No. 21-11532-BB

# United States Court of Appeals for the 11th Circuit

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LUCAS WALL,
*Appellant/Plaintiff*

v.

CENTERS FOR DISEASE CONTROL & PREVENTION, DEPARTMENT OF HEALTH & HUMAN SERVICES, TRANSPORTATION SECURITY ADMINISTRATION, DEPARTMENT OF HOMELAND SECURITY, & DEPARTMENT OF TRANSPORTATION,
*Appellees/Defendants*

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Appeal from the United States District Court
for the Middle District of Florida
No. 6:21-cv-975

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## APPELLANT'S OPENING BRIEF

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LUCAS WALL
Appellant *Pro Se*
3601 Cosmos Way
The Villages, FL 32163
202-351-1735
Lucas.Wall@yahoo.com

## I. CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1, I certify that in addition to the parties, I believe these persons and organizations have an interest in this case. This is unchanged from the CIP I filed May 9, 2022:

## I. TRIAL JUDGES

- District Judge Paul Byron, Middle District of Florida
- Magistrate Judge Daniel Irick, Middle District of Florida

## II. ATTORNEYS

- Andrew Freidah, trial counsel for appellees
- Alisa Klein, appellate counsel for appellees
- Brian Springer, appellate counsel for appellees
- Johnny Walker, trial counsel for appellees
- Marcia Sowles, trial counsel for appellees
- Michael Gerardi, trial counsel for appellees
- Stephen Pezzi, trial counsel for appellees

## III. PEOPLE – *AMICI CURIAE*

- Uri Marcus, dual citizen of United States and Israel and lead *amicus curiae* for 2 Dual Citizens
- Kleanthis Andreadakis, dual citizen of United States and Greece

- Janviere Carlin, JetBlue Pilot and lead *amicus curiae* for 309 Pilots & Flight Attendants
- Aaron Gastaldo, Southwest Pilot
- Aaron Komara, Xojet Pilot
- Aaron Seiter, JetBlue Pilot
- Aiden Dorsey, PSA Pilot
- Alaina Trocano, American Flight Attendant
- Andrea Woolley, SkyWest Flight Attendant
- Andrew L Phyfe, Spirit Pilot
- Andy Ix, Southwest Pilot
- Angie May, Southwest Flight Attendant
- Ann Durnwald, Spirit Flight Attendant
- Anthony Korzhov, JetBlue Pilot
- April Rose Mikleton, Southwest Flight Attendant
- Aram Shakarian, JetBlue Pilot
- Barbara Soucy, Spirit Flight Attendant
- Baris Michael Arslan, Spirit Pilot
- Barry Johnson, Frontier Pilot
- Benjamin Oliver, JetBlue Pilot
- Beth Ellis, JetBlue Pilot

- Beverlee Norman, Southwest Flight Attendant
- Beverse Bringas, Southwest Flight Attendant
- Bobby Maurer, Southwest Flight Attendant
- Bradley Brockman, Southwest Pilot
- Brandon Heard, Spirit Pilot
- Brandy Roland, Southwest Flight Attendant
- Brooke Miller, Southwest Pilot
- Brett Molzahn, Delta Pilot
- Canan Agaoglu, American Flight Attendant
- Caren Moody, Southwest Flight Attendant
- Carin S Powell, Delta Flight Attendant
- Carson Dodds, JetBlue Pilot
- Casey Turk, JetBlue Pilot
- Cassi Wright, Southwest Flight Attendant
- Cesar H Reyes Jr., JetBlue Pilot
- Charles F. Adams Jr., Spirit Pilot
- Charles Steffens, Southwest Pilot
- Chris DeLong, American Pilot
- Chris Mills, Spirit Pilot
- Christina Henry, Southwest Flight Attendant

- Christopher Jobes, Southwest Pilot
- Christopher Lowery, Spirit Pilot
- Christopher Ray West, JetBlue Pilot
- Christopher Simeone, Southwest Pilot
- Christopher Sims, American Pilot
- Cindy Jennings, United Flight Attendant
- Collier Yarish, JetBlue Pilot
- Corey Hodges, American Flight Attendant
- Corinn Miller, Southwest Flight Attendant
- Courtney Hatton, Southwest Flight Attendant
- Cristina Field, PSA Pilot
- Dana Hoegh-Guldberg, American Pilot
- Daniel Olthoff, Pilot
- Danielle Waltz, SkyWest Flight Attendant
- David Hasslinger, JetBlue Pilot
- David Torres, JetBlue Pilot
- David Venci, JetBlue Pilot
- Dawn LeClair, Southwest Flight Attendant
- Debbie Baker, American Pilot
- Debra Kovanda, Allegiant Flight Attendant

- Denver Sommers, JetBlue Pilot
- Derek Archer, Delta Pilot
- Derek Osborn, JetBlue Pilot
- Derek Wilkins, JetBlue Pilot
- Diane Knowles Emira, SkyWest Flight Attendant
- Dianna Shannon, Southwest Flight Attendant
- Diego Chaves, Spirit Pilot
- Dominique Bailey, Southwest Flight Attendant
- Don Whittle, American Pilot
- Donna Montalbano, Southwest Flight Attendant
- Dragos Negrut, Spirit Pilot
- Dusty Dunaj, Spirit Flight Attendant
- Earl Blackshire, Delta Flight Attendant
- Eileen Michaud, Delta Flight Attendant
- Elisabeth Serian, JetBlue Flight Attendant
- Elizabeth Burke, American Flight Attendant
- Elmer Muniz, JetBlue Pilot
- Elysia Cerasuolo, JetBlue Flight Attendant
- Ernie Gameng, Delta Pilot
- Francis Parsons, Alaska Pilot

- Gabriel Rubin, JetBlue Pilot
- Gary J. Giancola, Delta Pilot
- Gerard William Egel, Southwest Pilot
- Gina Peterson, Southwest Flight Attendant
- Gregory Custer, PSA Pilot
- Gregory Ramola, JetBlue Pilot
- Gregory Stack, JetBlue Pilot
- Hank Landman, Southwest Pilot
- Harmony M. Martinez, Allegiant Flight Attendant
- Harry Lyman, JetBlue Pilot
- Heather Scaglione, Southwest Dispatch
- Heidi Garrison, Frontier Flight Attendant
- Hernan Orellana, JetBlue Pilot
- Hung Vo, Spirit Pilot
- Ivy Rivera, JetBlue Pilot
- J. Luciene Rathwell, American Pilot
- Jake Gaston, JetBlue Pilot
- James Bruce, Spirit Pilot
- James P Hogan, JetBlue Pilot
- James Varner, JetBlue Pilot

- Jameson B Shonk, JetBlue Pilot
- Jana Hill, Southwest Flight Attendant
- Jarod Meehan, Spirit Pilot
- Jason Parks, Southwest Pilot
- Jean-Michel Trousse, JetBlue Pilot
- Jeanene Harris, American Flight Attendant
- Jeannie Howell, Delta Flight Attendant
- Jeff Chandler, Southwest Pilot
- Jeff Devey, Spirit Pilot
- Jeff Johnson, Southwest Pilot
- Jeffery Menna, FedEx Pilot
- Jeffrey Filice, JetBlue Pilot
- Jeffrey J Abbadini, Delta Pilot
- Jenann Logan, Southwest Flight Attendant
- Jenni Lantz, Southwest Cargo
- Jennifer Glass Stefaniak, Southwest Flight Attendant
- Jennifer Shaddock Lewis, Southwest Flight Attendant
- Jeremy Ivanovskis, American Flight Attendant
- Jessica A Locke, JetBlue Flight Attendant
- Jessica Sarkisian, Frontier Pilot

- John Allen, Southwest Pilot
- John Reed, Southwest Pilot
- Jolene Williams, Southwest Flight Attendant
- Jon Mermann, American Pilot
- Jon Rising, JetBlue Pilot
- Jonathan Carlson, Spirit Pilot
- Jonathan Russell Biehl, Delta Pilot
- Joni Kolar, Southwest Flight Attendant
- Joseph A Callan Jr., Southwest Pilot
- Joseph Cogelia, JetBlue Pilot
- Judith Lear, Director of Marketing & Aircraft Appraisals
- Judith Seibold, Southwest Flight Attendant
- Julia Christiansen, Southwest Flight Attendant
- Julia Edwards, American Flight Attendant
- Julie Kay Jackson, SkyWest Flight Attendant
- Justin Jordan, Spirit Pilot
- Justin Richard, Spirit Pilot
- Karen Malone, Southwest Flight Attendant
- Karen Wright, Spirit Flight Attendant
- Kathleen Goff, American Flight Attendant

- Kathryn Gill, United Flight Attendant
- Kathryn Kugler, Southwest Flight Attendant
- Katrina Johnson, Southwest Flight Attendant
- Katrina Lopez, American Flight Attendant
- Kecia Pettey, American Flight Attendant
- Keith Owens, Spirit Pilot
- Kelli Floyd, Spirit Flight Attendant
- Kellie Meehan, Spirit Pilot
- Kelly Wink, Southwest Flight Attendant
- Ken Norman, ABX Air Pilot
- Keri Ann Reardon, SkyWest Flight Attendant
- Kevin Goff, JetBlue Pilot
- Kevin Hall, Delta Pilot
- Kevin Macelhaney, American Pilot
- Kevin Yoder, Delta Pilot
- Kimberly Christian, Southwest Flight Attendant
- Kimberly Dashley, Southwest Flight Attendant
- Kimberly Russek, Southwest Flight Attendant
- Kristen Humbert, Southwest Flight Attendant
- Kristen Salas, Southwest Flight Attendant

- Kristin Vanden Branden, Southwest Flight Attendant
- Krystle Wong, Delta Flight Attendant
- Kurt Schuster, JetBlue Pilot
- Laura Culp, Southwest Flight Attendant
- Laura Sutter, American Flight Attendant
- Lauren Flemmons, Southwest Flight Attendant
- Laurie Harry, Southwest Flight Attendant
- Laurie Parke, Delta Flight Attendant
- Lawrence Young, JetBlue Pilot
- Leo Heiss, JetBlue Pilot
- Lisa Williams, American Flight Attendant
- Lorraine Petersen, Allegiant Flight Attendant
- Lotus Bonadona, Southwest Flight Attendant
- Lynn Dicken, Southwest Flight Attendant
- Maggie Eickhoff, Delta Pilot
- Maggie Gelfand, SkyWest Flight Attendant
- Marc Haney, Spirit Pilot
- María de los Angeles Coppen-Brickman, Frontier Flight Attendant
- Mark Blackman, JetBlue Pilot
- Mark Graca, Spirit Pilot

