U.S.C. § 264. First, the Mask Mandate is a "sanitation" measure, as that term was historically understood—both popularly and especially in the public health context. Second, the masking requirement falls squarely within the statute's catchall clause, which sweeps in "other measures" that the CDC deems necessary to prevent the spread of disease.

The Mask Mandate is a proper exercise of the CDC's delegated authority. Accordingly, *amici* ask the Court to reverse the District Court's decision below.

ARGUMENT

I. The CDC's Mask Mandate Is an Exercise of the Agency's Core Regulatory Function

The CDC's core powers include undertaking measures "to prevent the spread of infectious diseases into and throughout the United States." *Laws and Regulations*, Ctrs. for Disease Control & Prevention (Oct. 13, 2021), https://www.cdc.gov/ncezid/dgmq/laws-and-regulations.html; *see also CDC Regulations*, Ctrs. for Disease Control & Prevention (June 30, 2016), https://www.cdc.gov/regulations/index.html.

Infectious diseases do not recognize jurisdictional boundaries. For this reason, the CDC and its predecessors[2] have long exercised regulatory authority at national and state borders. This history, along with the rise of air travel and the growth of interstate transit, informed Congress's approach in passing the PHSA. *See, e.g.*, *Hearing on H.R. 3379: A Bill to Codify the Laws Relating to the Public Health*

[2] The CDC is a part of the Department of Health and Human Services (HHS) that with other agencies, like the Food and Drug Administration (FDA), form the nation's present-day federal public health apparatus. *See HHS Organizational Chart*, U.S. Dep't of Health & Hum. Servs. (Apr. 14, 2022), https://www.hhs.gov/about/agencies/orgchart/index.html. This brief references the CDC's currently delegated authority, which other agencies have held previously. *See* Wen W. Shen, Cong. Rsch. Serv., R46758, *Scope of CDC Authority Under Section 361 of the Public Health Service Act (PHSA)* 11–12 (2021) (discussing the delegation of § 264 authority to, *inter alia*, the Public Health Service, the FDA, and the CDC).

Service, and for Other Purposes Before a Subcomm. of the H. Comm. on Interstate & Foreign Commerce, 78th Cong. 45 (1944) (in which the Surgeon General testified, in advocating for certain regulatory powers, that "the revolution in travel brought about by the airplane has necessitated the revolution of our methods of control and our defense against disease"); *see also* H.R. Rep. No. 1364, at 24–25 (1944) (in enacting § 264 of the PHSA, identifying "the speed of air travel" and "the present-day mobility of our population" as causes for contagion spread, which can occur "before the disease has become detectable").[3]

Since no state acting alone can prevent the spread of communicable diseases across state lines, the CDC has filled gaps in the nation's disease control network, including with respect to interstate and mass transportation. *See, e.g.*, *Legal Authorities for Isolation and Quarantine*, Ctrs. for Disease Control & Prevention (Sept. 17, 2021), https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html (highlighting the CDC's authority "to take measures to prevent the spread of communicable diseases between states"); H.R. Rep. No. 1364, at 24 (noting in the

[3] *See also* Alexandra Sifferlin, *Doctors Inside Emory's Ebola Unit Speak Out*, Time (Aug. 10, 2014), https://time.com/3096724/doctors-inside-emorys-ebola-unit-speak-out (reciting a former CDC Director's comment that "[w]e live in a world where we are all connected by the air we breathe, the water we drink, the food we eat, and by airplanes that can bring disease from anywhere to anywhere in a day").

PHSA's legislative history that, "for half a century[,] the Public Health Service has been charged with the responsibility of preventing the interstate spread of disease").[4]

While states and municipalities can use their police powers to mitigate the spread of diseases within their borders, they lack the authority to act across jurisdictional lines—for example, by limiting or setting conditions on interstate travel. *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460 (2005); *Or. Waste Sys., Inc v. Dep't of Env't Quality of Or.*, 511 U.S. 93 (1994); *see also* Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint* 96–97 (3d ed. 2016). Further, actions that states can take within their own borders may be inadequate in stopping the spread of disease across state lines. *See, e.g.*, H.R. Rep. No. 1364, at 24 (in which Congress noted, in enacting the PHSA, that "[i]n some situations[,] State and local quarantine measures afford inadequate protection to other States"). Sometimes, only federal action can limit a disease's spread across the country. Thus, the CDC acts at the height of its authority when it implements, where states alone

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[4] *See also* President Franklin D. Roosevelt, Address at the Dedication of the National Institute of Health, Bethesda, Maryland (Oct. 31, 1940), https://www.presidency.ucsb.edu/documents/address-the-dedication-the-national-institute-health-bethesda-maryland ("Disease disregards State as well as national lines and among the States there is, as we know, an inequality of opportunity for health. In such cases the Public Health Service is helping and must continue even more greatly to help.").

cannot, evidence-based public health measures to prevent the spread of infectious diseases into the country or across state lines.

