UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FAMILY RESEARCH COUNCIL ACTION, INC., MATTHEW KRAUSE, DONNA BRAMSON, and S.P., a minor, by his next friend and father, Anthony Perkins,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, U.S. DEPARTMENT OF TRANSPORTATION, PETER P. BUTTIGIEG, in his official capacity as Secretary of Transportation, FEDERAL AVIATION ADMINISTRATION, STEPHEN M. DICKSON, in his official capacity as Administrator of the FAA, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, CENTERS FOR DISEASE CONTROL AND PREVENTION, ROCHELLE P. WALENSKY, in her official capacity as Director of the CDC, SHERRI A. BERGER, in her official capacity as Chief of Staff of the CDC, U.S. DEPARTMENT OF HOMELAND SECURITY, ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security, TRANSPORTATION SECURITY ADMINISTRATION, DAVID P. PEKOSKE, in his official capacity as Administrator of the TSA, and the UNITED STATES OF AMERICA,

Defendants.

Civil Action No.:
4:22-cv-00209-O

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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COVID-19 policies should "follow the science," which is what it seems everyone claims is their North Star in fighting the disease. The United States has been battling COVID-19 for over two years, and the policies implemented to do so should continually be updated to be in sync with our growing understanding of which measures are effective and which ones are not. The "Mask Mandate" on airplanes is an example of the latter.

The day after he was inaugurated, President Joseph R. Biden, Jr., ordered several federal agencies to impose a Mask Mandate requiring most people who wear a mask over their face when inside an airport or when onboard a commercial aircraft. The Biden Administration recently extended that Mask Mandate despite the fact that the available science shows little benefit to masks, measurable harms, and that the odds of contracting or spreading COVID-19 on an airplane are exceedingly low.

Plaintiffs include individuals who travel on airplanes and do not wish to continue wearing masks. Plaintiffs also include a minor, who is at lower risk from COVID-19 and higher risks from wearing masks than adults, and should especially not be required to wear a mask. And another Plaintiff is a nonprofit whose mission is opposed to unlawful government mandates that transgress individual liberty, and its 26,000-plus members across America should not be required to wear masks.

The Mask Mandate is arbitrary and capricious. As such, the Administrative Procedure Act requires this Court to hold the agencies actions comprising the Mask Mandate unlawful and set aside. This Court should enjoin its continuance nationwide.

BACKGROUND

On January 21, 2021, President Biden signed Executive Order 13998 (EO), requiring various federal agencies to establish the Mask Mandate. Ex. 1, Exec. Order 13998, *Promoting COVID-19 Safety in Domestic and International Travel*, 86 Fed. Reg. 7205 (Jan. 26, 2021).

Among the agencies the President directed to impose the Mask Mandate for airplanes and airports were the U.S. Department of Health and Human Resources (HHS) and HHS's Centers for Disease Control and Prevention (CDC), the U.S. Department of Transportation (DOT) and its Federal Aviation Administration (FAA), and the U.S. Department of Homeland Security (DHS) and its Transportation Security Administration (TSA). *Id.* § 2(a).

On January 27, 2021, Acting Secretary of Homeland Security David P. Pekoske—who is now the TSA Administrator—determined that a national emergency existed regarded COVID-19, and that consequently masks must be mandated in various forms of public transportation, including commercial aircraft and airports. Ex. 2, *Determination of a National Emergency Requiring Actions to Protect the Safety of Americans Using and Employed by the Transportation System*, 86 Fed. Reg. 8217 (Feb. 4, 2021). The Acting Secretary invoked his statutory authorities under 49 U.S.C. §§ 106(m) and 114(f), (g), (l), and (m) to direct TSA to implement the EO. *Id.* at 8218–19. Although CDC determinations are guidance only—not binding on DHS—Acting Secretary Pekoske's notice ordered TSA to "support[] the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system … from COVID-19." *Id.*