- Mark Maskiell, JetBlue Pilot
- Mark Register, Southwest Pilot
- Marshall Paull, Allegiant Pilot
- Marta Nowak, Delta Flight Attendant
- Martha Peterman, Southwest Flight Attendant
- Marty Moore, Delta Pilot
- Mary Ellen Ferrari, FedEx Pilot
- Mary Ramkowsky, Southwest Flight Attendant
- Matthew Peters, JetBlue Pilot
- Meagan Loomis-Martin, Southwest Flight Attendant
- Melanie D DeJean, Southwest Flight Attendant
- Melissa Kellerman, JetBlue Pilot
- Melody Wood, Southwest Flight Attendant
- Menem Hinton, Spirit Flight Attendant
- Meriza Subject, Delta Flight Attendant
- Michael Baldari, JetBlue Pilot
- Michael DiFiore, JetBlue Pilot
- Michael King, American Pilot
- Michael Scott LeBeau, American Pilot
- Michael Shea, FedEx Pilot

- Michaela Fitch, Spirit Flight Attendant
- Michele Jones Aichner, JetBlue Ground Operations
- Michelle Colby, Southwest Flight Attendant
- Monica Gomez, Southwest Pilot
- Nathan Lawrence Price, Southwest Pilot
- Nathan Town, JetBlue Pilot
- Nelly Heist, Delta Flight Attendant
- Nicholas J Pittson, SkyWest Flight Attendant
- Nichole Silva, United Flight Attendant
- Nichole Stearnes, Southwest Flight Attendant
- Nicole Stevens, Southwest Flight Attendant
- Nicolette Vajk, Delta Flight Attendant
- Pamela Fandrich, American Flight Attendant
- Pamela S Weilbacher, American Flight Attendant
- Pamela Von Schriltz, Southwest Flight Attendant
- Patricia Burnett, American Flight Attendant
- Patricia Karen Kinch, Southwest Flight Attendant
- Patricia Rossi, Delta Flight Attendant
- Patricia Sedwick, Allegiant Flight Attendant
- Paul Hertzberg, FedEx Pilot

- Paul Nolan, Alaska Pilot
- Paula Conner, Southwest Flight Attendant
- Peggy Sue Flynn, Southwest Flight Attendant
- Peter Birchenough, Southwest Pilot
- Peter Marquart, American Pilot
- Peter Smith, JetBlue Pilot
- Phillip Mack, JetBlue Pilot
- Philip Prada, Southwest Pilot
- Rachel Miller, Southwest Flight Attendant
- Rachel Stanton, Southwest Flight Attendant
- Rajkumar Seth, Spirit Pilot
- Rebecca L Badley, Spirit Pilot
- Richard P. Garrett IV, Southwest Pilot
- Richard Willis, Spirit Pilot
- Rob McCormick, JetBlue Pilot
- Robert Lynn Attaway, American Pilot
- Robert Iman, Southwest Flight Attendant
- Robert Lopez Jr., Southwest Flight Attendant
- Robin Staveley, JetBlue Pilot
- Roger Hayes, Southwest Pilot

- Ron Klimoff, Spirit Pilot
- Ronald Souther, American Pilot
- Ryan L Cairney, JetBlue Pilot
- Ryan T Smith, Spirit Pilot
- Ryan Ty Barlow, Southwest Flight Attendant
- Samantha Cazares, Frontier Flight Attendant
- Sandi Lloyd, Southwest Flight Attendant
- Sarah Emily Bliesath, Delta Pilot
- Scott C Stricklin, Southwest Pilot
- Scott Ferrando, JetBlue Pilot
- Sean Cooley, Southwest Flight Attendant
- Sean Harris, Southwest Pilot
- Sean Timothy Pearl, Mountain Air Cargo Pilot
- Sharolyn Stanley, United Flight Attendant
- Sharon Remillard, JetBlue Flight Attendant
- Shaun Brown, Spirit Pilot
- Shawn Allen, JetBlue Pilot
- Shawna Timmons, SkyWest Flight Attendant
- Shawna Ward, American Flight Attendant
- Sheila Casiano, American Flight Attendant

- Stacy LaValle, Southwest Flight Attendant
- Stephani Astin Hancock, Southwest Flight Attendant
- Stephen Gehman, JetBlue Pilot
- Stephen La Point, American Pilot
- Stephen Mearriam, Hawaiian Pilot
- Steve Lewis, Southwest A&P Mechanic
- Susan Connaughton, American Flight Attendant
- Susan Golliheair, Southwest Flight Attendant
- Susan Karr, Delta Flight Attendant
- T. Hunter Ande, Spirit Pilot
- Tammy Gipp, Frontier Flight Attendant
- Tammy Smart, American Pilot
- Tara Jones, Southwest Flight Attendant
- Ted Richard Miller, Delta Pilot
- Terry MacArthur, Delta Flight Attendant
- Theresa Lavin, Delta Flight Attendant
- Theresa Leonardo, Southwest Flight Attendant
- Therese Paul, Delta Pilot
- Terri Ackerman, Southwest Flight Attendant
- Thomas N. Stevens, Aircraft Maintenance Instructor & Pilot

- Thomas Neil, Southwest Pilot
- Tiffani Harvey, Delta Flight Attendant
- Timothy D Propst, Spirit Pilot
- Timothy Holewinski, JetBlue Pilot
- Timothy L Maness, JetBlue Pilot
- Tina Thornton, Southwest Flight Attendant
- Todd Brusseau, Frontier Pilot
- Todd Saunders, JetBlue Pilot
- Tom Klingensmith, Delta Pilot
- Tom Oltorik, Pilot
- Tonia Williams, Southwest Flight Attendant
- Traci Jo Morrey, Southwest Flight Attendant
- Traci Kay, American Flight Attendant
- Traci Smith, Southwest Flight Attendant
- Tracy Johnston, Southwest Flight Attendant
- Travi Carr, Southwest Flight Attendant
- Travis Kenneth Jarvi, Southwest Pilot
- Trent Babish, Spirit Pilot
- Troy Playman, Southwest Flight Attendant
- Victoria Vasenden, Southwest Flight Attendant

- Vishal Bhatia, Spirit Pilot
- William Dunaske, JetBlue Pilot
- Winston Chapin Wolczak, FedEx Pilot

## IV. PEOPLE – OTHER

- Every person who uses any form of public transportation anywhere in the United States of America and is subject to the Federal Transportation Mask Mandate
- Every employee in the transportation industry who must enforce the Federal Transportation Mask Mandate and/or International Traveler Testing Requirement
- All airline passengers worldwide who are subject to the International Traveler Testing Requirement
- All employees of the corporations and associations listed below whose salaries and jobs are dependent on their employer's revenue intake, which has been greatly diminished as a result of the Federal Transportation Mask Mandate and International Traveler Testing Requirement

## V. LARGE CORPORATIONS

- Accor
- Alaska Airlines
- American Airlines
- Atlas Air Worldwide
- BWH Hotel Group
- Caesars Entertainment

- Carnival Corp.
- Choice Hotels International
- Delta Air Lines
- Disney Parks, Experiences, & Products
- Emirates Airline
- Encore
- Enterprise Holdings
- Expedia Group
- FedEx Express
- Hawaiian Airlines
- Herschend Enterprises
- Hilton
- Hyatt Hotels Corp.
- IDEMIA North America
- IHG Hotels & Resorts
- JetBlue Airways
- Marriott International
- MGM Resorts International
- Nikko Hotels International
- Omni Hotels & Resorts

- Southwest Airlines
- United Airlines
- Universal Parks & Resorts
- UPS Airlines
- Venetian Resort Las Vegas
- Wyndham Hotels & Resorts
- All other operators of airplanes and other public-transportation conveyances as well as transport hubs nationwide that must enforce the Federal Transportation Mask Mandate
- All other airlines flying from foreign countries to the United States that must enforce the International Traveler Testing Requirement

## VI. AIRPORTS

- Chicago Department of Aviation
- Cincinnati/Northern Kentucky International Airport
- Denver International Airport
- Los Angeles World Airports
- Metropolitan Washington Airports Authority
- Miami International Airport
- Philadelphia International Airport
- Port Authority of New York and New Jersey
- Portland International Airport

- San Diego International Airport
- San Francisco International Airport
- Tampa International Airport
- All other airports in the United States that must enforce the Federal Transportation Mask Mandate
- All airports in foreign countries with flights to the United States that must handle passengers detained by CDC for failure to present a negative COVID-19 test during check-in

## VII. NATIONAL ASSOCIATIONS

- Airlines for America
- Airports Council International - North America
- American Hotel & Lodging Association
- American Society of Travel Advisors
- Asian American Hotel Owners Association
- Associated Luxury Hotels International
- Consumer Technology Association
- Cruise Lines International Association
- Destinations International
- Exhibitions & Conferences Alliance
- International Air Transport Association
- International Association of Amusement Parks & Attractions

- International Association of Exhibitions & Events
- International Inbound Travel Association
- International Society of Hotel Associations
- Meeting Profesionals Interantional
- National Association of Manufacturers
- National Park Hospitality Association
- National Tour Association
- Professional Convention Management Association
- Society of Independent Show Organizers
- Student Youth Travel Association
- Travel Technology Association
- U.S. Chamber of Commerce
- U.S. Tour Operators Association
- U.S. Travel Association

## VIII. OTHER ASSOCIATIONS & SMALL/MEDIUM BUSINESSES

- Atlanta Convention & Visitors Bureau
- Arlington Convention & Visitors Bureau
- Arizona Lodging & Tourism Association
- Associated Equipment Distributors

