

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

John Doe

Plaintiff,

v.

United States Dept. of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Peter P. Buttigieg, U.S. Dept. of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Blane A. Workie, U.S. Dept. of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Centers for Disease Control & Prevention
1600 Clifton Road NE
Atlanta, Georgia 30333

Rochelle Walensky, CDC
1600 Clifton Road NE
Atlanta, Georgia 30333

United States Dept. of Health & Human Services
200 Independence Ave SW
Washington, DC 20201

Xavier Becerra, U.S. Dept. of HHS
200 Independence Ave SW
Washington, DC 20201

Defendants.

Case No. 2:22-cv-00402-CRE

PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION
WITH INCORPORATED MEMORANDUM IN SUPPORT

Plaintiff John Doe seeks preliminary injunctive relief from this Court against the Defendants United States of America, the Department of Transportation (“DOT”), Peter P. Buttigieg (in his official capacity as Secretary of the Department of Transportation), Blane A. Workie (in her official capacity as Assistant General Counsel for the Office of Aviation Consumer Protection within the U.S. Department of Transportation), the Centers for Disease Control and Prevention (the “CDC”), 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 (“HHS”), and Xavier Becerra (in his official capacity as Secretary of HHS), (collectively, the “Defendants”). Plaintiff challenges the lawfulness of the Defendants’ orders imposing extra requirements and restrictions on people with disabilities as part of their mandate for people to wear face masks while on conveyances and at transportation hubs.

Plaintiff would show the Court that a preliminary injunction should be issued because:

First, he has established a likelihood of success on the merits that the CDC order and DOT order are in clear violation of the Air Carrier Access Act.

Second, Plaintiff will suffer irreparable harm if the orders are not swiftly enjoined. The mask mandate was recently extended for the fourth time and could be extended again beyond its tentative expiration date of April 18, 2022. Plaintiff has multiple trips scheduled in the next 30-60 days, but because his disability precludes him from safely wearing a mask, he is subject to unlawful discrimination by the CDC order and the DOT order. Obtaining exemptions from wearing a mask during airline travel in accordance with the CDC order and DOT order requires

him to undergo onerous extra steps that are not required of passengers without disabilities, and even then, such exemptions are extremely difficult to obtain. Plaintiff is certain of future harm because he has already been harmed repeatedly by the orders, having been forced to undergo onerous extra steps and having been forced to cancel multiple airline trips due to airlines' compliance with the CDC order and DOT order. Plaintiff has already incurred irreparable harm and will continue to incur irreparable harm for as long as the orders are in place.

Third, the continued injury to Plaintiff outweighs whatever damage the proposed injunction may cause Defendants. Plaintiff is suffering adverse consequences on a repeated and ongoing basis because of the unlawful requirements imposed on him by the CDC order and DOT order, including adverse consequences to his professional life and his family life. Plaintiff has been repeatedly subjected to unlawful and degrading treatment under the CDC order and DOT order, and has been forced to cancel several flights and trips. The Defendants lack the authority to issue orders that are not in accordance with duly enacted federal law and thus have no legitimate interest in continuing to enforce such orders.

Fourth, the public interest would be served by a preliminary injunction because the public has an interest in protecting the rights of persons with disabilities, and there are many similarly-situated persons with disabilities who are subject to ongoing harm because they are unable to fly without a mask under the unlawful regime created by the mask mandate and are subjected to discriminatory treatment under the CDC order and DOT order.

For these reasons and those set forth in more detail in the accompanying memorandum in support, this Court should issue a preliminary injunction enjoining Defendants from enforcing the mask mandate.

