

No. 21-6147

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, *et al.*,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Kentucky
(3:21-cv-00055-GFVT)

BRIEF OF AMERICAN MEDICAL ASSOCIATION, AMERICAN COLLEGE OF PHYSICIANS, AMERICAN ACADEMY OF FAMILY PHYSICIANS, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN ACADEMY OF ALLERGY, ASTHMA & IMMUNOLOGY, AMERICAN COLLEGE OF CHEST PHYSICIANS, AMERICAN COLLEGE OF MEDICAL GENETICS AND GENOMICS, AMERICAN GERIATRICS SOCIETY, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY FOR CLINICAL PATHOLOGY, AMERICAN SOCIETY OF HEMATOLOGY, AMERICAN THORACIC SOCIETY, SOCIETY OF INTERVENTIONAL RADIOLOGY, AND AMERICAN LUNG ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS' MOTION FOR STAY OF THE DISTRICT COURT'S NOVEMBER 30, 2021 ORDER PENDING APPEAL

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INTEREST OF *AMICI CURIAE*

As set forth in the accompanying motion for leave to file, *Amici* are associations representing medical professionals and patients across disciplines. They have a strong interest in providing evidence-based guidance on public health issues and working to reduce the spread of contagious illnesses.¹

INTRODUCTION

The United States is in an unprecedented and ongoing public health crisis. SARS-CoV-2, the causative agent of COVID-19, has wreaked havoc in communities across the country, taxed hospitals to the point of rationing care, upended the lives of countless families, and killed over 794,000 Americans. Widespread vaccination is essential to ending the COVID-19 pandemic and preventing thousands more needless deaths.

Many COVID-19 outbreaks have occurred in workplaces, inducing an occupational health emergency. Needless to say, workers—including federal contractor employees—who contract the SARS-CoV-2 virus, or

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.

worse, develop COVID-19 symptoms, disrupt workplace efficiency and must stay home from workplaces during recovery.

For nearly two years, *Amici* have monitored the COVID-19 pandemic and advocated for evidence-based public health measures to end it. *Amici*'s extensive review of the medical literature demonstrates that COVID-19 vaccines authorized or approved by the Food and Drug Administration are safe and effective, and the widespread use of those vaccines is the best way to keep COVID-19 from spreading within workplaces. Maintaining the injunction against the Safer Federal Workforce Task Force's Guidance for Federal Contractors and Subcontractors² would therefore severely and irreparably harm workers and undermine the public interest.

² See Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Nov. 10, 2021), <https://bit.ly/3Cd6vFG>; Federal Acquisition Regulatory Council, *Memorandum to Chief Acquisition Officers et al. re: Issuance of Agency Deviations to Implement Executive Order 14042* (Sept. 30, 2021), <https://bit.ly/3qAlUha>.

ARGUMENT

I. **COVID-19 poses a grave danger to the health of federal contractor employees.**

COVID-19 presents a severe risk to public health. Although most people infected with the virus will experience mild to moderate symptoms, individuals with COVID-19 can become seriously ill or die at any age. As of December 14, 2021, there have been over forty-nine million confirmed cases of COVID-19 in the United States,³ leading to more than 3,471,000 hospitalizations⁴ and over 794,000 deaths—more than twenty-two times the number of people in the United States who die from influenza in the average year.⁵ Even those who recover from COVID-19 may experience debilitating symptoms lasting for several months after the acute phase of infection. A systematic review of forty-five studies including 9,751 participants found that 73% of infected individuals experienced at least one long-term symptom.⁶ Over half of

³ *COVID Data Tracker*, Centers for Disease Control and Prevention (Dec. 14, 2021), <https://bit.ly/3Du7Glz>.

⁴ *COVID Data Tracker Weekly Review*, CDC (Dec. 10, 2021), <https://bit.ly/3EYAdAb>.

⁵ *Disease Burden of Flu*, CDC (Oct. 4, 2021), <https://bit.ly/3ocAuZA>.