- ATL Airport District CVB
- Aurora Area Convention & Visitors Bureau
- Best Western Pony Soldier
- Bismarck-Mandan Convention & Visitors Bureau
- Branson Chamber & CVB
- Broadway Inbound
- Butler County Tourism
- Catalina Express
- California Travel Association
- Circle Wisconsin
- CityPASS
- Civitas
- Clark-Floyd Counties Convention & Tourism Bureau
- Commonwealth Hotels
- Connect Travel
- Coraggio Group LLC
- Cortland County Convention & Visitors Bureau
- CRVA/Visit Charlotte
- Destination Analysts
- Destination Augusta GA

- Destination DC
- Destination Door County
- Destination Madison
- Destination Niagara USA
- Destination Panama City (PCCDC)
- Destinations Wisconsin
- Digital Edge
- Discover Destinations LLC
- Discover Flagstaff
- Discover Green Bay
- Discover Puerto Rico
- Evans Hotels
- Experience Florida's Sports Coast
- Experience Kissimmee
- Explore Fairbanks
- Explore St Louis
- Extranomical Tours
- Fargo-Moorhead CVB
- Fenway Park Tours
- Fort Myers – Islands, Beaches & Neighborhoods

- G2 Travel
- Gather Media Network LLC
- Georgia's Rome Office of Tourism
- Georgia Association of Convention & Visitors
- Bureaus, Inc.
- Glacier Country Tourism
- Global Hospitality Marketing Link
- Go City
- Go Global Travel
- Grand Beach Hotel Group
- Greater Birmingham CVB
- Greater Boston Convention & Visitors Bureau
- Greater Folsom Partnership
- Greater Miami Convention & Visitors Bureau
- Greater Newark Convention & Visitors Bureau
- Greater Raleigh Convention & Visitors Bureau
- Greene County Ohio Convention & Visitors Bureau
- Gulf Shores & Orange Beach Tourism
- Hayward Lakes Visitors & Convention Bureau
- Hilton Head Island/Bluffton Chamber of Commerce

- Historic Tours of America
- Hostelling International USA
- Houston First Corporation
- Huntsville/Madison County Convention & Visitors Bureau
- Irving Convention & Visitors Bureau
- Kelly Tours – Grayline Savannah & Beaufort
- Kentucky Travel Industry Association
- Ketchikan Visitors Bureau
- Lake Tahoe Visitors Authority
- Lakes Region Tourism Association
- Las Vegas Convention and Visitors Authority
- Leading Companies International
- Longwoods International
- Los Angeles Tourism & Convention Board
- Louisiana Travel Association
- Luray Caverns
- Mackinac Island Convention & Visitors Bureau
- Madden Media
- Maine Office of Tourism
- Mall of America

- Manitowoc Area Visitor & Convention Bureau
- Maritz Holdings and Maritz Global Events
- Maryland Tourism Coalition
- Mat-Su CVB
- Mears Transportation
- meetNKY | Northern Kentucky Visitors Bureau
- Miles Partnership
- Miracle Mile Shops, Las Vegas
- Misha Tours
- Mississippi Tourism Association
- Myrtle Beach Area Chamber & CVB
- Naples, Marco Island, & Everglades CVB
- National Park Express
- Natural Bridge Caverns
- New Orleans & Company
- New Smyrna Beach Area Visitors Bureau
- North Dakota Department of Commerce
- NYC & Company
- Oklahoma Travel Industry Association
- Orlando Magic

- OTS Globe
- Paradise Advertising & Marketing
- Port Aransas Tourism Bureau & Chamber of Commerce
- Port of Seattle Tourism Department
- Railbookers Group
- Rancho Cordova Travel & Tourism
- Reno Tahoe
- Resorts World Las Vegas
- Richard Reasons
- RMI Destination Marketing
- Road.Travel
- Rocky Mountain Holiday Tours
- Rocky Mountaineer
- Samantha Brown Media
- San Francisco Travel Association
- San Diego Tourism Authority
- San Diego Zoo Wildlife Alliance
- Santa Monica Travel & Tourism
- Sawgrass Recreation Park
- Searchwide Global

- Shreveport-Bossier Convention & Tourist Bureau
- Sitka Tribe of Alaska
- Ski Utah
- Skyline Sightseeing
- Sojern
- South Carolina PRT
- South Coast Plaza
- South Dakota Department of Tourism
- Southeast Tourism Society
- Springfield Convention & Visitors Bureau
- St. Tammany Parish Tourist & Convention Commission
- Starline Tours of Hollywood
- State of Washington Tourism
- STR
- Sun Islands Hawaii
- Sunny Isles Beach Tourism & Marketing Council
- Texas Travel Alliance
- Tauck
- TBO LLC
- The Guest House at Graceland

- The Happy Valley Adventure Bureau
- Tour America LLC
- Tourism Economics
- TourMappers North America LLC
- Travalco USA
- TravDek
- Travel Butler County
- Travel Marquette
- Travel Portland
- Travel Oregon
- Travel Santa Ana
- Travel South USA
- Tropicana Las Vegas – a DoubleTree by Hilton
- TSA Tours
- U.S. Cultural & Heritage Marketing Council
- Ventura County Lodging Association
- Virginia Tourism Corporation
- Visit Anaheim
- Visit Aurora, CO
- Visit Baltimore

- Visit Cedar City Brian Head
- Visit Colorado Springs
- Visit Dallas
- Visit Denver
- Visit Eau Claire
- Visit Fairfax
- Visit Fort Worth
- Visit Greater Palm Springs
- Visit Harford
- Visit Henderson, NV
- Visit Huntington Beach
- Visit Lake Charles
- Visit Lake County
- Visit Lenawee
- Visit Milwaukee
- Visit Muskogee
- Visit Oakland
- Visit Orlando
- Visit Pensacola
- Visit Phoenix

- Visit Saint Paul
- Visit San Antonio
- Visit Sandy Springs
- Visit Santa Barbara
- Visit Savannah
- Visit St. Pete/Clearwater
- Visit Stockton
- Visit Tampa Bay
- Visit Tri-Valley
- Visit Vacaville
- Visit Vancouver WA
- Visit Williamsburg
- VisitLEX
- Warren County (Ohio) CVB
- Wausau/Central Wisconsin Convention & Visitors Bureau
- West Hollywood Travel & Tourism Board
- West Virginia Department of Tourism
- White Mountains Attractions Association
- www.getyourguide.com
- Yosemite Mariposa County Tourism Bureau

- Young Strategies
- Zartico
- Zimple Rentals

## II. STATEMENT REGARDING ORAL ARGUMENT

Given the importance of the issues presented in this case – the outcome of which will directly impact an estimated 36 million American public-transportation users every day plus more than 1 million employees who work in the aviation and mass-transit sectors, I suggest oral argument is appropriate and necessary. Argument is especially warranted because the 11 questions of law I present in this appeal are all of first impression to any appellate court nationwide.

For judicial economy, I suggest the Court might wish to schedule oral argument in this case the same day as the related action of *Health Freedom Defense Fund v. Biden*, No. 22-11287, ("*HFDF*") due to three similarities these two cases present:

- Is the Federal Transportation Mask Mandate ("FTMM" or "Mask Mandate") ordered by the Centers for Disease Control & Prevention ("CDC") and the Department of Health & Human Services ("HHS") illegal because Congress did not authorize it in the Public Health Service Act ("PHSA")(42 USC § 264(a)) nor any other statute?
- Is CDC's Mask Mandate arbitrary and capricious?
- Did CDC lack good cause to forego the required notice-and-comment before imposing the FTMM?

This case, however, is not a carbon copy of *HFDF*. I raise eight more questions for the Court's review than the three the government presented in its appeal of the related action and there are three additional appellees/defendants in this case: Transportation Security Administration ("TSA"), Department of Homeland Security ("DHS"), and Department of Transportation "DOT"). This case also deals not only with the FTMM, but also the International Traveler Testing Requirement ("ITTR" or "Testing Requirement").

## III. TABLE OF CONTENTS

## IV. TABLE OF CITATIONS

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## V. STATEMENT OF JURISDICTION

The U.S. District Court for the Middle District of Florida had jurisdiction to hear this case under 28 USC § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

This case involves judicial review of agency actions, namely the orders establishing the Federal Transportation Mask Mandate and International Traveler Testing Requirement (as well as the Department of Transportation's refusal to enforce the Air Carrier Access Act ("ACAA") due to the FTMM). "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 USC § 702.

The Administrative Procedure Act ("APA") also provides:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall … (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law…" 5 USC § 706.

This Court has jurisdiction to hear my appeal under 28 USC § 1291: "The

courts of appeals … shall have jurisdiction of appeals from all final decisions of the district courts of the United States…"

The district court's order granting summary judgment to the government was issued April 29, 2022. App. 453-481. The clerk filed the judgment and closed the case May 2. App. 482. I timely filed a Notice of Appeal on May 3. App. 25.

## VI. STATEMENT OF THE ISSUES

1. Did the district court err in ruling that CDC and HHS issued the Federal Transportation Mask Mandate and International Traveler Testing Requirement within their statutory and regulatory authority under the Public Health Service Act?
2. Did the district court err in ruling that CDC and HHS legally issued the FTMM and ITTR without notice and comment required by the Administrative Procedure Act?
3. Did the district court err in failing to decide if the FTMM and ITTR are arbitrary and capricious?
4. Did the district court err in ruling that the FTMM does not violate the Air Carrier Access Act by allowing airlines to discriminate against the disabled who can't tolerate wearing face masks?
5. Did the district court err in ruling that CDC's complete delegation of evaluating medical exemptions to the FTMM to nonfederal entities doesn't violate travelers' Fifth Amendment right to due process?
6. Did the district court err in ruling that the FTMM does not run afoul of the 10th Amendment by overruling the mask policies and laws of all 50 states and because it commandeers state employees to enforce federal orders?

7. Did the district court err in ruling that the FTMM and ITTR do not impermissibly interfere with the constitutional guarantee of freedom to travel among the states and internationally?
8. Did the district court err in declining to rule on whether the FTMM and ITTR violate travelers' rights under the Food, Drug, & Cosmetic Act ("FDCA") to refuse use of medical devices such as face masks and virus tests unauthorized by the Food & Drug Administration ("FDA") or permitted only an Emergency Use Authorization ("EUA")?
9. Did the district court err in refusing to rule on whether the FTMM and ITTR violate travelers' fundamental human rights under two international treaties the United States has ratified and which Congress requires the government enforce in the aviation sector?
10. Did the district court err in ruling that it lacks subject-matter jurisdiction to determine the legality of Health Directives issued by TSA, a part of DHS, acting under the direction of CDC and HHS?
11. Did the district err in ruling that DOT can't be ordered to enforce the ACAA, which Congress statutorily requires it to do, or to rescind a Notice of Enforcement Policy issued to airlines that directly contradicts DOT's own regulations issued to protect the disabled from discrimination in air travel?

