

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

JACOB DOYLE CORMAN, III, et al.,

Petitioners-Appellees,

vs.

ACTING SECRETARY OF THE
PENNSYLVANIA DEPARTMENT OF
HEALTH,

Respondent-Appellant.

No. 83 MAP 2021

**BRIEF OF AMICI CURIAE PENNSYLVANIA CHAPTER OF AMERICAN
ACADEMY OF PEDIATRICS AND AMERICAN ACADEMY OF
PEDIATRICS IN SUPPORT OF APPELLANT**

Appeal from the Commonwealth Court Order dated November 10, 2021 at No. 294 MD 2021.

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INTEREST OF *AMICI CURIAE*¹

The Pennsylvania Chapter of the American Academy of Pediatrics, (“PA AAP”) is a non-profit educational organization and professional society comprising approximately 2300 members, including pediatricians, residents, and medical students from Pennsylvania. PA AAP works to support the optimal health of children by addressing their needs and the needs of their families, their communities, and their health care providers.

The American Academy of Pediatrics (“AAP”) was founded in 1930 and is a national, not-for-profit professional organization dedicated to furthering the interests of child and adolescent health. The AAP’s membership includes over 67,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past year-and-a-half, the AAP has devoted substantial resources to researching the scientific literature regarding how to treat COVID-19 and reduce its spread so that the AAP can provide up-to-date, evidence-based guidance for pediatricians and public health officials. This includes, among other things, interim guidance on the use of face masks as an infection control measure and on operating safe schools during the COVID-19 pandemic.

¹ *Amici* certify that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund this brief, and no person other than *Amici*, their members, and their counsel contributed money intended to fund this brief.

INTRODUCTION

Over the past 18 months, *Amici* have worked ceaselessly to evaluate the dangers of and potential public health measures for reducing the deadly spread of COVID-19. The AAP has conducted a comprehensive review of the medical literature to determine what public health measures can effectively reduce the risk that COVID-19 poses to America's children. This comprehensive review and the experiences of the front-line pediatric practitioners who make up the PA AAP and AAP's membership prove two relevant facts beyond any doubt: COVID-19 poses grave risks to children, risks that escalated significantly with the rise of the Delta variant; and universal mask policies in schools significantly reduce the spread of COVID-19 and protect all children.

Prohibiting the Commonwealth from protecting its students would harm public health and subject parents of particularly vulnerable children to the untenable choice of either sending their children to schools where they have a high risk of contracting COVID-19, or keeping them home from school with the attendant harm to their social, emotional, and educational development.

Accordingly, this Court should reverse the decision below and allow the Commonwealth to maintain its considered public health policy.²

² While this brief is submitted in support of Appellant's position on the merits, *Amici* believe it is also highly relevant to this Court's consideration of Appellant's Emergency Application to Reinstate the Automatic Supersedeas, filed on November 22, 2021.

ARGUMENT

I. COVID-19 Is a Serious Childhood Illness

The AAP and the Children’s Hospital Association have collaborated throughout the pandemic to collect and share all publicly available data from states on COVID-19 cases among children.³ As of November 18, 2021, more than 6,750,000 total child COVID-19 cases have been reported in the United States, representing more than 16% of the total U.S. cases.⁴ The prevalence of pediatric COVID-19 has skyrocketed since the school year began, with more than a third of all child cases since the beginning of the pandemic 19 months ago diagnosed in the three months between August 13 and November 18.⁵ This surge appears to be due to two principal factors: the resumption of in-person schooling (and particularly schooling in places without masks), and the emergence of the Delta variant, which is more than twice as contagious as previous variants.⁶

As the rate of COVID-19 has soared, so has the number of serious cases; just among the 24 states and 1 city that report child hospitalizations, more than 7,800

³ See *Children and COVID-19: State-Level Data Report*, AAP, <https://bit.ly/31RMDLR> (data available as of Nov. 18, 2021).

⁴ *Id.*

⁵ *Children and COVID-19: State Data Report* at Appx. Tab. 2A, Children’s Hosp. Ass’n & Am. Acad. of Pediatrics (Nov. 18, 2021), <https://bit.ly/3FGhJ7R>.