On January 29, 2021, CDC issued a Notice and Order, *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025 (Feb. 3, 2021) ("CDC Order") (Ex. 3). CDC invoked its authority under 42 U.S.C. § 264(a) and 42 C.F.R. §§ 70.2, 71.31(b), and 71.32(b), requiring the wearing of masks on airplanes and in airports. *Id.* at 8026, 8029. Regarding statutory authority, 42 U.S.C. § 264(a) empowers CDC—in the place of the Surgeon General, with the approval of the Secretary of HHS—to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases …." *Id.*

The CDC Order explains that it shall be interpreted and implemented "to achieve the following objectives: Preservation of human life; Maintaining a safe and secure operating transportation system; Mitigating the further introduction, transmission, and spread of COVID-19 …; and Supporting response efforts to COVID-19 at the Federal, state, local, territorial, and tribal levels." 86 Fed. Reg. at 8027. Such masks are "a material covering the nose and mouth of the wearer," and does not include face shields. *Id.* It applies to, *inter alia*, a person using an aircraft as a means of transport or a person at an airport. *Id.* The CDC Order continues, "Masks help prevent people who have COVID-19, including those who are pre-symptomatic or asymptomatic, from spreading the virus to others." *Id.* at 8028. It also asserts, "Appropriately worn masks reduce the spread of COVID-19—particularly given the evidence of pre-symptomatic and asymptomatic transmission of COVID-19." *Id.* at 8028. Consequently, CDC claims "that the mask-wearing requirements in this Order are reasonably necessary to prevent the further introduction, transmission, or spread of COVID-19." *Id.* at 8029. The Order became effective without notice or delay, claiming not to be rule under the Administrative Procedure Act, or alternatively satisfying that statute's exception from notice or comment. *See id.* at 8030. On June 21, 2021, CDC modified the Order to not apply to outdoor areas of airports. *Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs*, CDC (updated as of Feb. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html.

The CDC Order includes exemptions. It specifies that it does not apply during certain events, such as while a person is eating or drinking, when a person speaking with someone who is hearing-impaired, or when an authorized person is seeking to confirm one's identity during a photo identification check. 86 Fed. Reg. at 8027. It also exempts certain categories of person, such as—especially relevant here—children under the age of two. *Id.*

The CDC Order does not include any effectiveness percentages or other metric-based evidentiary statements regarding the public-health benefits of wearing masks on airplanes and in airports. Nor does it include consideration of individuals who have previously contracted COVID-19, which generates antibodies that confer "natural immunity." It does not discuss how much less risk such individuals are from COVID-19, or explain why such individuals need to wear a mask to stop the spread of COVID-19. And it does not discuss how these risks and benefits are different for children vis-à-vis adults. Relatedly, it does not offer any scientific explanation of why the exemption cutoff from wearing a mask is 23 months (i.e., under age two) as opposed to some other age. CDC also did not offer any such data when it modified the order in June 2021 to not apply in outdoor areas of airports, nor when the Administration decided in March 2022 to extend the Mask Mandate.

The TSA issues Security Directives for airplanes and airports, as authorized by 49 U.S.C. §§ 114 and 44903, and issued in accordance with the provisions of 49 C.F.R. § 1542.303, and Emergency Amendments authorized by 49 U.S.C. §§ 114 and 44902, and issued in accordance with the provisions of 49 C.F.R. § 1546.105(d).

Subsequent to Acting Secretary Pekoske's determination, TSA implemented his order to impose the Mask Mandate by issuing a Security Directive and an Emergency Amendment. The current TSA components of the Mask Mandate are SD 1542-21-01D, *available at* https://www.tsa.gov/sites/default/files/SD%201542-21-01D.pdf (Ex. 4), and EA 1546-21-01D, *available at* https://www.tsa.gov/sites/default/files/EA%201546-21-01D.pdf (Ex. 5), both issued on March 19, 2022, to extend at least until April 18, 2022. And when TSA announced this latest extension, it gave no assurance that the Mandate will expire at that time. *See Statement regarding face mask use on public transportation*, TSA (Mar. 10, 2022),

https://www.tsa.gov/news/press/statements/2022/03/10/statement-regarding-face-mask-use-public-transportation. Instead, TSA employed the same language as DOT (discussed below), saying, "During that time, CDC will work with government agencies to help inform a revised policy framework for when, and under what circumstances, masks should be required in the public transportation corridor. This revised framework will be based on the COVID-19 community levels, risks of new variants, national data, and the latest science." *Id.* TSA's requirements include exemptions as well, such as being able to remove masks for up to 15 minutes while eating or drinking in an airport, and for children under age two. *See* SD 1542-21-01D (D)(2) n.6 & (F)(1).