## VII. STATEMENT OF FACTS & PROCEDURAL HISTORY

### A. Federal Actions to Mandate Masks & Require Virus Testing

The Coronavirus Disease 2019 ("COVID-19") was first identified in December 2019 in Wuhan, China. In the first couple months of 2020, it had spread around the world, leading the World Health Organization ("WHO") to declare a global pandemic March 11, 2020. Two days later, President Trump declared the novel coronavirus a national emergency. But even prior to these actions, the HHS secretary declared a nationwide public-health emergency Jan. 31, 2020. App. 490.

In the ensuing year, appellees in this case (five federal agencies: CDC, HHS, TSA, DHS, and DOT) issued no binding orders to control the respiratory virus in the transportation sector. Instead, the agencies responded prudently by issuing recommendations and guidance, but leaving actual policy-making to the states, which historically have a "police power" to regulate public health and intrastate movement. At some point during 2020, 40 states generally required people to wear face masks indoors under the mistaken impression that this would somehow slow the spread of COVID-19. Many states issued lockdown orders, forcing schools and businesses to close. Some states banned any event with more than a certain number of people.

Federalism came to a screeching halt Jan. 20, 2021, with the inauguration

of a new president of a different political party than his predecessor. President Biden made one of his top campaign promises to force all Americans using public transportation to wear face coverings, despite saying several times he knew it was almost certainly unconstitutional. App. 1,020-1,032.

The day after he took office, President Biden signed Executive Order 13,998, directing several federal agencies to promulgate orders that, *inter alia*, mandated the wearing of masks on all transportation conveyances and in all transit hubs (such as airports, train stations, and even city bus stops outdoors along the side of streets). 86 Fed. Reg. 7205 (Jan. 26, 2021); App. 484-489. The order also directed CDC and HHS to expand a requirement that all airplane travelers (but not those crossing into the United States by land or sea) submit proof of a negative COVID-19 test taken within three days of boarding a flight to America. President Biden issued the executive order despite admitting on the campaign trail it would likely fail constitutional scrutiny. App. 1,020-1,032.

Federal agencies that had not issued binding orders for nearly a year since HHS declared a public-health emergency suddenly sprang into action – not because of any change in science or the state of the pandemic, but to placate the political interests of a new president who wanted to fulfill his campaign

promise to obstruct the breathing of all travelers, even on short city bus, subway, or taxi rides with no nexus to interstate commerce.

Despite the United States being in a public-health emergency since January 2020, all the sudden on Jan. 27, 2021, DHS' acting secretary issued a "Determination of a National Emergency Requiring Actions to Protect the Safety of Americans Using and Employed by the Transportation System." Determination 21-130; App. 490-491. The acting secretary of homeland security

> "determine[d] that a national emergency exists and [is] directing the Transportation Security Administration to take actions consistent with the authorities in ATSA [Aviation & Transportation Security Act] as codified at 49 U.S.C. sections 106(m) and 114(f), (g), (l), and (m) to implement the Executive Order to promote safety in and secure the transportation system. This includes ***supporting the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system***, including passengers and employees, from COVID-19 and to mitigate the spread of COVID-19 through the transportation system, to the extent appropriate and ***consistent with applicable law***." App. 490-491 (emphases added).

Acting DHS Secretary David Pekoske's determination did not explain why the department was suddenly declaring a "national emergency" one year after the HHS secretary had done so and 10½ months after President Trump did the same. No explanation was given for this determination other than President Biden's Jan. 21 executive order.

Days later, CDC and HHS issued what they labeled an "Agency Order"

(App. 492) requiring that all passengers and employees using any public transportation anywhere in America, or even being present at a "transportation hub" without any intent to travel anywhere, obstruct their oxygen intake by placing any type of mask over their nose and mouth – regardless of whether the covering was approved by the FDA, issued a medical-device EUA by FDA, or had no FDA approval at all including masks made from any material at home. "Requirement for Persons to Wear Masks While on Conveyances & at Transportation Hubs,"[1] 86 Fed. Reg. 8,025 (published Feb. 3, 2021, but effective Feb. 1). App. 492-497. CDC and HHS did not provide notice to the public (as noted, the order was published two days *after* it took effect) nor did they solicit public comments for at least 30 days as required by the APA. Instead, the agency, in only a couple sentences, invoked the "good cause" exception. Notably the order did not contain an expiration date and is still on the books today, but unenforceable because of the April 18, 2022, *vacatur* in *HFDF*.

CDC and HHS' Mask Mandate included an exemption for passengers "with a disability who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act…"

[1] Referred to throughout this litigation as the Federal Transportation Mask Mandate (abbreviated as "FTMM" or "Mask Mandate")

App. 494. But in footnotes, the order states the exemption is "narrow" and the agencies provided that airlines could impose numerous requirements for a disabled passenger seeking a medical waiver that violate the Air Carrier Access Act. App. 494 at FN 8-9.

TSA announced "Starting on February 2, 2021, TSA will require individuals to wear a mask at TSA airport screening checkpoints and throughout the commercial and public transportation systems. This requirement will remain effective until May 11, 2021." App. 498. The agency, whose sole statutory mission is to protect the nation's transportation system from crimes and terrorist attacks, stated "TSA will recommend a fine ranging from $250 for the first offense [of not wearing a mask] up to $1,500 for repeat offenders." *Id.*[2] Lacking any authority from Congress to police purported health matters, TSA and DHS perpetrated a scheme whereby it would use its statutory authority to use "Security Directives" to deem COVID-19 a "threat to transportation security." It went so far as to make an absurd declaration that anyone not wearing a mask would be deemed a threat to aviation security: "Passengers who refuse to wear a mask will not be permitted to enter the secure area of the airport … those who refuse to wear a mask may be subject to a civil

[2] Later in 2021, President Biden announced this fine structure would double to $500 and $3,000.

penalty for attempting to circumvent screening requirements, interfering with screening personnel, or a combination of those offense." App. 498-499.

To put its *ultra vires* scheme into place, TSA issued three "Security Directives"[3] and one Emergency Amendment requiring face masks: Health Directives 1542-21-01, 1544-21-02, and 1582/84-21-01 as well as Emergency Amendment 1546-21-01 went into effect Feb. 2, 2021, and expired May 11, 2021.

When the original Health Directives lapsed, TSA reissued them five times for durations of four months (Version A, May to September 2021), four months (B, September 2021 to January 2022), two months (C, January to March 2022), one month (D, March 19 to April 18, 2022), and then two weeks (E, April 19 to May 3, 2022). Since the six versions are nearly identical, I include only Version D in the Appendix. App. 508-527.

TSA's Health Directives expanded on CDC and HHS' order, adding harsh requirements not seen anywhere else in the nation during the entire pandemic including that masks must be worn "between bites and sips" while eat-

[3] TSA's orders are misnamed "Security Directives" but in fact have nothing to do with the agency's statutory mission of ensuring transportation security. Since the orders actually deal with purported public-health matters, I will refer to them properly as "Health Directives" throughout the remainder of this brief.

ing or drinking. App. 515. The directives, like the CDC/HHS order, also purported to exempt "People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act…" *Id*. But the directives repeated that this is a "narrow exception" and authorized airlines to violate the Air Carrier Access Act in at least eight ways. *Id*. at FN 8-9.

To complete this administrative rewriting of a statute passed by Congress in 1986 to protect the disabled from discrimination in air transportation, the very agency tasked by Congress to enforce the ACAA, DOT, issued a Notice of Enforcement Policy on Feb. 5, 2021, advising airlines that they may no longer ban all disabled passengers who can't wear masks from flying – as DOT permitted almost every U.S. airline to do from July 2020 until DOT issued this notice in February 2021. If DOT had stopped there, all would be well. But the agency shockingly went on to advise airlines they also have carte blanche authorization to disobey numerous regulations codified in 14 CFR Part 382 to enforce the ACAA. App. 500-507.

The combination of the CDC/HHS order, TSA's Health Directives, and DOT's Notice of Enforcement Policy constitutes the largest conspiracy to interfere with the civil rights of the disabled since Congress passed the ACAA in 1986 and the ADA in 1990.

In addition to all this action on the FTMM, CDC/HHS also issued the International Traveler Testing Requirement: "Requirement for Negative Pre-Departure COVID-19 Test Result or Documentation of Recovery from COVID-19 for All Airline or Other Aircraft Passengers Arriving into the United States from Any Foreign Country." 86 Fed. Reg. 7,387 (Jan. 28, 2021). The ITTR went into effective immediately with no notice and comment required by the APA. The agencies amended the ITTR on Nov. 5, 2021, (86 Fed. Reg. 61,252) to shorten the time period before a flight to America that a test must be taken from three days to one day for unvaccinated passengers. The third and final version took effect Dec. 7, 2021, (86 Fed. Reg. 69,256) making the one-day limit also apply to vaccinated flyers. App. 532-560.

CDC and HHS rescinded the ITTR effective June 12, 2022. App. 561-564. But CDC asserted it believes it maintains legal authority to continue "monitor[ing] circulating SARS-CoV-2 variants around the world and can enhance prevention measures, ***including reinstituting testing requirements***, as warranted, including if a variant emerges that may present increased risk of severe illness and death." App. 562 (emphasis added). This threat of putting the ITTR back into place at any moment means this appeal is not moot.

**B. My Inability to Travel Due to the Government Orders**

I am a global nomad whose #1 passion in life is exploring the world. I have been to all 50 states, 134 countries, and 22 U.S. and foreign territories.

Although my permanent residence is in Washington, DC, when the FTMM and ITTR took effect in early 2021, I was looking after my mother in her retirement community of The Villages, Florida. We were adhering to CDC's guidance at the time to defer travel until after becoming fully vaccinated against COVID-19.