Respectfully submitted,

/s/ John Doe

Plaintiff

MEMORANDUM IN SUPPORT

A. Plaintiff is likely to succeed on the merits.

1. In moving for a preliminary injunction, “a plaintiff must show more than a mere possibility of success,” but need not “prove his case in full.” *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 545, 543 (6th Cir. 2007). It is “ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for litigation and thus for more deliberate investigation.” *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997).
2. The CDC order and DOT order explicitly allow – and even encourage – airlines to impose onerous extra conditions and requirements upon passengers with disabilities who cannot safely wear a mask, including requiring passengers requesting an exemption to give advance notice, provide a medical certificate, present evidence of a negative COVID-19 test taken at the passenger’s expense, take flights at a later time when airplanes and/or airports are less full, etc.
3. The Air Carrier Access Act expressly prohibits airlines from refusing transportation; delaying transportation; imposing any condition, restriction, or requirement not imposed on other passengers; or requiring a medical certificate, except to obtain certain specific services, unless the airline determines that the passenger’s condition poses a direct threat.
4. Finding that a passenger’s condition poses a direct threat requires the airline to make an *individualized* assessment of each passenger.

5. The DOT order requires airlines to treat *every* passenger as if he is a direct threat.

Airlines cannot possibly make an individualized assessment of each of the hundreds of millions of passengers who travel within, from, and to the United States each year.

6. The Air Carrier Access Act prohibits carriers from “subject[ing] passengers with a disability to restrictions that do not apply to other passengers” except under specific circumstances detailed in the law, of which traveling without a face mask is not one.

Since *every* passenger is treated as a direct threat, but only passengers with disabilities who cannot safely wear a mask are forced to comply with conditions, restrictions, and requirements not imposed on other passengers, passengers with disabilities are being unlawfully discriminated against under the Air Carrier Access Act.

7. Furthermore, the CDC order and DOT order explicitly permit and encourage airlines to require passengers with disabilities who cannot safely wear a mask to undergo onerous extra steps which are specifically prohibited by the Air Carrier Access Act, including requiring them to provide advance notice, submit medical certificates, undergo third-party medical screenings, take tests at their own expense, etc. Such requirements may only be imposed on disabled passengers in order to obtain specific special services, such as medical oxygen while in flight. Being able to fly without a mask – which was the universal practice for the entire history of commercial air travel in the United States prior to 2020 – is not one of those special services.

8. Furthermore, the extra conditions, restrictions, and requirements which the DOT not only permits but encourages airlines to impose on passengers with disabilities who cannot safely wear a mask are arbitrary and capricious because they permit wildly inconsistent treatment of passengers with disabilities across airlines and impose a significant burden

of time and expense on passengers with disabilities. As demonstrated in the complaint, some airlines require a medical screening, others require a doctor's note, and still others require a doctor's note *and* a medical screening. That is far from the end of the requirements. Some airlines require a passenger to present a negative COVID-19 test taken at his own expense. Some airlines allow passengers to request an exemption at the airport on the day of the flight while most domestic airlines require as much as 10 days' advance notice to request an exemption. Some airlines require a new doctor's note for each trip, which is not only burdensome but expensive if the doctor chooses to charge for his time spent on each letter. And even if a passenger fully complies with all steps of a particular airline's mask exemption process, he *still* can be denied if the airline is not "satisfied" with his request in their arbitrary judgment, per the DOT order.

9. For the reasons demonstrated above, the mask mandate is unlawful under the Air Carrier Access Act, and Plaintiff is likely to succeed on the merits.

B. Plaintiff will suffer irreparable harm without preliminary relief.

10. Courts have held that "[t]o satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer 'an injury that is neither remote nor speculative, but actual and imminent,' and cannot be remedied 'if a court waits until the end of trial to resolve the harm.'" *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66, (2d Cir. 2007) That test is definitely met here, as Plaintiff has multiple long-distance trips planned for the next 30 days and beyond for which air travel is the only feasible way to travel. He has already requested mask exemptions with multiple airlines for these trips, and even after following the process to the letter he has been denied on numerous occasions based on arbitrary decisions. Even if he manages to

get an exemption approved, it will be contingent on him complying with onerous and unlawful requirements.

