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January 19, 2022

Lyle W. Cayce, Clerk
Shirley M. Engelhardt, Deputy Clerk
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place, Suite 115
New Orleans, LA 70130

Re: No. 21-51083 E.T. v. Paxton
USDC No. 1:21-cv-717 (W.D. Tex.)

Dear Mr. Cayce:

Amici curiae the Texas Pediatric Society (“TPS”) and the American Academy of Pediatrics (“AAP”; collectively, “Amici”) respectfully submit this letter in response to the Court’s January 17, 2022 correspondence (the “Letter”) in the above-referenced appeal.¹

In the Letter, the Court requested that Amici respond to three “apparent contradictions between the brief [Amici] filed on January 13 and the AAP’s own website” and “sources cited in ... footnotes [in Amici’s brief].” Letter at 1. As Amici respectfully explain below, the statements in their January 13, 2022 amicus brief (the “Brief”)² are fully supported by the scientific evidence—including the authorities cited in footnotes in the Brief and AAP’s own website.

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

² Brief of Amici the Texas Pediatric Society and the American Academy of Pediatrics in Support of Plaintiffs-Appellees.

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Additionally, in response to the Letter, TPS and AAP leadership have reviewed their Brief in its entirety once again. Amici looked for any contradictions between the Brief and AAP's website or the sources cited in the Brief. That review has revealed no contradictions. In short, the statements set forth in the Brief remain the position of Amici.

Below, Amici explain on a per-bullet-point basis why there are no contradictions between statements in the Brief and other authorities addressed in the Letter.

A. “Universal school masking policies substantially reduce the risk of death and serious illness among Texas’s school-age population[.]”

This statement, taken from the Introduction to the Brief, summarizes the conclusion of Part II of the Brief: that universal school masking policies substantially reduce the risk of contracting COVID-19, thereby substantially reducing the risk of serious illness and/or death. There is no contradiction between this statement and the regularly updated State-Level Data Report that AAP publishes on its website.

The Letter correctly notes that, according to AAP's analysis, as of January 6, 2022: “Among states reporting, children were 0.00%–0.27% of all COVID-19 deaths, and 5 states reported zero child deaths. In states reporting, 0.00%–0.02% of all child COVID-19 cases resulted in death.”³ This data is not, as page one of the Letter suggests, in tension with the statements in the Brief, for two reasons.

First, the State-Level Data Report (the “Report”) and the Brief address distinct concepts: the Report offers baseline statistics about COVID-19 mortality, while the Brief addresses how masks *reduce* mortality rates, whatever they may be. Unfortunately, with a disease as contagious as COVID-19, even a low rate of mortality or serious

³ *Children and COVID-19: State-Level Data Report, Summary of Findings*, AAP <https://bit.ly/2Y5UTGq> (data as of Jan. 6, 2022, but updated as of Jan. 13, 2022).

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morbidity translates to many deaths or severe illnesses. As Amici have explained, *see* Brief at Part II(B), universal school masking policies substantially reduce the transmission of COVID-19, thus substantially reducing the likelihood and number of deaths or severe illnesses.

The number of lives saved by masking is substantial. The State of Texas has reported that 122 children aged 19 and under died of COVID-19 between March 2020 and December 2021.⁴ The medical literature indicates that (1) implementation of universal school masking policies would substantially reduce the number cases and therefore the number of deaths, even if deaths are a relatively small percentage of overall pediatric cases, and (2) extant masking policies likely prevented those numbers from being higher.

Second, the statistics that the Letter cites do not contradict the Brief because the data and the statement in the Brief address different scopes: the Brief discusses the risk of “death *and* serious illness,” while the statistics are limited to mortality. When serious illness is considered, the reduction in risk becomes even more pronounced. As of January 12, 2022, 471 children in Texas were hospitalized with COVID-19.⁵ Across the 24 states and one city that provide weekly reports of pediatric hospitalizations, 1,962 new hospitalizations were reported in the week between January 6 and January 13 alone—and the number has been rising week after week.⁶ Here again, even a modest reduction in transmission could spare hundreds of children or more in Texas from illnesses so severe that they require hospital stays.

⁴ *Case and Fatality Demographics Data*, Texas Health & Human Servs. (last updated Jan. 18, 2022), *available at* <https://bit.ly/3294kHk>.

⁵ Karen Brooks Harper & Carla Astudillo, *For Texas Children, COVID-19 Hospitalizations Are Outpacing Vaccinations*, Tex. Tribune (Jan. 14, 2022), <https://bit.ly/3GDVFvH>.