DOT has mirrored TSA's durational language, saying, "During this time, [CDC] will work with [DOT] regarding when and under what circumstances masks should be required for public transportation in the future. Any changes will be based on the COVID-19 community levels, risks of new variants, national data, and the latest science." *Federal Mask Requirement for Transit*, FED. TRANSIT ADMIN., https://www.transit.dot.gov/TransitMaskUp (last visited Mar. 31, 2022). DOT has incorporated CDC's masking determinations into the Federal Transit Administration's Master Agreement. *See* Ex. 6, FTA MA(28) § 49 (Feb. 9, 2021), https://www.transit.dot.gov/sites/fta.dot.gov/files/2021-02/FTA-Master-Agreement-v28-2021-02-09.pdf. And as a component agency of DOT, FAA likewise continues to enforce a mask mandate both in airports and on airplanes. *See FAA Statement on Wearing Masks in Airports and On Planes*, FAA (May 14, 2021), https://www.faa.gov/newsroom/faa-statement-wearing-masks-airports-and-planes.

Plaintiffs filed suit challenging the legality of the Mask Mandate on March 23, 2022. ECF No. 1. As residents of Tarrant County, Texas, Plaintiffs Krause and Bramson live near DFW, and it is overwhelmingly their airport of choice when they travel by air. Ex. 8, Krause Aff. ¶ 4; Ex. 9,

Bramson Aff. ¶ 3. Plaintiff Krause has several flights scheduled in the coming months, objects to wearing masks, and would not do so were it not required by the Mask Mandate. Krause Aff. ¶¶ 5–8. Plaintiff Bramson likewise has upcoming air travel plans and does not want to wear a mask. Bramson Aff. ¶¶ 4–5.

FRC Action is the legislative action affiliate of FRC, organized under 501(c)(4) of the Internal Revenue Code. Ex. 7, Perkins Aff. ¶ 2. FRC Action advocates for legislation and regulations that advance the mission of FRC, including opposition to the Mask Mandate. Led by Anthony ("Tony") Perkins, FRC Action opposes the Mask Mandate on behalf of FRC Action's 26,000-plus members nationwide. *Id.* ¶¶ 2, 7–8. As of March 21, 2022, FRC Action currently has 26,163 members. *Id.* ¶ 9. This includes 1,493 members in the State of Texas. *Id.* ¶ 9. As already noted, Representative Krause and Mrs. Bramson are two such members of FRC Action who reside in the Fort Worth Division of the Northern District of Texas.

STANDARD OF REVIEW

A district court shall issue a preliminary injunction if Plaintiffs establish: "(1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest." *Ladd v. Livingston*, 777 F.3d 286, 288 (5th Cir. 2015). "Where one or more of the factors is very strongly established, this will ordinarily be seen as compensating for a weaker showing as to another or others." *Knights of Ku Klux Klan v. E. Baton Rouge Par. Sch. Bd.*, 578 F.2d 1122, 1125 (5th Cir. 1978).

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their APA claim.

As the primary statute governing agency decisionmaking, the APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). "The APA directs [this Court] to 'hold unlawful and set aside' agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Univ. of Tex. M.D. Anderson Cancer Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 985 F.3d 472, 475 (5th Cir. 2021) (quoting 5 U.S.C. § 706(2)(A)) ("*MD Anderson*"). The APA authorizes judicial review of any final "agency action," 5 U.S.C. § 704. The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). Defendants' actions here to implement a Mask Mandate pursuant to Executive Order 13998 thus constitute final agency actions subject to APA review.