⁶ See *Delta Variant: What We Know About the Science*, CDC (Aug. 26, 2021), <https://bit.ly/3kDl7sc>.

children were hospitalized due to COVID-19 between August 13 and November 18, more than 30% of the total child hospitalizations to date.⁷ Before August 13, no more than 16 children had died from COVID-19 in any week of the pandemic; after August 13, that number was matched or eclipsed for 11 straight weeks.⁸ Pennsylvania has reported at least 289,812 COVID-19 cases among children, the fifth most in the nation, and at least 19 children have died from COVID-19 in the Commonwealth.⁹

As the hospitalization rate reflects, COVID-19 can cause severe symptoms and potentially fatal outcomes even in children. Among other things, COVID-19 infections can produce multisystem inflammatory syndrome in children (MIS-C).¹⁰ MIS-C involves clinically severe levels of fever, inflammation, and dysfunction or shock in multiple organ systems (including cardiac, renal, respiratory, hematologic, gastrointestinal, dermatologic, and/or neurological). Among other severe symptoms, it can cause coronary artery enlargement; aneurysm; meningitis; colitis;

⁷ See *Children and COVID-19: State Data Report*, *supra* n. 5, at Appx. Tab. 2B.

⁸ *Id.* at Appx. Tab. 2C.

⁹ *Id.* at Appx. Tabs. 3B, 6B.

¹⁰ See *Multisystem Inflammatory Syndrome in Children (MIS-C) Associated with Coronavirus Disease 19 (COVID-19)*, CDC (May 14, 2021), <https://bit.ly/3niE5WG>; *Multisystem Inflammatory Syndrome in Children (MIS-C) Interim Guidance*, AAP (last updated Feb. 10, 2021), <https://bit.ly/3Cp8Nlu>.

hepatitis; symptoms akin to toxic shock syndrome; thrombosis; acute kidney injury; stroke; encephalitis; congestive heart failure; and pulmonary embolism.

COVID-19 infection can also lead to many secondary conditions, ranging from subacute to severe. Several studies have shown that long-term symptoms can occur in children and adolescents.¹¹ Indeed, even cases with mild initial symptomatology can produce significant long-term effects. These include persistent respiratory symptoms ranging from chest pain, cough, and exercise-induced dyspnea to pulmonary emboli; myocarditis (i.e., inflammation of the heart muscle), shortness of breath, arrhythmia, and/or fatigue, and potentially leading to heart failure, myocardial infarction, stroke, or sudden cardiac arrest; persistent loss of the sense of smell (anosmia) or taste (ageusia), which can affect the nutritional status and quality of life of children and adolescents and be particularly disruptive to the feeding behavior of very young children; neurodevelopmental sequelae, both including the consequences of significant acute injuries such as stroke or encephalitis and subtle but persistent sequelae in cognitive, language, academic, motor, mood, and behavioral domains; cognitive foginess or fatigue; physical

¹¹ See, e.g., Danilo Buonsenso, et al., *Preliminary evidence on long COVID in children*, *Acta Paediatrica* (2021), <https://bit.ly/2YMGcsj> (studying 129 children in Italy and reporting that 42.6% experienced at least one symptom more than 60 days after infection); Helen Thomson, *Children with long covid*, 249 *New Scientist* 10 (2021), <https://bit.ly/3DquZgo> (U.K. Office of National Statistics estimate that 12.9% of children 2-11 years of age and 14.5% of children 12-16 years of age experienced symptoms 5 weeks after infection).

fatigue; and mental or behavioral health impacts such as stress and adjustment disorders.

Moreover, the uncontrolled spread of COVID-19 poses a massive risk to children and adults who have other medical needs. Hospital ICU capacity is strained beyond capacity in much of the country, as it was earlier in the pandemic. As of November 23, 2021, more than 85% of all pediatric ICU beds in the Commonwealth were in use; in at least 10 Pennsylvania counties, 90% or more of *all* ICU beds are in use.¹² Due to the strain on medical resources, this will result in excess morbidity and mortality even for children and adults who do not contract COVID-19; as research has shown, “[p]andemic COVID-19 surges [a]re associated with higher rates of in-hospital mortality among patients without COVID-19, suggesting disruptions in care patterns for patients with many common acute and chronic illnesses.”¹³ In layperson’s terms, more children and adults will become sick and possibly die, both due to COVID-19 and due to the delay of treatment for other urgent conditions.

¹² See *COVID-19 Dashboard*, Pa. Dep’t of Health (data available as of Nov. 23, 2021), <https://bit.ly/2YTQWW4>; *Pennsylvania COVID-19 Hospital Capacity*, Statesman J. (data available as of Nov. 23, 2021), <https://bit.ly/3cfqHwe>.

¹³ See, e.g., Amber K. Sabbatini, et al., *Excess Mortality Among Patients Hospitalized During the COVID-19 Pandemic*, J. Hospital Med. (2021), <https://bit.ly/3Hs5EEU>.

