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

ELIZABETH VAN DUYNE, and THE STATE OF TEXAS, *Plaintiffs,*	§	
v.	§	CIVIL ACTION NO. 4:22-cv-00122-O
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, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as Secretary of HHS, and UNITED STATES OF AMERICA. *Defendants*.	§	

PLAINTIFF VAN DUYNE'S RESPONSE TO DEFENDANTS' MARCH 30, 2022 BRIEF

On March 17, 2022, the Court ordered the parties to submit cross briefs as to whether the Court should consolidate Plaintiff Elizabeth Van Duyne's ("Plaintiff") motion for a preliminary injunction with a trial on the merits. (Doc. 15). Plaintiff and Defendants submitted cross briefs on March 30, 2022. (Docs. 18-19). Plaintiff urged the Court to convert her preliminary judgment motion to a motion for summary judgment as a means for expediting the case pursuant to Rule 56(f). (Doc. 18 at 2-4). Defendants agree that summary judgment would be an appropriate means of expediting the case but urged the Court not to expedite the case. (Doc. 19 at 5-6). The Court should expedite summary judgment briefing in this case by converting the motion for preliminary injunction into a motion for summary judgment and ordering Defendants to respond to the merits of Plaintiff's arguments. The dispute is purely legal and it is in the public interest to expeditiously resolve challenges disruptive, major rules.

I. This case is atypical and an expeditious resolution on the merits is in the public interest.

The *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8026 (Feb. 3, 2021) (the "Mask Mandate") is the first order of its kind and highly disruptive to commercial and public transportation.[1] The Court should use its discretion to expedite resolution of the case for at least three reasons. *See United States v. Colomb*, 419 F.3d 292, 300 (5th Cir. 2005).

First, exigent circumstances exist. As Plaintiff has previously explained, the harm from having to comply with the Mask Mandate remains ongoing. (Docs. 3, 14). Defendants fault Plaintiff for delay but fail to mention the Federal Government's own confusing and changing regulations. A delay in seeking a preliminary injunction is excusable if there is a "good explanation." *See Symetra Life Ins. v. Rapid Settlements LTD.*, 612 F.Supp.2d 759, 774 (S.D. Tex. July 19, 2007). There is a good explanation here. Defendants did not impose the Mask Mandate until almost a full year after the Federal Government declared COVID-19 a national emergency.[2] The Mask Mandate directs the Transportation Security Administration (the "TSA") to enforce it. 86 Fed. Reg. at 8030. To do so, the TSA has been issuing seriatim Security Directives that were never more than a few months from their expiration dates.[3] That is, Plaintiff has been complying with the Mask Mandate under the impression that its expiration was never more than a few flights

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[1] The CDC itself states that the Mask Mandate would qualify as a "major rule" under the Congressional Review Act. 86 Fed. Reg. at 8030. A major rule is one that is "likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." 5 U.S.C. § 804(2).

[2] The Federal Government declared a national emergency on March 13, 2020, and the Mask Mandate was not published in the Federal Register until February 3, 2021. (Doc. 13 at 5-7).

[3] The TSA's Security Directives are available at https://www.tsa.gov/sd-and-ea.

away. This has turned out to be a false hope. Indeed, in Defendants' most recent filing, they repeat the promise that the Mask Mandate may expire "*perhaps* as early as April 18. (Doc. 19 at 5) (emphasis added). Defendants continued moving of the goal posts explains any delay by Plaintiff in filing for a preliminary injunction.

Additionally, such a delay is only tangentially related to the issue of whether this is an appropriate case to convert Plaintiff's motion for a preliminary injunction into a motion for summary judgment. Rule 56(f) is appropriate when material facts are not in dispute and the parties have adequate time to respond to the district court's notice of intention to consider summary judgment. *Sayles v. Advanced Recovery Sys.*, 865 F.3d 246, 249 (5th Cir. 2017). That is the situation here, where Defendants are aware of Plaintiff's claims and arguments and the Court can give them reasonable time to respond before granting or denying summary judgment.