The need for federal action to limit interstate disease movement substantially motivated the creation of the U.S. public health apparatus. *See, e.g.*, Shen, *supra* note 2, at 8–9 (describing the expansion of federal authority to prevent infectious disease spread through interstate and international travel); Laura K. Donohue, *Biodefense and Constitutional Constraints*, 4 U. Miami Nat'l Sec. & Armed Conflict L. Rev. 82, 131–32, 135, 137–39 (2014) (noting that preventing disease through trade and travel drove federal public health interventions). For instance, the Communicable Disease Center, a CDC forerunner, opened in 1946 with a central mission to "prevent malaria from spreading across the nation." *Our History – Our Story*, Ctrs. for Disease Control & Prevention (Dec. 4, 2018), https://www.cdc.gov/about/history/index.html. Other predecessor agencies received "interstate and quarantine powers"—which were further expanded during national emergencies—"to prevent the introduction and spread of cholera, yellow fever, smallpox, and plague." Polly J. Price, *Federalization of the Mosquito: Structural Innovation in the New Deal Administrative State*, 60 Emory L.J. 325, 343 (2010). In promulgating the Mask Mandate, the CDC acted well within the scope of its traditional authority to limit the interstate transmission of a highly contagious, deadly pathogen. *See, e.g.*, Rebecca L. Haffajee et al., *Thinking Globally, Acting*

Locally—The U.S. Response to COVID-19, 382 New Eng. J. Med. e75(1), e75(1) (2020) ("SARS-CoV-2 is exactly the type of infectious disease for which federal public health powers and emergencies were conceived: it is highly transmissible, crosses borders efficiently, and threatens our national infrastructure and economy. . . . The federal government's ordinary public health legal authority . . . focuses on measures necessary to prevent the interstate or international spread of disease.").

The circumstances surrounding the directive further demonstrate that the Mask Mandate was a proper exercise of the CDC's core regulatory powers. The CDC introduced the Mask Mandate while a massive and sustained public health emergency—one that was recognized by the federal government and every state—raged. *See, e.g.*, Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, 86 Fed. Reg. 11,599 (Feb. 24, 2021) (continuing the national emergency declaration); *see also* Joel Achenbach et al., *Winter Coronavirus Wave Ebbs and Deaths Drop, but Experts Fear a Spring Surge*, Wash. Post (Feb. 12, 2021), https://www.washingtonpost.com/health/coronavirus-cases-deaths-dropping/2021/02/12/8e3cc38c-6c8b-11eb-9ead-673168d5b874_story.html (reporting on fear of imminent surges in light of new variants and then-current high infection and hospitalization rates).

It is of no moment that the CDC had not previously issued the precise masking directive at issue here.[5] Before the COVID-19 pandemic, the CDC had never faced a communicable respiratory disease outbreak of equivalent magnitude and duration. *See, e.g.*, Berkeley Lovelace Jr., *Covid Is Officially America's Deadliest Pandemic as U.S. Fatalities Surpass 1918 Flu Estimates*, CNBC (Sept. 20, 2021), https://www.cnbc.com/2021/09/20/covid-is-americas-deadliest-pandemic-as-us-fatalities-near-1918-flu-estimates.html (reporting on unprecedented mortality rates caused by COVID); Lauren M. Rossen et al., *Update on Excess Deaths Associated with the COVID-19 Pandemic—United States, January 26, 2020–February 27, 2021*, 70 Morbidity & Mortality Wkly. Rep. 570 (2021).