II. Based on Extensive Research, the AAP Strongly Recommends that Schools Maintain Universal Mask Policies in Schools as an Infection Control Measure.

A. Overview of AAP’s Research into School Safety During the Pandemic

One of the AAP’s chief functions is to provide evidence-based guidance to America’s pediatric professionals and public health officials. To do so, the AAP issues Policy Statements that report the most up-to-date, evidence-based expert consensus on key issues of pediatric practice and public health. These Policy Statements are written by recognized pediatrician experts who undertake a comprehensive review of the medical literature and available data on the topic at hand. They are then peer-reviewed by additional experts across the AAP and approved by the AAP’s executive staff and board of directors.

Since the spring of 2020, the AAP’s top focus has been supporting practicing pediatricians and public health policymakers in treating COVID-19 and reducing its spread, particularly among children. The AAP has issued Interim Guidance Statements on several topics related to COVID-19, The AAP has issued Interim Guidance Statements on several topics related to COVID-19, including guidance on when and how pediatricians should test patients for COVID-19;¹⁴ on providing clinical care to patients with COVID-19;¹⁵ on treating post-COVID

¹⁴ *COVID-19 Testing Guidance*, AAP (last updated Sept. 1, 2021), <https://bit.ly/3cfroFQ>.

¹⁵ *COVID-19 Interim Guidance*, AAP (last updated Nov. 2, 2021), <https://bit.ly/3Djk1Jx>.

conditions;¹⁶ on how to safely provide routine medical care such as check-ups, screenings, laboratory exams, treatment, and immunizations during the COVID-19 pandemic;¹⁷ on caring for youth with special health needs during the COVID-19 pandemic;¹⁸ on supporting the emotional and behavioral health needs of children, adolescents, and families during the COVID-19 pandemic;¹⁹ and—most relevant to this case—on the use of face masks as an infection control measure²⁰ and on operating safe schools during the COVID-19 pandemic that foster the overall health of children, adolescents, educators, staff, and communities.²¹ These Interim Guidances were drafted and reviewed by a number of pediatricians with expertise in a wide variety of disciplines, and have been continually reviewed and updated since spring of 2020. By this point, the AAP’s experts have reviewed hundreds of

¹⁶ *Post-COVID-19 Conditions in Children and Adolescents*, AAP (last updated July 28, 2021), <https://bit.ly/3cuLhJj>.

¹⁷ *Guidance on Providing Pediatric Well-Care During COVID-19*, AAP (last updated Aug. 30, 2021), <https://bit.ly/3Dqxlfe>.

¹⁸ *Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic*, AAP (last updated Sept. 20, 2021), <https://bit.ly/3DlqkvU>.

¹⁹ *Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children, Adolescents, and Families During the COVID-19 Pandemic*, AAP (last updated July 28, 2021), <https://bit.ly/3qGi5r2>.

²⁰ *Face Masks*, AAP (last updated Aug. 11, 2021), <https://bit.ly/30p9qOD>.

²¹ *COVID-19 Guidance for Safe Schools*, AAP (last updated Nov. 2, 2021), <https://bit.ly/3DkCrcM>.

articles related to the efficacy and safety of masks, as well as their effects (or lack thereof) on the cognitive, social, and psychological development of children.

As pediatrician organizations, the AAP and PA AAP recognize that not being able to attend school in person can negatively affect children’s cognitive, educational, and social development, as well as children’s short- and long-term mood, behavior, and mental health. Based on the AAP’s expert review of the scientific literature and the guidance outlined by the World Health Organization, United Nations Children’s Fund, and Centers for Disease Control and Prevention (“CDC”), along with AAP’s members’ collective expertise as pediatricians and researchers, the AAP concluded that “all local, state, and federal policy considerations for school COVID-19 plans should start with a goal of keeping students safe, physically present, and emotionally supported in school.”²² “[A]t this point in the pandemic, given what we know now about low rates of in-school transmission *when proper prevention measures are used*, together with the availability of effective vaccines for those eligible, . . . the benefits of in-person school outweigh the risks in almost all circumstances.”²³ Among the recommended prevention measures (such as immunization of all eligible individuals and adequate and timely COVID-19 testing), one of the most important is that “[a]ll students

²² *Id.*

²³ *Id.* (emphasis added).

older than 2 years and all school staff should wear face masks at school (unless medical or developmental conditions prohibit use).”²⁴