⁶ Tahmina Nasserie et al., *Assessment of the Frequency and Variety of Persistent Symptoms: A Systematic Review*, JAMA Network Open, May 26, 2021, <https://bit.ly/3qocFkk>.

previously hospitalized patients continue to experience cardiopulmonary symptoms and abnormalities six months later.⁷ Studies also indicate that COVID-19 is associated with increased risk of adverse neurological and psychiatric outcomes.⁸

SARS-CoV-2 is highly transmissible. The original strain was more contagious than the flu, and the Delta variant of SARS-CoV-2, currently the leading strain, is more than twice as contagious as the original.⁹ Crucially, over 50% of the spread of the virus may be from individuals who have no symptoms at the time of transmission.¹⁰

Workplace transmission has been a major factor in the spread of COVID-19. COVID-19 outbreaks have occurred among workers—

⁷ M.P. Cassar et al., *Symptom Persistence Despite Improvement in Cardiopulmonary Health – Insights from longitudinal CMR, CPET and lung function testing post-COVID-19*, *EClinicalMedicine* (2021), <https://bit.ly/3H7AeDB>.

⁸ Maxime Taquet et al., *6-month neurological and psychiatric outcomes in 236379 survivors of COVID-19: a retrospective cohort study using electronic health records*, *The Lancet Psychiatry* (Apr. 6, 2021), <https://bit.ly/3DXTbGo>.

⁹ *Delta Variant: What We Know About the Science*, CDC (Aug. 26, 2021), <https://bit.ly/3plAmcy>; Apoorva Mandavilli, *C.D.C. Internal Report Calls Delta Variant as Contagious as Chickenpox*, *N.Y. Times* (Jul. 30, 2021), <https://nyti.ms/3EtJXTb>.

¹⁰ *Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CDC (May 7, 2021), <https://bit.ly/30inWYx>.

including federal contractor employees—in numerous industries, including service and sales, education, hospitality, construction, domestic work, meat-processing, transportation, prison, and of course healthcare industries.¹¹ Studies found widespread COVID-19 outbreaks in meat- and poultry-processing facilities and “identified high proportions of asymptomatic or presymptomatic infections.”¹²

Forty-five percent more people reported missing work for medical reasons during 2020 than the previous twenty-year average.¹³ Another study found that adults who tested positive for SARS-CoV-2 were significantly more likely to report going to an office or school setting than adults who tested negative.¹⁴ Protecting workers from COVID-19 is

¹¹ *Update 64—COVID-19 Prevention at the Workplace*, World Health Organization (Jul. 28, 2021), <https://bit.ly/307J1V6>; *Investigating and Responding to COVID-19 Cases in Non-Healthcare Work Settings*, CDC (Oct. 25, 2021), <https://bit.ly/3qC74XN>.

¹² Michelle A. Waltenburg et al., *Coronavirus Disease among Workers in Food Processing, Food Manufacturing, and Agriculture Workplaces*, 27 *Emerging Infectious Diseases* 243 (2021), <https://bit.ly/3kp3Lip>.

¹³ Charisse Jones & Matt Wynn, *Coronavirus and the Workplace: The Virus Causes Record Numbers of Job Absences in 2020*, USA Today (Jan. 21, 2021), <https://bit.ly/3C39lgx>.

¹⁴ Kiva A. Fisher et al., *Telework Before Illness Onset Among Symptomatic Adults Aged ≥ 18 Years With and Without COVID-19 in 11 Outpatient Health Care Facilities — United States, July 2020*, 69 *Morbidity & Mortality Weekly Rep.* 1648 (Apr. 28, 2020), <https://bit.ly/3F5Ybt8>.

especially important given that “a large proportion of the United States workforce, across a variety of occupational sectors, are exposed to disease or infection at work more than once a month.”¹⁵ Requiring federal contractor employees to be vaccinated is not just an efficiency-promoting practice; it is life-saving.