This Court must accordingly "insist that an agency examine the relevant data and articulate a satisfactory explanation for its action." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quotation omitted). This Court's standard of review is "narrow" and the Court cannot substitute its "judgment for that of the agency." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nonetheless, the Court's review "is not toothless." *Wages & White Lion Investments, L.L.C. v. U.S. Food & Drug Admin.*, 16 F.4th 1130, 1136 (5th Cir. 2021). Quite the contrary, this Court's "review is searching and careful, and [must] only consider the reasoning articulated by the agency itself." *MD Anderson*, 985 F.3d at 475.

The APA requires agencies to engage in "reasoned decisionmaking" when taking action. *Michigan v. EPA*, 576 U.S. 743, 750 (2015). Part of reasoned decisionmaking is to consider all relevant factors. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). To

satisfy arbitrary and capricious review, agency must be "based on consideration of the relevant factors," "must examine the relevant data and articulate a satisfactory explanation for its action," and cannot "fail[] to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

Yet there are at least four issues regarding which there is highly relevant data that Defendants did not consider on the record or incorporate into their decisions. Defendants' decisionmaking was therefore not reasoned, and so their actions are arbitrary and capricious.

A. Masks are ineffective at stopping COVID-19.

Defendants overstate the benefits of masks. In one randomized trial with thousands of participants, researchers concluded that mask mandates "did not reduce, at conventional levels of statistical significance, incident SARS-CoV-2 infection compared with no mask recommendation." Henning Bundgaard et al., *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers: A Randomized Controlled Trial*, 174 ANNALS OF INTERNAL MED. 335, 339 (2021).

This is because most masks are relatively ineffective. Even R95 masks and KN95 masks are only 60 percent and 46 percent effective, respectively. But commonly worn cloth masks are only 10 percent effective, and surgical masks are only 12 percent. Yash Shah et al., *Experimental investigation of indoor aerosol dispersion and accumulation in the context of COVID-19: Effects of masks and ventilation*, AIP (July 21, 2021), https://aip.scitation.org/doi/10.1063/5.0057100. One respected source, *The Lancet*, concluded a study of mask-wearing to slow the spread of COVID-19 with this assessment: "We observed no association of risk of transmission with reported mask usage by contacts, with the age or sex of the index case, or with the presence of respiratory symptoms in the index case as the initial study visit." Michael Parks et al., *Transmission of COVID-19 in 282 clusters in Catalonia, Spain: A Cohort Study*, THE LANCET (Feb. 2, 2021), *available at* https://www.thelancet.com/journals/laninf/article/PIIS1473-

3099(20)30985-3/fulltext. The list of such studies and publications goes on, but Defendants offer only general assurances that science supports their decision. "Where, as here, the agency uses only generalized language to reject the evidence, we cannot conclude that the decisions rest on proper grounds." *Wages & White Lion*, 16 F.4th at 1140 (internal quotation marks omitted).

This Court "must reject 'an explanation for its decision that 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.'" *MD Anderson*, 985 F.3d at 475 (quoting *State Farm*, 463 U.S. at 43). Yet the record does not show that Defendants considered any of this evidence.

B. Airplanes are safer settings than many places that do not require masks.

This is especially striking regarding airplanes, which are "one of the most secure conditions you can be in" to avoid COVID-19 spread because of their filtration systems. Sophie Bushwick et al., *Evaluating COVID Risk on Planes, Trains and Automobiles*, SCI. AM. (Nov. 19, 2020), https://www.scientificamerican.com/article/evaluating-covid-risk-on-planes-trains-and-automobiles2/. According to a survey of epidemiologists, planes are safer than bars, theaters, gyms, and restaurants. *See Full Results: COVID-19 Survey of Epidemiologists on Reopening Risks and Data Quality*, CIVIC METER (2020), https://civicmeter.com/full-results-covid-19-survey-of-epidemiologists-on-reopening-risks-and-data-quality/.