As soon as vaccines became available to my age group (40+) in Florida, I got my first jab March 29, 2021, and the second April 26. Adding two weeks, CDC considered me "fully vaccinated" as of May 10, 2021. Later in May, I booked a series of tickets on seven airlines to travel extensively intrastate, interstate, and internationally from June to August 2021.

When it came time for the first departure, I was denied boarding an intrastate Southwest Airlines flight June 2, 2021, from Orlando to Fort Lauderdale, Florida, because I can't wear a mask due to my Generalized Anxiety Disorder. App. 666-671 & 677-680; *see also* medical records at App. 662-665. Southwest refused to grant me an exemption from the FTMM, and TSA

refused to allow me through its security checkpoint.[4] Unable to fly, I attempted to board a LYNX transit bus from Orlando International Airport to downtown Orlando but was again denied because of my inability to mask.[5]

Attempts to gain medical exemptions from Southwest and the other six airlines for future Summer 2021 flights all provided futile because the carriers required numerous illegal provisions to apply for a waiver. App. 672-676 & 681-694. I was unable to fly to Germany to visit my brother and his wife, who have lived there since 2015, due to the FTMM and the ITTR (I would not risk taking a trip to a foreign country and being detained/quarantined there by CDC if I could not obtain a COVID-19 test during the required timeframe or obtained a false positive.)

Later in 2021, I also booked several airline tickets for other trips domestically and internationally, but my medical waivers were again denied despite my pointing out to numerous airlines the outrageous numbers of laws and regulations their mask policies violated. App. 695-729.

[4] Watch videos of this incident on YouTube at https://bit.ly/LucasMaskLawsuitPL

[5] Watch video of this incident on YouTube at https://bit.ly/LucasMaskMandate9

**C. District Court Proceedings**

After being refused transportation June 2, I filed a Complaint on June 7, 2021, in the Middle District of Florida's Orlando Division against the five appellees (CDC, HHS, TSA, DHS, and DOT) as well as President Biden and the operators of the Orlando airport and transit system (Greater Orlando Aviation Authority ("GOAA") and Central Florida Regional Transportation Authority d/b/a "LYNX"). App. 28-233. My efforts to obtain a temporary restraining order and preliminary injunction so I could take the remainder of my Summer 2021 flights were unsuccessful, and I had to cancel all of those reservations.

I moved for summary judgment against the six Federal Defendants. They responded by cross moving for summary judgment on some counts and asking that those against TSA, DHS, DOT, and President Biden be dismissed. GOAA and LYNX, the "Local Defendants," filed Motions to Dismiss the counts against them for violating a Florida executive order prohibiting any governmental agency from mandating anyone cover their face.

Magistrate Judge Daniel Irick issued a Report & Recommendation on Oct. 7, 2021. App. 402-422. District Judge Paul Byron adopted in part and rejected in part the R&R in an order issued Dec. 18, 2021. App. 423-452. Judge Byron dismissed all counts against TSA, DHS, DOT, and President Biden;

and ordered my counts against CDC, HHS, GOAA, and LYNX to be replead in an Amended Complaint – improperly banned me from adding any additional charges against the four remaining defendants based on my improved knowledge of the law during the six months since the case was filed.

I filed the Amended Complaint as instructed Dec. 26, 2021. App. 234-322. The two remaining Federal Defendants, CDC and HHS, filed an Answer on Feb. 22, 2022. App. 323-400. GOAA and LYNX again filed Motions to Dismiss. The Federal Defendants and I cross-moved for summary judgment.

Judge Byron issued a final order April 29, 2022, (11 days after the FTMM was vacated by Judge Kathryn Mizelle in *HFDF)* granting summary judgment to CDC and HHS on all counts of the Amended Complaint and dismissing the charges against GOAA and LYNX without prejudice due to relinquishing supplemental jurisdiction over those state-law claims. App. 453-481. The clerk entered the judgment May 2. App. 482. I filed a Notice of Appeal the next day. Doc. 276.

**D. Standard of Review**

The district court's decision granting summary judgment to CDC and HHS, as well as its decision to dismiss my claims against TSA, DHS, and DOT, are subject to *de novo* review in this Court. *Brown v. Nexus Bus. Sols.*, 29 F.4th 1315, 1317 (11th Cir. 2022).

## VIII. ARGUMENT SUMMARY

This Court faces a conundrum: Within 11 days of each other, one judge in the Middle District of Florida (Judge Mizelle in Tampa) vacated worldwide the FTMM, declaring CDC and HHS issued it in excess of their statutory authority under the PHSA, failed to give notice and comment, and were arbitrary and capricious.

> "[T]he [Mask] Mandate exceeded the CDC's statutory authority, improperly invoked the good cause exception to notice and comment rulemaking, and failed to adequately explain its decisions. Because 'our system does not permit agencies to act unlawfully even in pursuit of desirable ends,' the Court declares unlawful and vacates the Mask Mandate." *HFDF,* No. 8:21-cv-1693, 2022 WL 1134138 (M.D. Fla. Apr. 18, 2022), appeal pending No. 22-22-11287 (11th Cir.).

But another judge in the same judicial district (Judge Byron in Orlando) came to the polar opposite conclusion in this case, declaring CDC and HHS have authority under the PHSA to mandate masks in the transportation sector and properly exercised "good cause" to forgo notice and comment. App. 453-481. Judge Byron failed to consider and/or rejected numerous other attacks I made against both the Mask Mandate and the Testing Requirement. *Id*. Previously he erred in dismissing my claims against TSA, DHS, and DOT.[6]

[6] My causes of action against President Biden, Greater Orlando Aviation Authority, and Central Florida Transportation Authority were also dismissed. I do not challenge those dismissals, therefore these three defendants are not parties to this appeal.

The only two of 20+ challenges to the FTMM and ITTR in federal courts across the nation that have been adjudicated are now before this Court, presenting at least 11 questions of first impression for any appellate tribunal. So who got it right? Judge Mizelle or Judge Byron? I urge the Court to conclude Judge Mizelle's ruling should be affirmed while Judge Bryon's should be reversed.

CDC and HHS have no authority from Congress to mandate masks in the nation's entire public-transportation system, more than 90% of which involves trips that never cross state lines and have no nexus to interstate commerce. The FTMM and ITTR were issued without notice and comment as required by the APA and are arbitrary and capricious. They also violate the Constitution, international law, and other federal statutes and regulations. The same goes for the Health Directives and Emergency Amendment issued by TSA at the direction of its parent department, DHS – acting at the behest of CDC and HHS.

Furthermore, DOT's role in the mask scheme can't go unchallenged. The Court should issue a writ of mandamus ordering DOT to comply with its statutory obligation to enforce the Air Carrier Access Act and a permanent injunction prohibiting it from ever again issuing guidance to the airlines it regulates that they are free to break the law.

Thanks to Judge Mizelle's decision in *HFDF*, the country now knows the FTMM was never "necessary" nor grounded in science. It was a purely political decision by a newly elected president who wanted to fulfill a campaign pledge, one he acknowledged multiple times was likely unconstitutional. App. 1,020-1,032. We all are now aware the government appellees are guilty of crying wolf. Masks never stopped the spread of COVID-19 in the transportation sector. Nor did the Testing Requirement stop the entry of coronavirus variants into the United States. Both policies were miserable failures. The American people and the transportation industry are euphoric that they are no longer in effect. People are voting with their faces – the vast majority of which are now uncovered on transportation conveyances across the nation. This Court must ensure these restrictions on our liberty to travel may never be reimposed.

Within hours of Judge Mizelle's decision April 18, the White House announced CDC and HHS would immediately cease enforcing the *ultra vires* Mask Mandate. TSA, which was not a party in *HFDF*, then promptly issued a statement that it was withdrawing Version "E" (the fifth extension) of the three Health Directives and one Emergency Amendment enforcing the FTMM, which were set to go into effect April 19 and last until May 3, 2022. Further extensions were likely given the Biden Administration's continued

false belief that masks are effective in reducing the spread of respiratory viruses such as COVID-19 and that Congress gave it authority to dictate that all transportation passengers and workers using any mode of transit across the entire nation cover their faces – an impossibility for millions of Americans such as myself with various medical disabilities who can't safely tolerate wearing masks.

As news of the *HFDF* decision declaring the FTMM illegal spread April 18, almost every private company (including every U.S. airline) and government transit authority subject to the requirement immediately terminated face-covering enforcement. Tens of thousands of elated airplane pilots, flight attendants, bus drivers, train conductors, subway operators, taxi and rideshare drivers, and ferry captains got on their intercoms to inform passengers they may remove their masks. These announcements were met by loud cheers and applause by a supermajority of passengers and employees. Videos went viral of flight attendants – giant smiles on their faces visible for the first time in two years – walking down airplane aisles midflight with a trash bag for customers to discard their masks.

The jubilation was also strongly felt by America's disabled community, many of whom (including myself) have medical conditions that preclude us from, *inter alia*, obstructing our breathing and/or having objects placed on

our faces. Despite the appellees' disingenuous arguments to the contrary, millions of us had been banned from using all forms of public transportation nationwide for nearly two years (at first because of airline and transit-agency mask requirements, then as of Feb. 1, 2021, the FTMM).

In addition to upholding *HFDF*, this Court must also declare that TSA's enforcement of the Mask Mandate exceeds the agency's statutory authority, was issued without notice and comment, and is arbitrary and capricious. It should also declare that the entire FTMM scheme is unconstitutional; violates federal anti-discrimination laws such as the Air Carrier Access Act; deprives Americans of our legal right under the Food, Drug, & Cosmetic Act to refuse use of an EUA medical device; and interferes with our fundamental rights under two international treaties Congress requires the Executive Branch enforce in the aviation sector.

To some this case might seem moot, but the government's positions make crystal clear why it is still so important. TSA a month ago told the D.C. Circuit, "Because the COVID-19 pandemic remains ongoing, however, TSA may elect to promulgate new directives related to the wearing of masks should it determine that such measures are necessary to prevent an ongoing threat to transportation security." Brief at 5, *Wall v. TSA*, No. 21-1220. As noted above, CDC said it will reimpose the ITTR at any time it chooses.