This conclusion has been consistently reinforced by all relevant data and credible research, leading the Centers for Disease Control (“CDC”) to recommend “universal indoor masking for all teachers, staff, students, and visitors to schools, regardless of vaccination status” on July 27, 2021.²⁵ Just this month, after reviewing all scientific evidence to date on the transmission and prevention of COVID-19 during the current school year, AAP reaffirmed its recommendation of universal masking.²⁶

B. Universal Masking Policies Are Highly Effective at Reducing Transmission of COVID

While there are several reasons for the AAP’s (and the CDC’s) recommendation of universal masking in school,²⁷ the most important is that the research literature has confirmed that masks are both effective and safe. Masks “reduce the emission of virus-laden droplets . . . , which is especially relevant for asymptomatic or presymptomatic infected wearers who feel well and may be

²⁴ *Id.* (emphasis in original).

²⁵ *Interim Public Health Recommendations for Fully Vaccinated People—Summary of Recent Changes*, CDC (Oct. 15, 2021), <https://bit.ly/3mmCmy6>.

²⁶ *COVID-19 Guidance for Safe Schools*, *supra* n. 21.

²⁷ *See id.* (identifying eight bases for AAP’s mask recommendation).

unaware of their infectiousness to others, and who are estimated to account for more than 50% of transmissions.”²⁸ Cloth masks “block most large droplets (i.e., 20-30 microns and larger)” and “also block the exhalation of fine droplets.”²⁹ “Multi-layer cloth masks can both block up to 50-70% of these fine droplets and particles,” with “[u]pwards of 80% blockage” recorded in some studies.³⁰ To a slightly lesser extent, masks also “help reduce inhalation of these droplets by the wearer”; multi-layer cloth masks can filter out “nearly 50% of fine particles less than 1 micron.”³¹

This difference between masks’ ability to block *exhalation* and *inhalation* of viral particles explains why it is so important for mask policies to be universal. Masks’ primary benefit is as “source control,” preventing infected carriers from spreading viral particles widely. As the CDC has explained, “masks are not designed to reduce the particles that the wearer will inhale The purpose of wearing a mask is to help reduce the spread of COVID-19 by reducing the spread

²⁸ *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CDC (May 7, 2021), <https://bit.ly/3utvxOA> (citations omitted).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

of the virus through respiratory droplets from asymptomatic individuals.”³²

Because wearing a mask provides only limited protection against contracting COVID-19 if the wearer is near one or more unmasked carriers, universal masking is needed as source control for COVID-19 carriers (who may be asymptomatic and not know they are shedding viral particles), thereby protecting vulnerable individuals.

Numerous studies have shown that increasing the rate of mask-wearing, including through universal mask policies in particular, significantly reduces the spread of COVID-19.³³ In particular, studies have shown that masking and similar

³² *Respiratory Protection vs. Source Control—What’s the Difference?*, CDC (Sept. 8, 2020), <https://bit.ly/3pn0y6s>.

³³ See, e.g., Jeremy Howard, et al., *An Evidence Review of Face Masks Against COVID-19*, 118 Proc. of the Nat’l Acad. of Servs. e2014564118 (2021), <https://bit.ly/3ndJVsl>; John T. Brooks & Jay C. Butler, *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, 325 J. of Am. Med. Ass’n 998 (2021), <https://bit.ly/3Fi8Hh7>; Heesoo Joo, et al., *Decline in COVID-19 Hospitalization Growth Rates Associated with Statewide Mask Mandates—10 States, March–October 2020*, 70 Morbidity & Mortality Weekly Rep. 212 (2021), <https://bit.ly/3cgPrEd>; Derek K. Chu, et al., *Physical Distancing, Face Masks, and Eye Protection to Prevent Person-to-Person Transmission of SARS-CoV-2 and COVID-19: A Systematic Review and Meta-Analysis*, 395 Lancet 1973 (2020), <https://bit.ly/3kEj1YU>; Christopher T. Leffler, et al., *Association of Country-wide Coronavirus Mortality with Demographics, Testing, Lockdowns, and Public Wearing of Masks*, 103 Am. J. Tropical Med. Hygiene 2400 (2020), <https://bit.ly/2YMIszO>; Miriam E. Van Dyke, et al., *Trends in County-Level COVID-19 Incidence in Counties With and Without a Mask Mandate—Kansas, June 1-August 23, 2020*, 69 Morbidity & Mortality Weekly Rep. 1777 (2020), <https://bit.ly/31SbU8H>; Wei Lyu & George L. Wehby, *Community Use of Face Masks and COVID-19: Evidence from a Natural Experiment of State Mandates in the US*, 39 Health Aff. 1419 (2020), <https://bit.ly/3Ho9VJw>.