The Department of Defense (DOD) studied the issue and agreed. Because of the ventilation systems on airplanes, DODs concluded that "at 100% seating capacity transmission model calculations," it takes "a minimum 54 flight hours required to produce inflight infection from aerosol transmission." David Silcott et al., *TRANSCOM/AMC Commercial Aircraft Cabin Aerosol Dispersion Tests*, USTRANSCOM (Oct. 14, 2020), http://web.archive.org/web/20201016142124/https://www.ustranscom.mil/cmd/docs/TRANSCOM%20Report%20Final.pdf.

The Mask Mandate thus "'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.'" *MD Anderson*, 985 F.3d at 475 (quoting *State Farm*, 463 U.S. at 43).

C. Defendants did not consider and account for natural immunity.

Defendants failed to adjust the Mask Mandate to account for natural immunity resulting from the antibodies people generate as they overcome COVID-19. Defendants should have considered whether it is necessary for such people to wear masks to the same extent as individuals who are not immune from the disease.

There is voluminous research on this issue. An Israeli study with almost 700,000 participants concludes that "natural immunity confers longer lasting and stronger protection against infection" than even what vaccines confer. Sivan Gazit et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, MEDRXIV (Aug. 25, 2021), https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1.full. Experimental evidence suggests that natural immunity is "very long lasting." Zijun Wang et al., *Naturally enhanced neutralizing breadth against SARS-CoV-2 one year after infection*, 595 NATURE 426, 426 (2021); *see also* Jackson Turner et al., *SARS-CoV-2 infection induces long-lived bone marrow plasma cells in humans*, 595 NATURE 421, 421 (2021) ("Overall, our results indicate that mild infection with SARS-CoV-2 induces robust antigen-specific, long-lived humoral immune memory in humans.") "There is now [a] growing body of literature supporting the conclusion that natural immunity … confers robust, durable, and high-level protection against COVID-19 …." Manish Joshi et al., *We must stop ignoring natural immunity—it's now long overdue!*, 2101 BRITISH MED. ASS'N 374, 374 (2021). "A previous history of SARS-CoV-2 infection was associated with an 84% lower risk of infection, with median protective effect observed 7 months following primary infection." Victoria Hall et al., *SARS-CoV-2 infection rates*

of antibody-positive compared with antibody-negative health-care workers in England: a large, multicentre, prospective cohort study (SIREN), 397 LANCET 1469, 1469 (2021).

Defendants' actions were not "based on consideration of the relevant factors," did not "examine the relevant data and articulate a satisfactory explanation for its action," and "failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Defendants "insufficiently address[ed] alternatives to issuing the" Mask Mandate by not exempting people who are immune. *Wages & White Lion*, 16 F.4th at 1139. "[A]n agency must consider and explain its rejection of reasonably obvious alternatives." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 724 (5th Cir. 2013).

D. Children are especially at risk from wearing masks.

The Fifth Circuit recently held arbitrary and capricious an agency action that "failed to adequately address" relevant concerns involving children. *Wages & White Lion*, 16 F.4th at 1139. That is precisely what Defendants are doing here, as children face greater risks from masks.

1. Masks can be especially harmful to children.

Forcing children to wear masks comes with a variety of health risks: skin issues, carbon dioxide in the blood, anxiety, and depression, which outweigh the mild benefits for children. *See* Marty Makary & H. Cody Meissner, *The Case Against Masks for Children*, WALL ST. J. (Aug. 8, 2021), https://www.wsj.com/articles/masks-children-parenting-schools-mandates-covid-19-coronavirus-pandemic-biden-administration-cdc-11628432716. *See also* John Tierney, *Much to Forgive: Adults have failed children in foisting unnecessary, harmful Covid-19 restrictions on them*, CITY J. (Apr. 20, 2021), https://www.city-journal.org/masking-children-unnecessary-and-harmful. Masks with ear loops—the most common kind of mask—can stimulate ear protrusion in children. Bruno Zanotti, *Can the Elastic of Surgical Face Masks Stimulate Ear Protrusion in*