Second, it is in the public interest to resolve challenges to major rules expeditiously. The disruption caused by the Mask Mandate is unprecedented. The CDC's admission that the Mask Mandate would be a major rule under the Congressional Review Act is evidence of its oversized impact on the daily lives of passengers and employees. 86 Fed. Reg. at 8030. Such a designation means Defendants are aware that the mask mandate either (A) imposes a $100 million cost on the economy; (B) results in a major increase of costs or prices for consumers, industries, government agencies, or geographic regions; or (C) has significant adverse effects on competition, employment, investment, productivity, or innovation. 5 U.S.C. § 804(2). A group of aviation executives recently issued an open letter to the Biden Administration noting how disruptive the Mask Mandate has been. Airlines for America, *A4A Urges White House to Lift Predeparture Testing Requirements, Mask Mandate* (March 23, 2022) (available at: https://www.airlines.org/news/a4a-urges-white-house-to-lift-predeparture-testing-requirements-

mask-mandate/). Noting that the "burden of enforcing" the Mask Mandate has fallen on airline employees, the letter explained "it is not a function they are trained to perform and subjects them to daily challenges by frustrated customers. This in turn takes a toll on their own well-being." *Id.*

Additionally, the rise in reports of unruly passengers since air travel resumed is well-documented.[4] The majority of these reports related to the Mask Mandate. For instance, by the Federal Aviation Administration's (the "FAA") statistics, there were more investigations of unruly passengers in 2021 than in the previous eight years combined. Federal Aviation Administration, *Unruly Passengers* (March 31, 2022) (available at: https://www.faa.gov/data_research/passengers_cargo/unruly_passengers/). For year-to-date statistics available through March 28, 2022, there were 1,035 reports of unruly passengers, of which 668 related to facemasks. *Id.* The Court should take this opportunity to expeditiously review this disruptive major rule.

Third, Defendants' argument that the State of Texas, the co-plaintiff, may not have standing is a red herring. There can be no doubt that Plaintiff Van Duyne has standing. *See Corbett v. Transp. Sec. Admin.*, 19 F.4th 478, 483 (D.C. Cir. 2021) ("As a directly regulated party, [Plaintiff] plainly has standing to pursue his claims in this case."). Further, "'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement,' and we therefore need conclude only that one plaintiff in the present case satisfies standing with respect to each claim." *Brackeen v. Haaland*, 994 F.3d 249, 291 (5th Cir. 2021) (quoting *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)); *see also Franciscan Alliance,*

[4] *See, e.g.*, Leslie Josephs, *FAA will keep 'zero tolerance' policy toward unruly passengers, outgoing chief says*, CNBC (March 25, 2022) (available at https://www.cnbc.com/2022/03/25/faa-will-keep-zero-tolerance-policy-toward-unruly-passengers-outgoing-chief-says.html); Marnie Hunter, *FAA numbers confirm it—2021 was terrible for bad behavior in the skies* (Jan. 13, 2022) (available at: https://www.cnn.com/travel/article/unruly-airline-passengers-faa-2021/index.html).

Inc. v. Burwell, 227 F.Supp.3d 660, 678 (N.D. Tex. Dec. 31, 2016) ("But it is not necessary for all Plaintiffs to demonstrate standing; rather, one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.") (internal quotation marks omitted). Granting summary judgment and the appropriate remedy—setting aside the illegal agency action under 5 U.S.C. § 706(2)(c)—to Plaintiff Van Duyne would resolve all claims in the case and would be appropriate to consider at the summary judgment stage.

CONCLUSION

For the foregoing reasons, the Court should order Defendants to respond to the merits of Plaintiff's claims immediately and schedule a hearing thereon as soon as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2022, I electronically filed the foregoing with the Clerk of the Court for the Northern District of Texas by using the CM/ECF system, which will serve a copy of same on all counsel of record.

/s/Matthew Miller
MATTHEW MILLER