The Supreme Court has issued at least seven emergency orders[7] unequivocally holding that governments may not restrict constitutional rights or disregard clear statutory terms even in the name of fighting a pandemic. Because CDC, HHS, TSA, DHS, and DOT issued the challenged orders, determinations, directives, and notices without constitutional, statutory, or regulatory authority, this Court must not only declare the FTMM and ITTR unlawful but also permanently enjoin these five agencies from ever reissuing mask mandates and testing requirements without clear, unambiguous authorization from Congress. A permanent injunction is the only way to stop these five appellees' illicit conduct.

[7] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 66 (2020); *Robinson v. Murphy*, 141 S.Ct. 972 (2020); *High Plains Harvest Church v. Polis*, 141 S.Ct. 527 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021); *Tandon v. Newsom*, 141 S.Ct. 1294 (2021); *Alabama Ass'n of Realtors v. HHS,* 141 S.Ct. 2485 (2021); and *NFIB v. Dept. of Labor*, No. 21A244 (U.S. Jan. 13, 2022).

# IX. ARGUMENT

## A. The district court erred in ruling that CDC and HHS issued the Federal Transportation Mask Mandate and International Traveler Testing Requirement within their statutory authority under the Public Health Service Act.

Congress never gave CDC the staggering amount of power it has claimed during this pandemic, a fact the Supreme Court forcefully opined on last year in terminating the agency's Eviction Moratorium.

> "It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened. Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts. … the sheer scope of the CDC's claimed authority under [PHSA § 264](a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast 'economic and political significance." … That is exactly the kind of power that the CDC claims here. … the Government's read of § [264](a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach…" *Alabama Ass'n of Realtors*.

Just like the Eviction Moratorium, the Mask Mandate, Testing Requirement, and Conditional Sailing Order ("CSO") severely restricting cruiseship operations were issued by CDC claiming nonexistent authority under 42 USC § 264(a). The Middle District of Florida's Tampa Division vacated the FTMM and enjoined the CSO. The ITTR is the only major CDC pandemic order that

the Judicial Branch has not blocked. This Court must take care of that anomaly now.

"[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends. … [(]even the Government's belief that its action 'was necessary to avert a national catastrophe' could not overcome a lack of congressional authorization). It is up to Congress, not the CDC, to decide whether the public interest merits further action here." *Id.*

With the FTMM, one judge in the Middle District of Florida (Judge Mizelle of Tampa) got it right:

> "[T]he Mask Mandate is best understood not as sanitation but as an exercise of the CDC's power to conditionally release individuals to travel despite concerns that they may spread a communicable disease… Subsection (d) allows for detention of an individual traveling between States only if he is 'reasonably believed to be infected' and is actually found 'upon examination' to be infected. The Mask Mandate complies with neither of these subsections. … As a result, the Mask Mandate exceeds the authority the statute grants the CDC." *HFDF.*

But just 11 days later, a different judge in the same judicial district (Judge Byron of Orlando) got it wrong, holding the exact opposite:

> "Cognizant that it is not the judiciary's role to impose its own construction on the statute, the Court finds that the CDC's interpretation of the PHSA is permissible and that it did not act arbitrarily and capriciously in issuing the FTMM and the ITTR. Given the ambiguity of the statutory text, the statutory context, and the legislative history, the CDC's broad reading of Section 361(a) is certainly reasonable." App. 469-470.

**1. The PHSA doesn't allow CDC to issue orders.**

Judge Byron's decision ignores a serious problem: CDC and HHS did not promulgate *regulations* requiring masks and virus testing into the Code of Federal Regulations, which is the only action the PHSA allows it to take. There is no authority for issuing "mandates" or "orders." He erroneously held that "The fact that the CDC classed the FTMM and the ITTR as 'orders' rather than 'rules' is immaterial. The FTMM and the ITTR obviously operate as generally applicable rules, and the Court will treat it as such." App. 454 at FN 2.

But this ignores the statute's plain meaning. CDC's director,

> "with the approval of the Secretary [of HHS], is authorized to make and enforce such ***regulations*** as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such ***regulations***, [CDC] may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." 42 USC § 264(a) (emphases added).

Creating rules that are codified in the Code of Federal Regulations involves a specific Congress laid out by Congress in the APA: Notice of Proposed Rulemaking, Public Comment, Response to Comments, and Publication of Final Rule. 5 USC § 553. Only then does an agency rule become a "regulation" published in the CFR.

The district court ignored that CDC and HHS labeled the FTMM more than a dozen times as an "Agency Order" or "Order." App. 492-497. The agencies also specifically asserted that "This Order ***is not a rule*** within the meaning of the Administrative Procedure Act ('APA") but rather is an emergency action taken…" App. 497 (emphasis added).

The district court's decision ignores that "order" and "rule" (aka "regulation") have distinct meanings in the law. "'[O]rder' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter ***other than rule making*** but including licensing." 5 USC § 551(6). Whereas "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy…" 5 USC § 551(4).

Despite CDC and HHS' assertion to the contrary, the FTMM "order" clearly attempted to "prescribe law or policy." The order's text audaciously demands that conveyance operators "instruct[] persons that Federal law requires wearing a mask on the conveyance and failure to comply constitutes a violation of Federal law," even though Congress never passed a law requiring maskwearing in any sector of society despite ample opportunities to do so in more than 20 bills enacted to address the COVID-19 pandemic. App. 493.

Like the FTMM, CDC labeled the Testing Requirement as an "Agency Order" or "Order." App. 532.

We must return to the plan language of the statute: CDC's director is only "authorized to make and enforce such ***regulations***..." 42 USC § 264(a) (emphasis added). She can't issue orders under this statutory authority. She can only promulgate rules/regulations using APA-directed procedures. Congress did not give CDC's director dictator powers to order every American to do what she says just because there's a pandemic. That is totalitarian rule totally foreign to our system of government.

The district court acknowledged CDC's power is limited to rulemaking.

> "Congress clearly intended to delegate authority to the CDC to make ***rules*** regarding public health with the force of law. Section 361(a) of the PHSA specifically states that "[t]he [CDC director], with the approval of the Secretary [of the HHS], is authorized to make and enforce such ***regulations***. 42 U.S.C. § 264(a). The statute also empowers the agency to 'make and enforce such ***regulations*** as . . . are *necessary* to prevent the introduction, transmission, or spread of communicable diseases," further revealing Congress' intent to give the CDC power to make binding ***regulations***." App. 460-461 (italic emphasis original; bold/italic emphases added).

The district court's analysis of the legality of the FTMM and ITTR therefore should have stopped right there. The Mask Mandate and Testing Requirement are self-labeled orders and are not published in the Code of Fed-

eral Regulations. Therefore, they are not authorized by the Public Health Service Act. That should be the end of the matter.

**2. The FTMM and ITTR run afoul of the Major Questions Doctrine.**

The district court erred in failing to apply the Major Questions Doctrine:

> "[T]he major questions doctrine stands for the proposition that courts 'expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.' The FTMM and the ITTR are not questions of 'deep 'economic and political significance" that demand explicit congressional delegations of power. Unlike the CDC's moratorium on eviction, which obviously placed a large financial burden on landlords, the masking and testing requirements place negligible financial burdens on travelers." App. 461 (internal citations omitted).

This analysis is flawed because the district court only focused on financial burdens. True, the cost of face masks is small. Virus testing, however, can be quite expensive, especially at foreign airports – some news reports described travelers needing to fly to the United States having to pay $210 for a rapid test at the airport when they couldn't find one elsewhere. That is clearly a major financial burden.

But money isn't the only thing that triggers the doctrine. The Supreme Court describes a major question as one of "vast economic ***and political*** significance." Anyone who hasn't hidden in a cave during the past 2¼ years knows that the debate over mask mandates across the country has been the

most intense political discussion during the pandemic. There are at least 14 states that have banned forcing masking. App. 1,090. Tens of thousands of protests were held at schools, businesses, government agencies, and elsewhere demanding an end to muzzling as a condition of getting an education, using a place of public accommodation, receiving government services, etc.

The Supreme Court spoke directly to this issue, but the district court failed to obey its holding:

> "The only exception is for workers who … wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here. … Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. … The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. … It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes." *NFIB v. Dept. of Labor*, No. 21A244 (U.S. Jan. 13, 2022).

"Congress has chosen not to afford OSHA – or any federal agency – the authority to issue a vaccine mandate. … The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate." *Id.* (Gorsuch, Thomas, & Alito, JJ., concurring). The same is true of the FTMM and ITTR.

There is no authority for the district court's finding that "The fact that the CDC operated within its area of expertise bolsters the Court's conclusion

here: the CDC's authority does not run afoul of the major questions doctrine." App. 462. But I never contended disease control and prevention is outside CDC's "area of expertise" – the words are literally in the agency's name. But the Major Questions Doctrine doesn't concern itself with whether an agency stayed within its zone. The issue is whether Congress spoke clearly regarding a significant economic and/or political issue. The district court acknowledges it did not: "Section 361(a) of the PHSA is clearly *un*clear." App. 463 (emphasis original).

> "Congress could have spoken directly to the issue of vaccination, masking, or other precautions in the last year when passing other COVID-19-related legislation, but it did not and has not. … The plain language of defendants' cited authority, the statutory context, and the existing regulations all confirm that the Secretary's interpretation … is not a permissible construction of the statute. … the identified sources of authority cannot fairly be construed so broadly as to include an unprecedented, nationwide requirement of a medical procedure or universal masking." *Texas v. Becerra*, No. 5:21-cv-300 (N.D. Tex. Dec. 31, 2021) (enjoining HHS' mask-and-vaccine mandate for Head Start).

Again, that should be the end of the analysis. Several interpretive canons counsel in favor of reading the PHSA not to authorize the FTMM and ITTR – not just the Major Questions Doctrine but also the federalism canon, *noscitur a sociis*, *ejusdem generis*, the rule against surplusage, and constitutional avoidance.

All too often the Executive Branch attempts to circumvent the legislative

process by imposing through executive authority measures that Congress fails to adopt through legislation. *See, e.g., U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 4 (D.C. Cir. 2020). That is precisely what happened here. Congress declined many times to pass a Mask Mandate or Testing Requirement. It's not CDC's role to overrule the decisions of the Legislative Branch.