II. Vaccines provide a safe and effective way to help reduce transmission of COVID-19 in the workplace.

COVID-19 vaccines are safe. Before FDA authorized/approved and CDC recommended use of the COVID-19 vaccines in the population, scientists conducted clinical trials. FDA, CDC, and their advisory committees conducted rigorous reviews of the data, and continue to monitor the vaccines’ safety.¹⁶ A study of over six million people who received the Pfizer or Moderna vaccines found that serious side effects are very rare.¹⁷ Another study concluded that there is no increased risk

¹⁵ Marissa G. Baker et al., *Estimating the burden of United States workers exposed to infection or disease: A key factor in containing risk of COVID-19 infection*, PLoS ONE (2020), <https://bit.ly/3BWDoq8>.

¹⁶ *Benefits of Getting a COVID-19 Vaccine*, CDC (last updated Nov. 29, 2021), <https://bit.ly/3H6BsiF>; Nicola P. Klein et al., *Surveillance for Adverse Events After COVID-19 mRNA Vaccination*, 326 JAMA 1390, (2021), <https://bit.ly/3F1XQYM>; *COVID-19 vaccine safety surveillance*, FDA (Jul. 12, 2021), <https://bit.ly/3y1dDET>.

¹⁷ Klein et al., *supra* n. 16.

for mortality among recipients of any of the COVID-19 vaccines, and that vaccine recipients in fact had lower non-COVID-19 mortality risks than did unvaccinated people.¹⁸

COVID-19 vaccines are also effective. First, each of the three vaccines greatly reduces the likelihood of contracting infection. The Pfizer, Moderna, and J&J/Janssen vaccines are 91.3%, 90%, and 72% effective against infection, respectively.¹⁹ Although the vaccines' efficacy wanes over time, initial data on Pfizer booster shots show that they may boost the vaccine efficacy to over 95%.²⁰ For comparison, the flu vaccination reduces the risk of flu illness by between 40% and 60%.²¹

Second, each of the three vaccines is even more effective against serious illness and death. Studies have estimated the Pfizer, Moderna, and J&J/Janssen vaccines as 95.3–97%, 95%, and 86% effective against

¹⁸ Stanley Xu et al., *COVID-19 Vaccination and Non-COVID-19 Mortality Risk — Seven Integrated Health Care Organizations, United States, December 14, 2020–July 31, 2021*, 70 *Morbidity & Mortality Weekly Rep.* 1520 (2021), <https://bit.ly/3D1ZRn4>.

¹⁹ Kathy Katella, *Comparing the COVID-19 Vaccines: How Are They Different?*, Yale Med. (Nov. 19, 2021), <https://bit.ly/307jEU5>.

²⁰ *Pfizer and BioNTech Announce Phase 3 Trial Data Showing High Efficacy of a Booster Dose of Their COVID-19 Vaccine*, Pfizer (Oct. 21, 2021), <https://bit.ly/3EXQa9K>.

²¹ *How Well Flu Vaccines Work: Questions & Answers*, CDC (last visited Dec. 13, 2021), <https://bit.ly/3HifLMP>.

severe disease, respectively.²² The vaccines are likewise highly effective against hospital admissions, “even in the face of widespread dissemination of the delta variant.”²³ According to one analysis, between March 11 and August 15, 2021, unvaccinated people accounted for 84.2% of patients hospitalized for COVID-19, including those infected with the Delta variant.²⁴ As of October 30, 2021, the age-adjusted rate of COVID-19 associated hospitalizations in unvaccinated adults was more than 12 times that of fully vaccinated adults.²⁵

The initial rollout of COVID-19 vaccines in the United States “was associated with reductions in COVID-19 cases, emergency department visits, and hospital admissions among older adults.”²⁶ In August 2021,

²² Katella, *supra* n. 19.

²³ Sara Y. Tartof et al., *Effectiveness of mRNA BNT162b2 COVID-19 Vaccine Up to 6 Months*, 398 *Lancet* 1407, 1407 (2021), <https://bit.ly/3ouPvqS>.