Children?, 44 AESTHETIC PLASTIC SURGERY 1947, 1947 (2020) ("These elastics cause constant compression on the skin and, consequently, on the cartilage of the auricle, leading to erythematous and painful lesions of the retroauricular skin when the masks are used for many hours a day.") German researchers have found that children report a variety of side effects after wearing masks for extended periods of time. Silke Schwarz, *Corona child studies "Co-Ki": first results of a Germany-wide register on mouth and nose covering (mask) in children*, 169 MONTHLY PAEDIATRICS 353, 357–359 (2021). Masks also reduce children's ability to recognize emotions. Monica Gori et al., *Masking Emotions: Face Masks Impair How We Read Emotions*, FRONTIERS PSYCHOL. (May 25, 2021), https://www.frontiersin.org/articles/10.3389/fpsyg.2021.669432/full. It is also worth noting that N95 masks are not approved for children. *N95 Respirators, Surgical Masks, Face Masks, and Barrier Face Coverings*, FDA, https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/n95-respirators-surgical-masks-face-masks-and-barrier-face-coverings (last visited Mar. 31, 2022).

Defendants are also at odds with our foreign partners on this issue. The World Health Organization (WHO) recommends that children under age six not be required to wear masks. *Coronavirus disease (COVID-19): Children and masks*, WORLD HEALTH ORG. (Mar. 7, 2022), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-children-and-masks-related-to-covid-19. WHO declares, "Children aged 5 years and under should not be required to wear masks. This is based on the safety and overall interest of the child and the capacity to appropriately use a mask with minimal assistance." *Schooling in the time of COVID-19*, WORLD HEALTH ORG., https://www.euro.who.int/__data/assets/pdf_file/0016/463102/Schooling-COVID19-masks.pdf (last visited Mar. 31, 2022). Yet Defendants require masks for ages two, three, four, and five,

despite the fact that WHO recommends against doing so. Moreover, WHO has also explicitly cautioned regarding mandating masks for children ages six through eleven, citing the "[p]otential impact of wearing a mask on learning and psychosocial development." *Id.*

Once again, Defendants fail to cite to any of these authorities, attempt to refute them, or demonstrate any consideration of these data whatsoever. Given that, setting the exemption age at under two instead of a data-driven age, without any recognition that at least one major global authority insists that exemption cutoff is ill-advised, fails to consider relevant factors and ignores an important aspect of the problem. It is a stereotypical example of arbitrary and capricious action.

2. Children are at lower risk from COVID-19 anyway.

Masks did not meaningfully improve the health outcomes in a sample of around one million children, as younger children generally resist COVID-19 better than adults. Sergio Alonso et al., *Age-dependency of the Propagation Rate of Coronavirus Disease 2019 Inside School Bubble Groups in Catalonia, Spain*, 40 PEDIATRIC INFECTIOUS DISEASE J. 955, 959–960 (2021). In fact, the risk of COVID-19 to children is generally low. *See Science Brief: Transmission of SARS-CoV-2 in K–12 Schools and Early Care and Education Programs–Updated*, CDC (Dec. 17, 2021) ("Compared with adults, children and adolescents who are infected with SARS-CoV-2 are more commonly asymptomatic (never develop symptoms) or have mild, non-specific symptoms (e.g. headache, sore throat)."), https://tinyurl.com/yckkyr8p. It is all the more so given that "the leading journal *Nature* estimated the Covid-19 survival rate to be approximately 99.995% in children and teens." Joseph A. Ladapo, *The 'Universal Vaccination' Chimera*, WALL ST. J. (Feb. 4, 2021), https://www.wsj.com/articles/the-universal-vaccination-chimera-11612466130?mod=opinion_lead_pos5.

E. Each of these failures is arbitrary and capricious.

"It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (internal quotation marks omitted). This Court should not look beyond the authorities and evidence Defendants reference in their rules and orders. Like a math exam in high school, Defendants needed to "show their work" to demonstrate their reasoned decisionmaking. They failed abysmally.

Nor does this Court wait to see what new evidence supporting their arguments Defendants bring forth in their response to this memorandum. "The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted." *Id.* at 1909. Consequently, "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 95 (1943). The science in hand did not support Defendants' action establishing the Mask Mandate, and Defendants did not show that they considered the relevant factors that Plaintiffs argue here.