As the district court conceded, an agency may not be afforded *Chevron* deference under the Major Questions Doctrine. But it went on to ignore that CDC and HHS admitted in the FTMM that "the Office of Information and Regulatory Affairs has determined that if this Order were a rule, it would be a ***major rule*** under the Congressional Review Act…" App. 497 (emphasis added). "This order is also an ***economically significant*** regulatory action…" *Id.* (emphasis added).

Likewise the ITTR states "it would be a ***major rule***…" App. 536 (emphasis added). "This Amended Order is also an ***economically significant*** regulatory action…" *Id.* (emphasis added).

If the agencies themselves acknowledge the two policies are a "major rule" and "economically significant," how could the district court conclude the opposite? This finding also ignores the numerous letters I submitted into evi-

dence from hundreds of transportation and travel companies and organizations demanding abolition of the FTMM and ITTR because their economic impacts were "***devastating***." App. 1,076-1,089.

For an "agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must … expressly and specifically delegate to the agency the authority both to decide the major policy question…" *Paul v. United States*, 140 S.Ct. 342 (2019). Only Congress may decide whether masking and pre-departure virus testing is needed to combat COVID-19. It has determined they are not. Notably the only vote taken on the floor of either chamber was when the Senate decided 57-40 to abolish the FTMM. S.J.Res. 37 (roll-call vote March 15, 2022). App. 620-623.

Judge Mizelle got it right in determining "But there is an independent bar to the government's invocation of *Chevron*: the major questions doctrine. The government's interpretation is untenable because courts 'expect Congress to speak clearly' if it assigns decisions 'of vast economic and political Significance' to an administrative agency. The CDC asserts such a power in the Mask Mandate, but § 264(a) is far from such a grant." *HFDF*.

**3. CDC and HHS are not entitled to *Chevron* deference because Congress never authorized the agencies to issue rules concerning masks and virus testing as a condition of travel. Masks are not "sanitation" and testing is not "inspection."**

Even if the Court ignores the Major Questions Doctrine, the agencies still are not entitled to *Chevron* deference. The district court wrote:

> "The initial inquiry – Step Zero – is whether the application of the doctrine is proper. '*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.' 'This approach 'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.'' App. 459-460 (internal citations omitted).

Yet again, the inquiry should have stopped here. As Judge Mizelle found, "[T]he statute is not ambiguous. Congress addressed whether the CDC may enact preventative measures that condition the interstate travel of an entire population on adherence to CDC dictates. It may not. So 'that is the end of the matter.' ... Nor is the government's interpretation a reasonable one." *HFDF*.

She went on to correctly determine that

> "The government here advances a reading of 'sanitation' that untethers it from the surrounding words and the statutory structure. Such an interpretation 'does not merit deference.' *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (finding an agency interpretation unreasonable because it did not fit with the statute's design and structure). Accordingly, *Chevron* deference does not apply." *Id*.

Even if, *arguendo*, CDC and HHS could clear "Step Zero," the district court erred in its analysis of "Step One." As Judge Byron correctly wrote, "'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" App. 460 (quoting *Chevron* at 842–43).

No one can seriously argue that placing a mask on your face is "sanitation" nor that being forced to undergo virus testing in a foreign country is "inspection." These terms appear in § 264(a), but this subsection only applies to property, not people.

> "There is another serious flaw to the masking-as-sanitation argument: subsection (a) does not give the CDC power to act on individuals directly. … The first part, subsection (a), gives the CDC power to directly impose on an individual's *property* interests. The second part, subsections (b)-(d), gives the CDC power to directly impose on an individual's *liberty* interests. … Since the Mask Mandate regulates an individual's behavior – wearing a mask – it imposes directly on liberty interests, not the property interests contemplated in subsection (a)." *HFDF* (emphasis original).

"Subsection (a) refers to direct impositions on property, while subsections (b)-(d) contemplate direct restrictions on individual movement." *Id.*

Judge Mizelle's correct conclusion was informed by the fact that every court that has addressed the question has found that § 264(a) pertains to animals, articles, or property, not people. § 264(a) "allows the regulation of only an infected or infecting item." *Florida v. Becerra*, 544 F. Supp. 3d 1241

(M.D. Fla. 2021), aff'd No. 21-12243 (11th Cir. July 23, 2021) (enjoining CDC's Conditional Sailing Order for cruiseships).

The Sixth Circuit, striking down CDC's Eviction Moratorium, held that the PHSA clearly distinguishes between "property interests" under § 264(a) and "liberty interests" under § 264(d). "Sanitation" is the power for CDC "to sanitize and dispose of infected matter…" *Tiger Lily v. HUD*, 992 F.3d 518, 522-523 (6th Cir. 2021). Clearly a mask disposes of nothing.

"Start with the immediate context. Sanitation travels in company with 'inspection, fumigation, disinfection, … pest extermination, [and] destruction.' § 264(a). These terms involve measures aimed at 'identifying, isolating, and destroying the disease itself.'" *HFDF*.

But, as Judge Mizelle correctly held, a mask does not identify coronavirus; it does not isolate the virus because droplets and aerosols travel through the top, bottom, and sides of the mask (directly into the faces of travelers sitting next to you on a plane, bus, train, etc.); and it does not destroy the disease.

> "§ 264(a) does not authorize the CDC to issue the Mask Mandate. … 'sanitation' and 'other measures' refer to measures that clean something, not ones that keep something clean. Wearing a mask cleans nothing. … If the government is correct that sanitation allows for the CDC's Mask Mandate because it promotes hygiene and prevents the spread of disease, then the remaining words in § 264(a), such as disinfection and fumigation are unnecessary. … Instead, sanitation more likely refers – consistent with its most common usage at the time – to acts that remove refuse or debris from an area or object, a reading that preserves independent

meaning for the other terms in § 264(a).” *HFDF*.

The Court also has to defer to common sense and English language use. Nobody has ever said in donning a mask that “I am putting on my sanitation device” nor “I’m sanitizing my face by covering it with a piece of cloth.” We do not visit the doctor for an “inspection,” we go for an “examination.” A place in a medical clinic where tests are performed on patients is not labeled an “inspection room,” it is called an “exam room.”

> “This reading is reinforced by three textual observations. First the titles of subsections (b), (c), and (d) each reference persons, while the title of subsection (a) does not. … Far more importantly, the body of subsection (a) focuses on what the CDC may do to objects that may be dangerous to persons, while subsections (b)-(d) are addressed only to the CDC's treatment of individuals. Second all the examples in subsection (a) – inspection, fumigation, disinfection, sanitation, pest extermination, and destruction – are words that are not commonly used to describe what one does to a person. Instead they are tied to "specific tangible things on which the agent)’ may act.’ *Skyworks*, 524 F. Supp. 3d at 758.” *HFDF*.

Critical for this Court’s analysis of the ITTR, “The only term arguably applicable to persons is ‘inspection.’ But that would undercut any independent meaning given to ‘examination’ in the later subsection. See § 264(d).” *Id*.

Importantly, the FTMM does not use the word “sanitation.” When forced to defend the order in litigation, CDC/HHS lawyers invented that masks are “sanitation.” But review of an executive decisions is “limited to the agency's original reasons, and [any different] explanation ‘must be viewed critically’

to ensure that the [order] is not upheld on the basis of impermissible '*post hoc* rationalization.'" *DHS v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1908 (2020).

The district court admitted it may "not rely on any *post-hoc* rationalizations in arriving at its decision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (holding a court reviewing an agency's decision 'must judge the propriety of [the agency] action solely by the grounds invoked by the agency')." App. 474 at FN 17. But then it goes on to do exactly that.

Concerning the ITTR, that order does not contain the word "inspection." Therefore CDC and HHS' attempts during litigation to save the Mask Mandate and Testing Requirement by calling them "sanitation" and "inspection" measures "can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us." *DHS* at 1909.

CDC's *post hoc* argument that "sanitation" includes masking human faces is defied by its own definitions regarding transportation and disease. A "sanitary inspection" of carriers arriving at a U.S. port includes "determin[ing] whether there exists rodent, insect, or other vermin infestation, contaminated food or water, or other insanitary conditions…" 42 CFR § 71.41. A "sanitary inspection" does not include what the arriving crew and passengers are wearing on their faces.

CDC itself defines sanitation as "having access to facilities for the safe disposal of human waste (feces and urine), as well as having the ability to maintain hygienic conditions, through services such as garbage collection, industrial/hazardous waste management, and wastewater treatment and disposal."[8] Because the FTMM does not deal with sewage, water, or solid waste, it is not a "sanitation" measure. CDC and HHS' argument to the contrary "suggests a ruse, a mere contrivance, superficially attempting to justify a sweeping, invasive, and unprecedented public health requirement imposed unilaterally by President Biden." *Florida v. Nelson*, No. 8:21-cv-2524 (M.D. Fla. Dec. 22, 2021) (enjoining vaccine mandate for federal contractors).

§ 264(a) does not authorize worldwide measures targeting every single traveler and transportation worker, only "discrete action[s]," such as "bann[ing] a discrete item," "detain[ing]" a ship, or taking other similar measures "distinctly limited in time, scope, and subject matter." *Florida v. Becerra*.

The World Health Organization defines sanitation as providing clean water and proper disposal of urine and feces. It aims to provide nations with sanitation information to "help decide how to invest in providing toilets and

[8] https://www.cdc.gov/healthywater/global/sanitation/index.html (visited June 27, 2022)

ensuring safe management of wastewater and excreta."[9] Nowhere does WHO define sanitation as including a mask or any other medical device.

The government's 1940s dictionaries fare no better in defining "sanitation" as including the covering of human faces. The 1946 edition of Funk & Wagnalls defines "sanitary" as "A public water-closet or urinal, especially once equipped with sanitary features." Notably that dictionary includes a diagram regarding "Providing Sanitation for a Modern House," describing the use of clean water, pipes, toilets, sinks, bathtubs, and discharges to sewers. Interestingly a mask is not included in this diagram.

Webster's 1942 dictionary likewise terms "sanitary" as "A water closet, urinal, or the like, fitted with sanitary plumbing" and "sanitary engineering" as "That branch of civil engineering dealing with the water supply, sewage, and waste disposal for cities, and other sanitary problems."

These definitions are reflected in common English language use. We don't say "I'm going to the sanitarian to see why I'm ill" or "I'm going to the sanitation facility to pick up my medicine." We go to the doctor and the pharmacy. We don't visit a sanitation facility to buy a mask or seek healthcare; we only go there if we want to take in some really terrible smells.