²⁴ Mark W. Tenforde, *Association Between mRNA Vaccination and COVID-19 Hospitalization and Disease Severity*, 326 *JAMA* 2043 (2021), <https://bit.ly/3bZBHhb>.

²⁵ See *Rates of laboratory-confirmed COVID-19 hospitalizations by vaccination status*, CDC (last updated Dec. 2, 2021), <https://bit.ly/3oIwsZ4>.

²⁶ Lucy A. McNamara et al., *Estimating the Early Impact of the US COVID-19 Vaccination Programme on COVID-19 Cases, Emergency Department Visits, Hospital Admissions, and Deaths Among Adults Aged 65 Years and Older: An Ecological Analysis of National Surveillance Data*, *Lancet* (Nov. 3, 2021), <https://bit.ly/31NqTRq>.

unvaccinated people were 6.1 times more likely to test positive for COVID-19, and were 11.3 times more likely to die from COVID-19, than fully vaccinated people.²⁷

Third, evidence suggests that those who are fully vaccinated are contagious for shorter periods than unvaccinated people.²⁸ Most importantly, “[r]egardless of viral loads in vaccinated and unvaccinated individuals, the fact remains clear that unvaccinated people pose a higher risk of transmission to others than vaccinated people, simply because they are much more likely to get COVID-19 in the first place.”²⁹

III. The more federal contractor employees who get vaccinated, the safer the workplace becomes.

The more federal contractor employees who get vaccinated, the closer we are to slowing the spread of the virus, creating a safer environment, and preventing employee illness due to COVID-19. As the American Medical Association has explained, “[t]he only way to truly

²⁷ *Rates of COVID-19 Cases and Deaths by Vaccination Status*, CDC (last visited Dec. 13, 2021), <https://bit.ly/3F3YMLV>.

²⁸ See COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402, 61,419 (Nov. 5, 2021).

²⁹ *Id.*

end this pandemic is to ensure *widespread* vaccination.”³⁰ Infectious diseases such as COVID-19 continue to circulate as long as the average infected individual is able to transmit the disease to one or more uninfected individuals within the community.³¹ Widespread vaccination is the only practical way to push the effective reproduction rate of the SARS-CoV-2 virus below one, the rate at which endemic transmission begins to die out.

Widespread vaccination reduces the likelihood of infections among both vaccinated and unvaccinated people. “[S]tates with high vaccination rates (>70% of the population) are reporting lower numbers of vaccine breakthrough cases as well as hospitalizations and deaths from COVID-19.”³² This is particularly important for people who cannot get vaccinated due to age or medical condition, as well as

³⁰ Press Release, Am. Med. Ass’n, *AMA, AHA, ANA urge vaccinations as U.S. reaches 750,000 COVID-19 deaths* (Nov. 4, 2021) (emphasis added), <https://bit.ly/3C07CIS>.

³¹ See generally Paul Fine et al., “*Herd Immunity*”: A Rough Guide, 52 *Clinical Infectious Diseases* 911 (2011), <https://bit.ly/31TY5qL>.

³² Carlos del Rio et al., *Confronting the Delta Variant of SARS-CoV-2, Summer 2021*, 326 *JAMA* 1001, 1002 (2021), <https://bit.ly/3bVL5Cj>.

immunocompromised people, who remain particularly susceptible to infection even after vaccination.³³

History has shown that vaccine requirements are critical to achieving the degree of vaccination necessary to curb or eradicate infectious disease. Countries or states that mandated smallpox vaccination saw 10 to 30 times fewer smallpox cases than those that declined to do so.³⁴ Before compulsory school vaccination laws were in place throughout the United States, states with strict vaccination requirements had incidence rates of measles less than half those of states that did not.³⁵

More recently, in 2014, two Ohioans were exposed abroad, which resulted in “the largest [measles] outbreak documented in the United

³³ Katherine Lontok, *How Effective Are COVID-19 Vaccines in Immunocompromised People?*, Am. Soc’y for Microbiology (Aug. 12, 2021), <https://bit.ly/3F24HBh>.