Defendants offer only conclusory statements, implicitly asserting their expertise. For example: "Appropriately worn masks reduce the spread of COVID-19—particularly given the evidence of pre-symptomatic and asymptomatic transmission of COVID-19." 86 Fed. Reg. at 8026. But "reliance on expertise and experience" is not enough to satisfy 5 U.S.C. § 706(2)(A), because such reliance "is no substitute for reasoned decisionmaking." *Wages & White Lion*, 16 F.4th at 1137. Instead, "'[t]he requirement of explanation presumes the expertise and experience of the agency and still demands an adequate explanation in the particular matter.'" *Texas v. Biden*, 20 F.4th 928, 993 (5th Cir. 2021) (quoting *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016)). "'Stating that a factor was considered … is not a substitute for considering

it.'" *Id.* at 993 (quoting *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986)). Defendants did not consider those factors.

The APA requires "that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). "That requirement is satisfied when the agency's explanation is clear enough that its path may be reasonably discerned." *Id.* "Unexplained inconsistency" is a reason for holding an agency action arbitrary and capricious under the APA. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). "Illogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action." *U.S. Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 382 (5th Cir. 2018).

Yet that is precisely what is happening here, giving rise to questions Defendants' record does not—and cannot—answer: Why exempt one-year-olds, but not five-year-olds (like WHO would)? Why say people must wear a mask when standing in an airport, but not while they are sitting, so long as they are eating or drinking for a short period of time? How does the presence of food or drink at their table lower their risk of contracting or spreading COVID-19 than sitting at the same table without a beverage? And what data clearly explain why the permissible time period to sit in an airport restaurant maskless is 15 minutes, instead of 10 minutes or 45 minutes? And if they can sit for 15 minutes without a mask when sitting in an airport restaurant, why cannot they sit without a mask for 15 minutes while on an airplane? For that matter, given how much more heavily filtered the air is on an airplane—*cleaner* than restaurant air, which is what they would breathe at a restaurant in an airport—why are they then not allowed to remove their mask for *longer* than 15 minutes? These things are unexplained by the record because they are inexplicable. Each of these questions demonstrates that Defendants are acting unreasonably,

illogically, and inconsistently by imposing a Mask Mandate with these features, all in violation of the APA.

F. All else aside, the March 18, 2022, extension was arbitrary and capricious.

Then just when the Mask Mandate was set to expire on March 18, 2022, Defendants "pulled a surprise switcharoo on regulated entities" by extending it. *Wages & White Lion*, 16 F.4th at 1138 (internal quotation marks and alterations omitted). And in that extension, Defendants once again offered nothing by way of scientific evidence or considerations of relevant factors to justify their action. The original Mask Mandate failed under the aforementioned standard. But even if it had passed muster, the decision to extend the Mask Mandate beyond its March 18, 2022, expiration date contained no scientific rationale, nor a consideration of the factors discussed above.

The fact that Defendants did not allow the Mask Mandate to expire on March 18, 2022, is fatal here. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars*, 579 U.S. at 221. The previous policy determination was to let the mandate expire. The "presumption from which judicial review should start" is one "*against* changes in current policy" unless those changes were justified by the agency's record. *State Farm*, 463 U.S. at 42. Agencies must examine relevant data and show a rational connection between the facts found and the choice made. *Id.* at 56. An agency's view of the public interest may change, but the agency must furnish a reasoned analysis for any new actions. *Regents*, 140 S. Ct. at 1913. The record is instead void of any such justification, as Defendants published no such data or rationale—to say anything approaching a "reasoned analysis"—for extending the Mask Mandate.

Defendants' decision to extend the Mask Mandate is "in critical tension," *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1016 (5th Cir. 2019), with loosening other COVID-19 restrictions. "That paradoxical action signals arbitrary and capricious agency action." *Id.* An agency must

assess "the wisdom of its policy on a continuing basis." *Brand X*, 545 U.S. at 981 (internal quotation marks omitted). Defendants failed to do so in March 2022. "That omission alone renders [the Mask Mandate] extension arbitrary and capricious." *Regents*, 140 S. Ct. 1913.