⁶ Children’s Hosp. Ass’n & AAP, *Children and COVID-19: State Data Report*, (Jan. 13, 2022), at Appx. Tab 2B, <https://bit.ly/3nyNtFd> (compare 30,856 reported hospitalizations on January 6 with 32,818 reported hospitalizations on January 13).

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B. “[The AAP’s] comprehensive review and the experiences of the front-line pediatric practitioners who make up the AAP’s membership prove three relevant facts beyond any doubt: . . . (3) Masks do not harm children.”

This statement, taken from page 3 of the Brief, addresses the scientific literature demonstrating that masks do not harm children. There is no contradiction between this statement and the State-Level Data Report (the “Report”) to which the Letter refers, for two reasons.

First, the “apparent contradiction” the Letter cites from the Report does not contradict the sentence the Letter quotes from the Brief because they address different topics. The Brief addresses masking, while the Report does not. The Letter correctly cites the Report as stating: “It is important to recognize there are immediate effects of the pandemic on children’s health, but importantly we need to identify and address the long-lasting impacts on the physical, mental, and social well-being of this generation of children and youth.”⁷ However, neither that statement nor anything else in the Report pertains to “the long-term effects of masking on children.” Letter at 1. Indeed, the word “mask” does not appear on the page at all.

Read in context, the statement is discussing the impact of the *pandemic*, not the impact of masks. The sentence that immediately precedes the quoted statement on the website makes this clear: “There is an urgent need to collect more age-specific data to assess the severity of illness related to new variants as well as potential longer-term effects.”⁸ The virus itself can have long-term effects on children’s health, and children’s mental and social well-being can be severely affected by the death of caregivers, social isolation, and other consequences of contracting the virus. The webpage on which the statement is found summarizes the data Amici have collected regarding child COVID-19 cases, hospitalizations, and deaths; unlike AAP’s relevant guidance

⁷ *Children and COVID-19: State-Level Data Report, Summary, supra* note 3.

⁸ *Id.*

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documents, it does not discuss masking or other means of reducing transmission at all.

Second, the AAP's website does not, either on the page the Letter identified or elsewhere, suggest that it is an "open question" whether masks harm children, either physically or otherwise. Letter at 1. AAP has written extensively about the negative social, psychological, and developmental effects that the pandemic and the resulting school closures have had for children.⁹ Far from suggesting that mask-wearing contributes to these harms, it has consistently advised that masks *reduce* these harms by reducing the transmission of COVID-19 and allowing for safe in-person schooling.¹⁰

⁹ See, e.g., *Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children, Adolescents, and Families During the COVID-19 Pandemic*, AAP (last updated Dec. 9, 2021), <https://bit.ly/3fzBS4z> ("There are many factors unique to this pandemic (eg, duration of the crisis, rapidly changing and conflicting messages, need for quarantine and physical isolation, and uncertainty about the future) that have increased its effects on emotional and behavioral health."); *COVID-19 Guidance for Safe Schools and Promotion of In-Person Learning*, AAP (last updated Nov. 2, 2021), <https://bit.ly/3KoSx9k> ("Remote learning . . . was detrimental to the educational attainment of students of all ages and worsened the growing mental health crisis among children and adolescents.").

¹⁰ See, e.g., *Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children*, *supra* note 9 ("Reframing and taking control of small things, such as making their own masks . . . , can help children and caregivers feel less vulnerable."); *COVID-19 Guidance for Safe Schools*, *supra* note 9 (explaining why AAP "currently recommends universal masking in school" for school staff and students older than two years, as part of a multi-pronged, layered approach to "make in-person learning safe and possible").

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C. “Though the AG does not expressly make the argument, some in Texas and elsewhere have touted bans on masking like GA-38 on the false premise that masks harm children. If that argument is raised in this appeal, the scientific evidence squarely refutes it.”

This statement, taken from page 22 of the Brief, addresses the understandable but mistaken concerns that have sometimes been raised about masks’ effect on children. There is no contradiction between this statement and either of the two articles cited in footnote 49 of the Brief.¹¹

Far from contradicting the Brief, the first article cited in footnote 49 supports the conclusion that masks do not harm children. The article *begins* by recognizing a *hypothesis*—that “some families wonder whether continuous use of face masks by daycare providers, preschool teachers, and other adults may negatively affect their child’s speech and language development.”¹² But it then seeks to allay these concerns and rejects the hypothesis, detailing twice over how “there are no known studies that use of a face mask negatively impacts a child’s speech and language development,” and that “there is no known evidence that use of face masks interferes with speech and language development or social communication.”¹³ AAP’s article bolsters this conclusion by referencing scientific studies of visually impaired children, and the commonsense understanding of those who encounter them: “visually impaired children develop speech and language skills at the same rate as their peers. In fact, when one sense is taken away, the others may be heightened. Young children will use other clues provided to them to

¹¹ *Do Masks Delay Speech and Language Development?*, AAP (last updated Aug. 26, 2021), <https://bit.ly/3B3c8GH>; Ashley L. Ruba & Seth D. Pollak, *Children’s emotion inferences from masked faces: Implications for social interactions during COVID-19*, 15(12) PLoS ONE e0243708 (Dec. 23, 2020), <https://bit.ly/2ZJk9Tv>.