³⁴ Rajaie Batniji, *Historical Evidence to Inform COVID-19 Vaccine Mandates*, 397 *Lancet* 791 (2021), <https://bit.ly/3pW3HbR> (citing Frank Fenner, et al., World Health Org., *Smallpox and Its Eradication* (1988)).

³⁵ Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *Law in Public Health Practice* 262 (1st ed., 2003), <https://bit.ly/3BUviyg>.

States in more than two decades,” with 383 confirmed cases.³⁶ Approximately 89% of the individuals who contracted measles were unvaccinated before the outbreak, but “high baseline vaccination coverage in the general community was probably effective against further spread of measles.”³⁷ Similarly, the more federal contractor employees who are vaccinated, the better protected all employees—vaccinated and unvaccinated alike—will be.

IV. Widespread vaccination is the most effective way to protect federal contractor employees from COVID-19.

The statistics on COVID-19 vaccine efficacy speak for themselves. No other measure has been shown to reduce the risk of infection, hospitalization, and death to the degree that vaccination does. The science is clear: no arguments against the need for vaccination are medically valid, other than to accommodate a medical contraindication.

Natural immunity—the immunity against SARS-CoV-2 that develops following recovery from infection—is not an adequate

³⁶ Paul A. Gastañaduy *et al.*, *A Measles Outbreak in an Underimmunized Amish Community in Ohio*, *New England J. Med.* (2016), <https://bit.ly/3lVs8Fb>.

³⁷ *Id.*

substitute for vaccination.³⁸ Infection carries a significant risk of death or serious illness; vaccination does not. Moreover, vaccination better protects previously infected people against reinfection. Studies have shown that unvaccinated people are at least twice as likely to become reinfected as are vaccinated people.³⁹ There is no evidence that vaccination is harmful to people who were previously infected.

Other mitigation measures, such as mask wearing and social distancing, remain important. They do not, however, provide the same level of protection against COVID-19 as does vaccination. Although face masks can be highly effective at limiting the transmission of SARS-CoV-2, many people choose not to wear face masks, even when encouraged or

³⁸ See Catherine H. Bozio et al., *Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19-Like Illness with Infection-Induced or mRNA Vaccine-Induced SARS-CoV-2 Immunity – Nine States, January–September 2021*, 70 *Morbidity & Mortality Weekly Rep.* 1539 (2021), <https://bit.ly/3kvoBwR> (finding 5.5 times higher odds of laboratory-confirmed COVID-19 among previously infected patients than among fully vaccinated patients).

³⁹ Alyson M. Cavanaugh et al., *Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination – Kentucky, May–June 2021*, 70 *Morbidity & Mortality Weekly Rep.* 1081 (2021), <https://bit.ly/306e4Bg>.

legally required to do so. Noncontinuous mask-wearing has been shown to result in the spread of COVID-19 in the workplace.⁴⁰

Immediate, widespread vaccination against COVID-19 not only promotes workplace efficiency and reduces worker absenteeism, but it also is the surest way to protect federal contractor employees and the public and to end this costly pandemic.⁴¹

CONCLUSION

For the reasons stated above and in Defendants-Appellants' filings, *Amici* urge this Court to grant Defendants-Appellants' motion for stay pending appeal.

⁴⁰ Donatella Sarti et al., *COVID-19 in Workplaces: Secondary Transmission*, 65 *Annals Work Exposures & Health* 1145 (2021), <https://bit.ly/3Cj6oJ3>.

⁴¹ *Cf. Florida v. HHS*, Case No. 21-14098, 2021 WL 5768796, at *17 (11th Cir. Dec. 6, 2021) (“Imposing an injunction to bar enforcement of the interim rule would harm the public interest in slowing the spread of COVID-19 . . .”).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b), this document contains 2,597 words according to the word count function of Microsoft Word 365.

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/s/ Rachel Fried

Date: December 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2021, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Rachel Fried

Date: December 14, 2021