Nor, in prior pandemics, was the CDC required to contend with levels of domestic and global air travel comparable to those that exist today. *See, e.g.*, Rachel E. Baker et al., *Infectious Disease in an Era of Global Change*, 20 Nature Revs. Microbiology 193, 198 (2021) (because the "number of airline passengers doubled" to four billion between 2000–2019, hypothesizing that "rapid global air travel is expected to have played a key role in the global spread of SARS-CoV-2"); *The XDR*

[5] The CDC has, however, imposed limits on travel for the purpose of preventing contagious disease spread. *See, e.g.*, *Travel Restrictions to Prevent the Spread of Disease*, Ctrs. for Disease Control & Prevention (Jan. 28, 2022), https://www.cdc.gov/quarantine/travel-restrictions.html; James J. Misrahi, *The CDC's Communicable Disease Regulations: Striking the Balance Between Public Health & Individual Rights*, 67 Emory L.J. 463, 470, 474 (2018).

Tuberculosis Incident: A Poorly Coordinated Federal Response to an Incident with Homeland Security Implications: Hearing Before the H. Comm. on Homeland Sec., 110th Cong. 56 (June 6, 2007) (in which the then-CDC Director emphasized, in the context of an investigation of a traveler with drug resistant tuberculosis, "that infectious diseases are not a thing of the past, and that we need to continually adapt our prevention and response capabilities in an era of increasing threat and globalization").

In enacting the PHSA in 1944, Congress recognized that new types of threats might arise, and expressly contemplated the need for a decisive national response in such situations. Because Congress could not anticipate with perfect precision all the tools that the CDC would need to stem every future pandemic, Congress delegated to the CDC the authority to take all measures that, in its "judgment[,] may be necessary" to prevent the international or interstate transmission of novel infectious diseases. 42 U.S.C. § 264(a). Through the PHSA's capacious language, Congress sought to equip the CDC with the flexibility necessary to manage previously unforeseen threats that might arise. *See, e.g.*, H.R. Rep. No. 1364, at 25 (acknowledging that § 264 was "written broadly enough to apply to any disease," considering the potential impact of contagion exposure through interstate commerce, and "the impossibility of foreseeing what preventive measure may become necessary").

As an evidence-based mechanism tailored to reduce disease transmission across state lines, the Mask Mandate is a quintessential use of the CDC's regulatory authority. Masking involves only a minimal intrusion on civil liberties and no significant logistical or financial burdens. At the same time, the epidemiologic support for masking's efficacy in minimizing COVID-19 infections in crowded spaces is extensive. *See, e.g.*, Yanni Li et al., *Face Masks to Prevent Transmission of COVID-19: A Systematic Review and Meta-Analysis*, 49 Am. J. Infection Control 900 (2021); John T. Brooks et al., *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, 325 JAMA 998 (2021). For this reason, nearly every major public health agency, from the CDC to the World Health Organization, has touted the benefits of masking. *See, e.g.*, *Coronavirus Disease (COVID-19) Advice for the Public: When and How to Use Masks*, World Health Org. (Dec. 2021), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks; *Face Masks and COVID-19: Protecting Yourself and Others*, Nat'l Insts. of Health (Nov. 2021), https://newsinhealth.nih.gov/2021/11/face-masks-covid-19. Further, during the COVID-19 pandemic, many U.S. jurisdictions imposed their own internal mask mandates, which helped to limit community transmission of SARS-CoV-2. *See, e.g.*, Jing Huang et al., *The Effectiveness of Government Masking Mandates on COVID-*

19 County-Level Case Incidence Across the United States, 2020, 41 Health Affairs 445 (2022).

Masking was similarly invoked as an important public health measure during the 1918 Spanish Influenza pandemic—the prior century's most severe public health crisis. *See 1918 Pandemic (H1N1 Virus)*, Ctrs. for Disease Control & Prevention (Mar. 20, 2019), https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html. To combat that virus's spread, several jurisdictions implemented masking ordinances. *See, e.g.*, Bradford Luckingham, *To Mask or Not to Mask: A Note on the 1918 Spanish Influenza Epidemic in Tucson*, 25 J. Ariz. Hist. 191, 194, 196 (1984); Richard H. Peterson, *The Spanish Influenza Epidemic in San Diego, 1918–1919*, 71 S. Cal. Q. 89, 94, 96, 98 (1989); Univ. of Mich. Ctr. for the History of Med. & Mich. Publ'g, *The American Influenza Epidemic of 1918–1919: A Digital Encyclopedia, San Francisco, California* (last visited June 3, 2022), https://www.influenzaarchive.org/cities/city-sanfrancisco.html. U.S. health guidance during that outbreak, including from the Department of Health and Sanitation, Emergency Fleet Corporation, recommended mask-wearing when attending to the sick. *See, e.g.*, L.L. Lumsden, *Influenza: Avoid It and Prevent Its Spread: Instructions Issued by the Department of Health and Sanitation, Emergency Fleet Corporation*, 33 Pub. Health Reps. 1731, 1731 (1918) ("If necessarily attending the sick, wear a gauze mask over the nose and mouth.").