¹² *Do Masks Delay Speech and Language Development?*, *supra* note 11.

¹³ *Id.*

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understand and learn language. They will watch gestures, hear changes in tone of voice, see eyes convey emotions, and listen to words.”¹⁴

The second article cited in footnote 49 follows from the first, and illustrates that there is affirmative scientific evidence that masks do not harm children. The second article concludes—consistent with Amici’s statements in the Brief—that “it appears that masks do not negatively impact children’s emotional inferences to a greater degree than sunglasses.”¹⁵ So the Court can see the article’s conclusions in context, Amici quote from them here at length:

These results highlight how children’s social interactions may be minimally impacted by mask wearing during the COVID-19 pandemic. Positive social interactions are predicated on the ability to accurately infer and respond to others’ emotions. In the current study, children’s emotion inferences about faces that wore masks compared to when faces were not covered were still above chance. Masks seem to have the greatest effect on children’s inferences about facial configurations associated with “fear,” which were commonly identified as “surprised” when the mouth and nose were covered. Thus, although children may require more visual facial information to infer emotions with masks, children may reasonably infer whether someone wearing a mask is sad or angry, based on the eye region alone. In addition, children’s accuracy with masked facial configurations did not significantly differ from their accuracy with facial configurations that wore sunglasses—a common accessory that children encounter in their everyday lives. Thus, it appears that masks do not negatively impact children’s emotional inferences to a greater degree than sunglasses. In sum, children’s ability to infer and respond to

¹⁴ *Id.*

¹⁵ Ruba & Pollak, *supra* note 11.

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another person’s emotion, and their resulting social interactions, may not be dramatically impaired by mask wearing during the COVID-19 pandemic.¹⁶

While the authors observed “some loss of emotional information due to mask wearing,” they specifically found that this did *not* prevent children from “infer[ring] emotions from faces”¹⁷

The Letter also points to a statement that it is “uncertain” how children infer emotions when others are wearing masks. Letter at 2. This quotation, however, is not a *conclusion* of the article, but rather a summary of the *question* posed in the introduction that the authors sought to answer. In other words, the article’s authors identified a gap in the existing scientific literature—uncertainty around children’s ability to infer emotions in a mask-wearing context—and then proceeded to fill that gap with their study. And, as discussed above, they ultimately concluded that masks do not in fact meaningfully prevent children from inferring emotions.

To be sure, there are situations where “masking is genuinely contradicted by an individual child’s developmental or physical conditions,” as Amici previously noted. Brief at 23. But the potential need for accommodations in such cases does not detract from the overall safety of masks, nor does it cast doubt on the District Court’s holding that universal masking policies may be a reasonable and necessary accommodation for students at heightened risk of severe symptoms if they contract COVID-19.

* * *

¹⁶ *Id.*

¹⁷ *Id.*

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In sum, none of the statements in the Brief are contradicted by AAP's website or the other sources to which the Letter refers. As pediatric organizations and experts that have reviewed the available scientific evidence, Amici continue to believe that the public interest and the interest of all children would best be served by affirming the District Court's decision permitting school districts to make decisions regarding mask requirements as befits their local circumstances.

Amici hope that this information provides the Court with relevant matter that "has not already been brought to [the Court's] attention by the parties." Fed. R. App. P. 29(b) (advisory committee's notes to 1998 amendment). To the extent the Court has additional questions regarding any aspect of Amici's Brief or their other publications, Amici would welcome the opportunity to provide further information.

Respectfully Submitted,

/s/ Jeffrey P. Justman

Jeffrey P. Justman

Mr. Lyle W. Cayce, Clerk - 10 - January 19, 2022

CERTIFICATE OF SERVICE

I, Jeffrey P. Justman, counsel for Amici, certify that on January 19, 2022, a copy of the foregoing letter was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

I further certify that 1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; 2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and 3) the document has been scanned for viruses and has been found to be free of viruses.

/s/ Jeffrey P. Justman
JEFFREY P. JUSTMAN