mitigation measures can limit transmission in schools.³⁴ Most recently, the CDC released three studies conducted during this school year, all of which found that “school districts without a universal masking policy in place were more likely to have COVID-19 outbreaks.”³⁵ As the ABC Science Collaborative, a 13-state initiative coordinated by the Duke Clinical Research Institute at the Duke University School of Medicine, summed it up, “[p]roper masking is the most effective mitigation strategy to prevent COVID-19 transmission in schools when

³⁴ See, e.g., Patrick Dawson, et al., *Pilot Investigation of SARS-CoV-2 Secondary Transmission in Kindergarten Through Grade 12 Schools Implementing Mitigation Strategies—St. Louis County and City of Springfield, Missouri, December 2020*, 70 *Morbidity & Mortality Weekly Rep.* 449 (2021), <https://bit.ly/3HsAL3w>; Darria L. Gillespie, et al., *The Experience of 2 Independent Schools With In-Person Learning During the COVID-19 Pandemic*, 91 *J. Sch. Health* 347 (2021), <https://bit.ly/3kAEtxR>; Rebecca B. Hershov, et al., *Low SARS-CoV-2 Transmission in Elementary Schools - Salt Lake County, Utah, December 3, 2020-January 31, 2021*, 70 *Morbidity & Mortality Weekly Rep.* 442 (2021), <https://bit.ly/3cb48ZE>; Amy Falk, et al., *COVID-19 Cases and Transmission in 17 K-12 Schools - Wood County, Wisconsin, August 31-November 29, 2020*, 70 *Morbidity & Mortality Weekly Rep.* 136 (2021), <https://bit.ly/3qFvxeD>; Fiona Russell et al., *COVID-19 in Victorian Schools: An Analysis of Child-Care and School Outbreak Data and Evidence-Based Recommendations for Opening Schools and Keeping Them Open*, Murdoch Children’s Rsch. Inst. & The Univ. of Melb. (2020), available at <https://bit.ly/31TpNU6>; see generally *Science Brief: Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs—Updated*, CDC (July 9, 2021), <https://bit.ly/2YRMJCe>.

³⁵ Press Release, *Studies Show More COVID-19 Cases in Areas Without School Masking Policies*, CDC (Sept. 24, 2021), <https://bit.ly/3kYtuyU>; see Megan Jehn, et al., *Association Between K–12 School Mask Policies and School-Associated COVID-19 Outbreaks—Maricopa and Pima Counties, Arizona, July–August 2021*, 70 *Morbidity & Mortality Weekly Rep.* 1372 (2021), <https://bit.ly/3uwVdKh>; Samantha E. Budzyn, et al., *Pediatric COVID-19 Cases in Counties With and Without School Mask Requirements—United States, July 1–September 4, 2021*, 70 *Morbidity & Mortality Weekly Rep.* 1377 (2021), <https://bit.ly/3uIQ8il>; Sharyn E. Parks, et al., *COVID-19–Related School Closures and Learning Modality Changes—United States, August 1–September 17, 2021*, 70 *Morbidity & Mortality Weekly Rep.* 1374 (2021), <https://bit.ly/3ipDVtD>.

vaccination is unavailable or there are insufficient levels of vaccination among students and staff.”³⁶

III. Enjoining the Commonwealth’s Policy Will Adversely Affect the Public Interest

For the reasons laid out above, enjoining the Commonwealth’s policy will substantially harm public health and is against the public interest. The policy challenged here is one of the most important measures in place to reduce the transmission of COVID-19 in Pennsylvania’s schools. Lifting it will increase the rate of COVID-19, harming individual students—and particularly harming those with medical conditions that place them at risk of severe complications if they contract COVID-19. Indeed, numerous courts have found that universal mask policies are *required* at this stage of the pandemic to comply with the federal Americans with Disabilities Act and Rehabilitation Act, due to the heightened risk for such children.³⁷ More children will need to stay home from school to avoid this

³⁶ ABC Science Collaborative, *The ABCs of North Carolina’s Plan*, <https://bit.ly/3nhUYkr> (last visited Nov. 15, 2021); *see also* ABC Science Collaborative, *Final Report for NC School Districts and Charters in Plan A*, at 3 (June 30, 2021), *available at* <https://bit.ly/3cgHMWs>.