"In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515–16. "Consistency is great—but only when the agency is consistently following the law. As the Supreme Court has made clear: 'Arbitrary agency action becomes no less so by simple dint of repetition.'" *Wages & White Lion*, 16 F.4th at 1140 (quoting *Judulang v. Holder*, 565 U.S. 42, 61 (2011)). "When an agency changes its existing position, it … must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars*, 579 U.S. at 221 (internal quotation marks omitted).

* * *

The APA requires a district court to invalidate agency actions that are arbitrary and capricious. That requirement imposes a standard that is typically easily met, because agencies usually engage in reasoned decisionmaking based on substantial evidence. Yet in this case the science does not support Defendants' Mask Mandate.

As one leading scientist on COVID-19 opined, "It's okay to have an incorrect scientific hypothesis. But when new data proves it wrong, you have to adapt." Marty Makary, *Natural immunity to covid is powerful. Policymakers seem afraid to say so*, WASH. POST (Sept. 15, 2021), *available at* https://www.washingtonpost.com/outlook/2021/09/15/natural-immunity-vaccine-mandate/. Instead of adapt as new evidence has come to light, Defendants doubled down with policy statements that are "conclusory, unsupported, and thus wholly insufficient." *Wages &*

White Lion, 16 F.4th at 1137. The mask mandate is accordingly arbitrary and capricious, and became moreso when it was extended. Plaintiffs therefore have a substantial likelihood of success.

II. Plaintiffs will continue to be irreparably harmed unless this Court issues a preliminary injunction.

The Fifth Circuit has held that "complying with [agency actions] later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quotation omitted). That is certainly the case here. Plaintiffs will continue having to purchase and clean masks as their own monetary expense to comply with the Mask Mandate for as long it continues and FRC Action members and their children continue to fly. Such financial costs that cannot be recovered from Defendants—which is unquestionably so here, given that in the APA the United States did not waive sovereign immunity—is a stereotypical irreparable harm. *See, e.g.*, *Janvey v. Alguire*, 647 F.3d 585, 600–01 (5th Cir. 2011). The fact that masks are inexpensive is immaterial. It is still an out-of-pocket expense for FRC Action members like Plaintiffs Krause and Bramson, and that is sufficient.

Beyond that, Plaintiffs will continue to suffer harm from the health risks of wearing masks. That is especially true for S.P. and for the children of FRC Action members, given the evidence discussed above of the harms children are suffering from these masks.

Nor is it of any moment that under the status quo people are wearing masks on airplanes and in airports. While injunctions are frequently sought to preserve the status quo, there is no "particular magic in [that] phrase." *Canal Auth. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) (per curiam). Because "the currently existing status quo itself is causing … irreparable injury, it is necessary to alter the situation so as to prevent [that] injury." *Id.*

III. Both the balance of equities and the public interest weigh in favor of an injunction.

When the Federal Government is the Defendant, the third and fourth injunction factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). And these factors are easily satisfied here. "The public interest is in having governmental agencies abide by the federal laws that govern their existence and operations. And there is generally no public interest in the perpetuation of unlawful agency action." *Wages & White Lion*, 16 F.4th at 1143 (internal quotation marks omitted). Because the Mask Mandate is an unlawful agency action, it is in the public interest to enjoin it.

CONCLUSION

For the foregoing reasons, this Court should issue a preliminary injunction.

March 30, 2022

Respectfully submitted,

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**Pro hac vice* application forthcoming

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

On March 31, 2022, I filed the foregoing document with the clerk of court for the United States District Court, Northern District of Texas, by using the Court's CM/ECF filing system. I hereby certify that I have served the document on all counsel of record by a manner authorized by Federal Rule of Civil Procedure 5(b)(2).

Additionally, I communicated both by telephone and email with Stephen M. Pizzi who informed me that he was counsel for Defendants, and that the he would be representing Defendants in this matter.

Notice and a copy of the foregoing has been provided to this attorney via email and by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

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