11. The mask mandate has been extended four times, most recently this month, and it is reasonable to expect that the mask mandate will be extended again in some form beyond its current tentative expiration date of April 18, 2022. Plaintiff is therefore likely to suffer continued harm even beyond his most imminent plans to travel.
12. Plaintiff will also suffer irreparable harm because he has little or no recourse against the airlines for their actions. The Air Carrier Access Act provides no private right of action. *Stokes v. Southwest Airlines*, 887 F.3d 199 (5th Cir. 2018). The Air Carrier Access Act only provides for recourse via administrative law complaint with DOT, but DOT is the very agency permitting the airlines to discriminate against persons with disabilities, and complaints can only be filed after the incident occurs, so Plaintiff essentially has no way to prevent or recover from the harm he will suffer.

C. The threatened injury to Plaintiff outweighs any potential damage that may be caused to defendants by a preliminary injunction.

12. Courts have held that any interest a federal agency may claim in enforcing an unlawful agency action is illegitimate, and any harm said agency may suffer pales in comparison to the harms the absence of a stay threatens to cause others. *BST Holdings, LLC. v. Occupational Safety & Health Admin.*, No. 21-60845 (5th Cir. Nov. 12, 2021). Here, the DOT order and CDC order violate federal law, and they have no legitimate interest in enforcing such orders while disabled passengers suffer.

D. An injunction against an unlawful or unconstitutional action will serve the public interest.

13. A preliminary injunction is in the public interest. Courts have held that “[i]t is clearly in the public interest for the Court to enforce compliance with federal law prohibiting discrimination on the basis of disability.” *Jordan v. Greater Dayton Premier Mgmt.*, 9 F. Supp. 3d 847, 863 (S.D. Ohio 2014).
14. The public interest inquiry “primarily addresses impact on non-parties rather than parties.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). That test is definitely satisfied here. Similarly-situated persons with disabilities who cannot safely wear a mask have been subject to, and are continuing subjects of, discrimination by airlines on the basis that they cannot wear a mask. News stories have detailed numerous incidents of persons with various disabilities, including children, being kicked off planes or denied boarding because they were unable to safely wear a mask. Airlines point to federal policy in justifying these disturbing and unlawful incidents.

CONCLUSION

For the reasons outlined above, this Court should issue a preliminary injunction enjoining Defendants from enforcing the mask mandate.

Respectfully submitted,

/s/ John Doe

Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion and incorporated memorandum in support was electronically filed on March 16, 2022 and will be served via U.S. Mail, signature required, upon the following:

Cindy K. Chung,
United States Attorney, Western District of Pennsylvania
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Pittsburgh, PA 15219

United States Dept. of Transportation
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Washington, DC 20590

Peter P. Buttigieg, U.S. Dept. of Transportation
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/s/ John Doe
JOHN DOE

**IN THE UNITED STATES DISTRICT COURT
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JOHN DOE
Plaintiff,

v.

UNITED STATES DEPARTMENT OF
TRANSPORTATION, PETER P. BUTTIGIEG,
in his official capacity as Secretary of the DOT,
BLANE A. WORKIE, in her official capacity as
Assistant General Counsel for the Office of
Aviation Consumer Protection, CENTERS FOR
DISEASE CONTROL & PREVENTION,
ROCHELLE P. WALENSKY, in her official
capacity as Director of the CDC, UNITED
STATES DEPARTMENT OF HEALTH &
HUMAN SERVICES, XAVIER BECERRA, in
his official capacity as Secretary of HHS, and
UNITED STATES OF AMERICA,
Defendants.

Case No. 2:22-cv-00402-CRE

**[PROPOSED] ORDER ON PLAINTIFF JOHN DOE’S
MOTION FOR PRELIMINARY INJUNCTION**

The Court, having considered Plaintiff's Motion for Preliminary Injunction and all Memoranda submitted in support of and in opposition to the motion, as well as the applicable law, concludes that the motion has merit and is hereby GRANTED. Defendants are hereby ENJOINED from enforcing the Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 3, 2021), and Notice of Enforcement Policy: Accommodation by Carriers of Persons with Disabilities Who Are Unable to Wear or Safely Wear Masks While on Commercial Aircraft (Feb. 5, 2021).

SIGNED this ____ day of March, 2022.

UNITED STATES DISTRICT JUDGE