Congress enacted the PHSA to ensure that federal public health agencies would have the flexibility needed to limit communicable diseases' entry into the country and across state lines. That flexibility is vital to the nation's capability to respond to future public health threats—which may involve additional COVID-19 variants and other even more transmissible and deadly diseases. By undercutting CDC's core powers, the decision below, if allowed to stand, would hamstring the CDC's ability to fulfill its central purpose and hinder the federal government's capacity to respond to threats that the states alone cannot meet. This would leave the United States highly vulnerable to the inevitable deadly contagions to come.

II. The CDC's Mask Mandate Is Authorized Under the Public Health Service Act

The Mask Mandate is authorized by the PHSA's plain text, as informed by the historical record and the contemporary meaning of its language. The first sentence of § 264(a) of the PHSA provides in broad terms:

> The Surgeon General, with approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.

The sentence that follows "informs" this broad grant of authority[6] "by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles." *See Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021). As the Supreme Court has explained, the measures reflected in § 264(a)'s second sentence "directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself." *Id*.

"Reading both sentences together"—as the Supreme Court requires, *id.*—it is clear that the Mask Mandate falls within the CDC's authority to take action directly "necessary to prevent the introduction, transmission, or spread" of COVID-19, including through the adoption of "sanitation" or "other measures."

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[6] By their plain language, § 264(b)–(d) do not provide for additional authority beyond § 264(a) (as the District Court incorrectly suggested). *Health Freedom Defense Fund, Inc. v. Biden*, _ F. Supp. 3d _, 2022 WL 1134138, at *8 (M.D. Fla. Apr. 18, 2022). Instead, they limit the broad authority already delegated under § 264(a) in the case of regulations involving, for instance, the isolation and quarantine of individuals. *See, e.g.*, 42 U.S.C. § 264(b) ("Regulations prescribed *under this* ***section*** *shall* ***not*** provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General[.]" (emphases added)); *see also Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021) (observing that regulations under Subsection (a) have previously involved "quarantining infected individuals").

A. The Mask Mandate Is a Sanitation Measure Under the PHSA

In the opinion below, the District Court considered two possible meanings of "sanitation" as used in the PHSA: (1) active cleaning, or (2) preservation of cleanliness. *Health Freedom Def. Fund, Inc. v. Biden*, _ F. Supp. 3d _, 2022 WL 1134138, at *5–*7 (M.D. Fla. Apr. 18, 2022). The latter definition, the District Court found, would cover the Mask Mandate, while the former definition would not. *Id.* The District Court then concluded that the PHSA used only the former, narrower definition, because it was the more common usage in the period leading up to 1944, according to the Court's research. *Id.*

The District Court's narrow reading of "sanitation" to include only active cleaning measures runs contrary to the historical record and divorces the statute's language from its context in a law Congress enacted in order to address public health threats. Scientific literature around the date of the PHSA's enactment describe "sanitation" to include preventative measures. *See, e.g.*, J. Howard Beard, *The Contribution of Cholera to Public Health*, 43 Sci. Monthly 515, 521 (1936) (noting that cholera "gave terrible emphasis to the urgent need of sanitation—the necessity of," *inter alia*, "better housing, cleanliness and an efficient organization to prevent and to control contagion"); *see also Home Sanitation*, 55 Pub. Health Reps. 2282, 2282–2284 (1940) (describing that "[h]ealth departments are also realizing that home sanitation is important in the control of many diseases," where sanitation

includes, *inter alia*, fresh air, ventilation (windows), and avoidance of overcrowding). At the time, hospitals and businesses employed "air sanitation" measures, to prevent risks of infection. *See, e.g.*, B.O. Kendall, *Cleaning and Sanitation*, 6 Sanitarian 497, 500 (1944). "[B]asic principles of hospital sanitation" included "good ventilation with clean, pure air." Frank Gohr, *Hospital Sanitation*, 23 Sanitarian 75, 76 (1960). Such measures were not limited to active cleaning.