³⁷ *See E.T. v. Morath*, No. 21-cv-717, 2021 WL 5236553 (W.D. Tex. Nov. 10, 2021) (granting permanent injunction); *R.K. v. Lee*, No. 21-cv-725, 2021 WL 4942871 (M.D. Tenn. Oct. 22, 2021) (granting preliminary injunction); *S.B. v. Lee*, No. 21-cv-317, 2021 WL 4755619 (E.D. Tenn. Oct. 12, 2021) (same); *Arc of Iowa v. Reynolds*, No. 21-cv-264, 2021 WL 4737902 (S.D. Iowa Oct. 8, 2021) (same); *Disability Rights S.C. v. McMaster*, No. 21-cv-2728, 2021 WL 4444841 (D.S.C. Sept. 28, 2021) (same); *G.S. v. Lee*, No. 21-cv-2552, 2021 WL 4268285 (W.D. Tenn. Sept. 17, 2021) (granting temporary restraining order).

risk, hampering their educational and social development and increasing the damage caused by the pandemic to their emotional health.

When applying to the Commonwealth Court to lift the automatic supersedeas, Petitioners denied none of this. *See* Pet'rs' Appl. ¶¶ 30-39. Instead, their principal argument was that removing the automatic supersedeas would not harm the general public because the Governor plans to lift the universal mask policy on January 17, 2022. *Id.* ¶ 33. This misunderstands the current state of the pandemic. While pediatric vaccines are now *available* for children as young as five years old, few if any children between five and eleven have been fully vaccinated to date. Even children who got their first shot immediately after the CDC permitted vaccinating this age group on November 2, 2021 need to wait three weeks for their second shot,³⁸ and vaccine efficacy is not complete for seven to fourteen days thereafter.³⁹ And it will take time for all or even a majority of children to receive the vaccine; even among 12- to 17-year-olds, who have been eligible for the vaccine for months, only 50% are fully vaccinated, both nationally and in Pennsylvania.⁴⁰ The Governor's timetable may reflect a considered evaluation of

³⁸ *See COVID-19 Vaccines for Children and Teens*, CDC (Nov. 4, 2021), <https://bit.ly/3ouCoEY>.

³⁹ *See About the COVID-19 Vaccine: Frequently Asked Questions*, AAP (Nov. 12, 2021), <https://bit.ly/3ouUqHl>.

⁴⁰ *See Children and COVID-19 Vaccinations Trends*, AAP, at 6, 10 (Nov. 17, 2021), <https://bit.ly/3DLQSa1>.

when vaccine uptake among children may be sufficiently widespread to stop universal masking without unduly harming children and communities; Petitioners' request of immediate termination does not.

Continuing to enjoin the masking policy now would be especially dangerous because of the imminent holiday season. Last year, Thanksgiving and Christmas ushered in the worst surge of the pandemic.⁴¹ The weekly death rate reached a peak 50% higher than any point in the pandemic before or since.⁴² While vaccination rates will suppress this year's holiday surge, the highly transmissible Delta variant creates a significant risk of another major spike.⁴³ As former FDA Commissioner Scott Gottlieb put it, "We're going to see a post-holiday spike, there's no question about that. People are exhausted right now, but we need to remain vigilant just for a little bit longer."⁴⁴

Given the risk of an imminent public health crisis, the harm to children who will need to stay home from school to avoid exposure to COVID-19, and the

⁴¹ See, e.g., Christina Maxouris, *December Is the Deadliest Month in the US Since the Coronavirus Pandemic Began—and Projections for January Are "Nightmarish," Expert Says*, CNN Health (Dec. 27, 2020), <https://cnn.it/3oO1BKX>.

⁴² *Weekly Updates by Select Demographic and Geographic Characteristics*, CDC (data available as of Nov. 10, 2021), <https://bit.ly/3wLRp9f>.

⁴³ See, e.g., Jackie Salo, *Former FDA Head Warns of Post-Thanksgiving Spike in COVID-19 Cases*, N.Y. Post (Nov. 14, 2021), <https://bit.ly/30AIQ6t> (predicting particularly severe effects in, among other places, western Pennsylvania).

⁴⁴ *Id.*

potentially fatal harm to individuals by increasing the risk of COVID-19, the Court should allow the Commonwealth's policy to continue.

CONCLUSION

For these reasons and those stated in Petitioners' brief, the Court should reverse the decision below.

Dated: November 23, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 23, 2021

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CERTIFICATE OF SERVICE

I certify that on November 23, 2021, the above brief was filed using the court's CM/ECF system, which will notify all registered counsel.

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