Reading "sanitation" to encompass numerous measures that preserve health is also consistent with the historical use of the term[7] in international regulations for public health. In 1851, countries convened the first International Sanitary Conference to develop standardized procedures to stop the spread of cholera across Europe. Norman Howard-Jones, *The Scientific Background of the International Sanitary Conferences 1851–1938*, at 12–16 (1975). These early discussions were focused on the evidentiary basis of quarantine to stop the spread of cholera, yellow fever, and plague and the developing understanding of the germ theory. *See, e.g.*, Valeska Huber, *The Unification of the Globe by Disease? The International Sanitary Conferences on Cholera, 1851–1894*, 49 Hist. J. 453 (2006). The use of "sanitary" to describe these efforts demonstrates that the term was used to refer to a range of public health measures aimed at stopping the spread of disease. Following these

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[7] The etymology of sanitation comes from the Latin "sanitas," meaning "health." Sanitas, *Oxford English Dictionary* (last visited May 31, 2022), www.oed.com/view/Entry/170706.

conferences, countries adopted several International Sanitary Conventions over the later 19th and early 20th centuries. *Id.*

In 1919, the Public Health Service described the importance of "enforcement of rigid rules of sanitation and the avoidance of personal contact" in combatting influenza's spread. *Influenza*, 34 Pub. Health Reps. 2105, 2106 (1919). As influenza can spread through the air, the sanitation guidance noted that "[t]o guard against this mode of spread[,] the use of face masks has been advocated." *Id.* at 2108. A 1920 textbook titled *Primer of Sanitation* similarly described mask-wearing as having proved helpful in some hospitals in protecting against influenza. John W. Ritchie, *Primer of Sanitation: Being a Simple Textbook on Disease Germs and How to Fight Them* 48 (1920).

The terms "sanitary" and "sanitation" continued to be used to refer to a range of public health measures into the middle of the 20th century. For example, in 1951, countries adopted the International Sanitary Regulations under the WHO Constitution, consolidating all prior international sanitary conventions. *See* Howard-Jones, *supra*, at 15. In 1969, the International Sanitary Regulations were renamed as the International Health Regulations partly because the term "sanitary" was no longer "in line with health definitions now in use." World Health Assembly, *Fourteenth Report of the Committee on International Quarantine and Special Review of the International Sanitary Regulations* 14 (1968). This change

demonstrates the increased use of the broad term "health" to capture measures that were historically (including through the 1940s) termed "sanitary" measures.

Despite this history, the District Court found that the narrower use of "sanitation" as active cleaning was more common around the time of the PHSA's enactment and therefore was the meaning used in the statute. That conclusion ignores that in enacting the PHSA—a statute designed to protect public health—Congress most likely used the term "sanitation" in its public health sense.

Further, the District Court relied on historical dictionaries to justify its conclusion that "sanitation" had a more common but narrow meaning related to active cleaning. *Health Freedom Defense Fund*, 2022 WL 1134138, at *5, *10. However, historical dictionaries undermine, rather than support, that determination. A 1929 edition of Funk & Wagnalls defined "sanitation" as "the devising and applying of measures for preserving and promoting public health." Sanitation, *New Standard Dictionary of the English Language* 2172 (1929). Although the dictionary secondarily defined the term as "the removal or neutralization of elements injurious to health," *id.*, that was sanitation's less common meaning, *see id.* at xii ("If a word has two or more meanings, the most common meaning has been given first.").

A later edition of Funk & Wagnalls explained that "if the term has two or more different meanings, each definition is set off unmistakably by a bold-faced figure, as **1 … 2 … 3**." Funk & Wagnalls, *New Practical Standard Dictionary of the*

English Language vii (1946). In that dictionary, the word "sanitation" is again defined without such numbered formatting, indicating only one sense: "The practical application of sanitary science; the removal or neutralization of elements injurious to health." Sanitation, *id.* at 1160. Thus, rather than providing two distinct definitions, dictionaries from around the time of the PHSA's enactment indicate a single broad definition of "sanitation" related to sanitary science broadly understood, including but not limited to the neutralization of elements injurious to health. *See generally* Stefan Th. Gries et al., *Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond*, 123 COLUM. L. REV. F. (forthcoming 2022).

This broader, health-related meaning of "sanitation" is also supported by the editions of Black's Law Dictionaries published around the time of the PHSA's enactment. Between 1933 and 1968, Black's defined sanitation as: "Devising and applying of measures for preserving and promoting public health; removal or neutralization of elements injurious to health; practical application of sanitary science."[8] Sanitation, *Black's Law Dictionary* 1581 (3d ed. 1933); Sanitation,

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[8] These dictionaries cite *Smith v. State*, 129 S.E. 542 (Ga. 1925), which quotes the definition from an earlier Funk & Wagnalls dictionary and describes "recognized methods of sanitation, such as vaccination to prevent smallpox, serums to prevent typhoid fever, diphtheria, scarlet fever, and the like, the purification of water, the destruction of the mosquito which produces yellow fever and malaria, and other well-known methods of sanitation." *Id.* at 545.

Black's Law Dictionary 1508 (4th ed. 1951); Sanitation, *Black's Law Dictionary* 1508 (4th rev. ed. 1968). Ballentine's Law Dictionaries support the same conclusion. *E.g.*, Sanitary, *Ballentine's Law Dictionary* 455 (1st ed. 1916) (defining "sanitary" as "Pertaining to the public health"); Sanitary Regulations, *Ballentine's Law Dictionary* 1138 (3d ed. 1968) (defining "sanitary regulations" as "Building regulations imposed in the interest of health" or "Regulations intended to prevent the spread of communicable diseases").

The District Court's reasoning is also in tension with many sanitary measures historically undertaken pursuant to § 264(a) by the Food and Drug Administration (which also exercises authority under the PHSA). These measures do not fall within the precise parameters of any of the other enumerated terms in § 264(a) and, like the Mask Mandate, are preventative in nature. *See, e.g.*, Final Regulations for Collection, Processing and Storage, 40 Fed. Reg. 53,532, 53,541, 53,542 (Nov. 18, 1975) (codified at 21 C.F.R. pts. 606 and 640) (describing procedures to "prevent contamination" of blood and noting that blood should be "stored in a safe, sanitary and orderly manner"); Transfer of Regulations, 40 Fed. Reg. 5,620, 5,625 (Feb. 6, 1975) (codified at 21 C.F.R. pts. 1240 and 1250) (regulating the temperature for storage of perishable food and drink). Imposing the District Court's narrow reading of "sanitation," as limited to active cleaning, would not only invalidate the Mask

Mandate; it would jeopardize other longstanding federal measures to protect public health.

Yet even under the District Court's artificially narrow definition, in which sanitation is limited to "the removal or neutralization of elements injurious to health," *Health Freedom Def. Fund*, 2022 WL 1134138, at *5, the CDC has the authority to impose the Mask Mandate. Mask wearing does, in fact, neutralize and remove injurious airborne particles and droplets, preventing inhalation and infection. *See, e.g.*, Brian M. Gurbaxani et al., *Evaluation of Different Types of Face Masks to Limit the Spread of SARS-CoV-2: A Modeling Study*, 12 Sci. Reps. 1, 1–3 (2022).

In sum, mask wearing in the service of health has long been understood as a paradigmatic form of sanitation, and comfortably fits within the term "sanitation" as used in the PHSA.

B. Catchall Language in § 264(a) Encompasses the Mask Mandate

In addition to "sanitation" measures, the PHSA authorizes the CDC to adopt "other measures" that the CDC deems "necessary." 42 U.S.C. § 264(a). The Mask Mandate is authorized under this term.

The District Court read "other measures" to be restricted to only measures virtually identical to those previously enumerated—that is, sanitation and the like. *Cf.* Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2160 (2016) (describing the *ejusdem generis* canon). However, many

scholars and judges reject such a narrow interpretive approach. *See, e.g.*, *id.* (in which Justice Kavanaugh advises "to be wary of adding implicit limitations to statutes that the statutes' drafters did not see fit to add"). Given the legislative history of the PHSA, in which Congress sought to empower the CDC to respond to unforeseen health threats, "other measures" should not be understood so restrictively but rather as a signal that the list is non-exhaustive, albeit one limited to measures that directly combat the spread and transmission of disease. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2488 (noting that the measures reflected in § 264(a)'s second sentence "directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself").

Even if the PHSA's "other measures" reference is restricted to measures that are similar to the previously enumerated measures, the Mask Mandate would be authorized. Every explicitly named measure aims to prevent the direct transmission of infectious diseases. So does the Mask Mandate. As such, it falls within even the narrowest interpretation of "other measures."

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the District Court's decision.

June 7, 2022

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

I hereby certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 5,187 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced font in Microsoft Word using 14-point Times New Roman.

Date: June 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all counsel in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: June 7, 2022

Respectfully submitted,

/s/ Robert A. Braun