[9] https://www.who.int/news-room/fact-sheets/detail/sanitation (visited June 27, 2022)

The district court's findings can't be sustained. "[I]t is reasonable to categorize the FTMM as a 'sanitation' measure. As a matter of common sense, masks control the number of particles inhaled from the public airspace by the wearer and the number of particles exhaled by the wearer into the public airspace." App. 470. But the true science (and common sense) is that masks do no such thing. Face coverings "sanitize" nothing. Even if masks did reduce the number of particles exhaled into the airspace, that would result in an infected wearer making him/herself many times more sick by constantly reinhaling COVID-19 rather than expelling it from the lungs as the respiratory system is designed to do. *See* many studies explaining these dynamics at https://bit.ly/masksarebad, a sample of which are at App. 731-998.

The district court went on to wrongly conclude that "it is reasonable to categorize the ITTR as an 'inspection' measure," defeating its own contention by then writing "Logically, these tests are critical ***examinations*** of patients' samples to uncover the presence of the SARS-CoV-2 virus…." App. 470-471 (emphasis added). Because the statute uses both the terms "inspection" and "examination," they can't have the same meaning as Judge Byron believes. We inspect property and things; we exam human beings.

Many courts strongly disagreed with CDC's broad reading of its power under the PHSA. "CDC claims authority to impose nationwide any measure,

unrestrained by the second sentence of Section 264(a), to reduce to 'zero' the risk of transmission of a disease – all based only on the director's discretionary finding of 'necessity.' That is a breathtaking, unprecedented, and acutely and singularly authoritarian claim." *Florida v. Becerra*.

If this Court allows CDC, HHS, TSA, DHS, and DOT to force masks over the mouths and noses of all transportation passengers and workers, the agencies' sweeping view of their domain would, if left unchecked, allow them to adopt future regulations governing nearly all aspects of national life in the name of public health. "[I]f CDC promulgates regulations the director finds 'necessary to prevent' the interstate or international transmission of a disease, the enforcement measures must resemble or remain akin to 'inspection, fumigation, disinfection, sanitation, pest extermination, [or the] destruction of infected animals or articles.'" *Id.*

The district court issued a political statement, not a legal finding, when it wrote "The narrow reading of the PHSA constrains the CDC's ability to expediently address health crises, such as the COVID-19 pandemic, to the detriment of the public health." App. 471. But if Congress wants to force travelers to wear masks or require virus testing before departing a foreign airport, it could do so by statute – or it could clearly, unambiguously grant CDC that power. It has not.

For all these reasons, the district court erred in finding that "After examining each Step of the Chevron doctrine, the Court concludes that the FTMM and the ITTR are valid exercises of the CDC's authority under Section 361(a) of the PHSA." App. 460.

### B. The district court erred in ruling that CDC and HHS legally issued the FTMM and ITTR without notice and comment.

The Mask Mandate and Testing Requirement were issued without following APA procedures including notice and comment. "Legislative rules have the 'force and effect of law' and may be promulgated only after public notice and comment. *INS v. Chadha*, 462 U.S. 919, 986…" *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014). The APA requires notice of, and comment on, agency rules that "affect individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979). These procedures are congressionally mandated "to assure due deliberation" when an agency promulgates rules having the force of law. *Smiley v. Citibank*, 517 U.S. 735, 741 (1996).

The FTMM and ITTR, despite CDC's assertions to the contrary, are legislative rules with the "force and effect of law" because they prohibit anyone from using public transportation who can't or won't don a face covering, sub-

ject to the threat of large fines, and ban everyone (including American citizens) from flying to the USA unless they can provide a negative virus test taken within one day of departure.

CDC's Conditional Sailing order was enjoined because it

> "carries identifiable legal consequences, such as the prospect of criminal penalties, substantial fines, and suspension of sailing. … [CSO] carries the force of law and bears all of the qualities of a legislative rule. Accordingly, the [CSO]'s prospective, generalized application invites the conclusion that the order is a 'rule.' In plain words, if it reads like a rule, is filed like a rule, is treated like a rule, and imposes the consequences of a rule, it's probably a rule. Because the [CSO] is a rule, CDC was obligated to follow the procedures applying to the promulgation of a rule…" *Florida v. Becerra*.

In this case, a different judge of the same district court incorrectly ascertained "whether, in promulgating the FTMM and the ITTR, the CDC appropriately bypassed the standard notice-and-comment rulemaking procedure under the APA's good cause exception. The answer: yes." App. 476.

The correct answer is "no." CDC offered the most threadbare statement in invoking good cause:

> "notice and comment and a delay in effective date are not required because there is good cause to dispense with prior public notice and comment and the opportunity to comment on this Order and the delay in effective date. Considering the public health emergency caused by COVID-19, it would be impracticable and contrary to the public's health, and by extension the public's interest, to delay the issuance and effective date of this Order." App. 497.

HHS declared COVID-19 a national emergency in January 2020, however. CDC and HHS had an entire year to put the Mask Mandate through APA's required notice-and-comment procedures,[10] but failed to do so. "Good cause cannot arise as a result of the agency's own delay…" *NRDC v. NHTSA*, 894 F.3d 95, 114 (2nd Cir. 2018). "[C]ertainly neither 'good cause' nor 'urgent and compelling circumstances' exists to justify summary disregard of the requirements of administrative law and rulemaking." *Florida v. Nelson*.

> "The Mandate's explanation – a single conclusory sentence – does not carry its burden to 'show strong enough reason to invoke the [good cause] exception.' *U.S. Steel Corp.*, 595 F.2d at 214. 'A mere recitation that good cause exists … does not amount to good cause.' *Zhang v. Slattery*, 55 F.3d 732, 746 (2nd Cir. 1995) … Nor does it allow the Court to 'ensur[e] that [the CDC]

[10] Had CDC, HHS, TSA, and DHS put the Mask Mandate through the required APA notice-and-comment period, I would have submitted, *inter alia*, the following concerns: 1) data shows states without mask mandates suffered fewer deaths per capita than states that imposed such requirements; 2) the FTMM is out of step with the current policies of every state that don't require anyone to cover their face; 3) requiring masks in the transportation sector leads to widespread chaos in the skies and on the ground, endangering aviation and transit safety; 4) the FTMM unlawfully discriminates against travelers who can't wear a face covering due to a disability; 5) the gargantuan amount of scientific and medical evidence showing that masks have proven to be totally ineffective in reducing COVID-19 spread and deaths (*see* 228 scientific studies, medical articles, and videos at https://bit.ly/masksarebad); 6) scientists have known for a long time that masks aren't effective in reducing transmission of respiratory viruses (*Id.*); 7) masks pose serious health risks to humans forced to wear them (*Id.*); 8) many experts consider forcing kids to wear masks child abuse; 9) people who have recovered from COVID-19 have long-lasting immunity and don't need to don a mask; and 10) airplane cabins pose little risk for coronavirus spread and there have been few, if any, reports of coronavirus transmission on aircraft.

engaged in reasoned decisionmaking.'" *HFDF*.

> "Precedent demonstrates how infrequently the exception should receive acceptance. *See, e.g., Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981) ('[A]dministrative agencies should remain conscious that such emergency situations are indeed rare.'); *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) (explaining that the circumstances permitting reliance on the 'good cause' exception are exceedingly 'rare'). ... The 'good cause' exception, 'narrowly construed and only reluctantly countenanced,' *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)), excuses the APA's notice-and-comment procedures in an 'emergency situation.' *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)." *Florida v. Becerra*.

"[B]ald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice-and-comment procedures." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800 (D.C. Cir. 1983).

COVID-19 itself does not always justify an agency bypassing notice and comment. *Florida v. HHS*, 19 F.4th 1271, 1290 (11th Cir. 2021). "Besides its brief reference to the pandemic, the Mandate makes no effort to explain its reasoning that there was an exceptional circumstance at the time it implemented the rule." *HFDF*, noting the pandemic had been going on for more than a year and CDC didn't explain its long delay. Nor did it cite any evidence of COVID-19 hotspots attributed to the transport sector.

"CDC's failure to explain its reasoning is particularly problematic

> here. At the time when the CDC issued the Mandate, the COVID-19 pandemic had been ongoing for almost a year and COVID-19 case numbers were decreasing. … This timing undercuts the CDC's suggestion that its action was so urgent that a 30-day comment period was contrary to the public interest. So too, the CDC's delay in issuing the Mandate further undercuts its position. The CDC issued the mandate in February 2021, almost two weeks after the President called for a mandate, 11 months after the President had declared COVID-19 a national emergency, and almost 13 months since the Secretary of Health and Human Services had declared a public health emergency." *HFDF*.

Notice improves the quality of the rulemaking by ensuring agency regulations will be tested by exposure to diverse public opinion. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983). Notice and the opportunity to be heard are essential components of fairness to affected parties. *Id*. The notice must provide sufficient factual detail and rationale for the rule to permit interested persons to comment meaningfully. *Chemical Waste Mgmt. v. EPA*, 976 F.2d 2 (D.C. Cir. 1992).

Many courts have rejected the Executive Branch's invocation of good cause in issuing coronavirus orders. "The situation was not so urgent that notice and comment were not required. … Notice and comment would have allowed others to comment upon the need for such drastic action." *Louisiana v. Becerra*, No. 3:21-cv-4370 (W.D. La. Jan. 1, 2022) (enjoining HHS' mask-and-vaccine mandate for Head Start).

But in this case, the district court went against this overwhelming precedent in other pandemic cases.

> "Here, the FTMM, issued on February 3, 2021, explicitly invokes the good cause exception… The highly contagious character and the devastating effects of the SARS-CoV-2 virus demanded expeditious action by the CDC. Frankly, if battling this elusive enemy does not rise to the level of urgency that qualifies for deviation from normal rulemaking procedures under the good cause exception, the Court is not sure what does." App. 477-478.

The district court's statement might have made sense if the FTMM had been issued in January 2020 instead of January 2021. Despite Judge Byron's doom-and-gloom statements, coronavirus cases were actually going down when the FTMM and ITTR were issued. The science didn't change. All that changed was the inauguration of President Biden. That did not create an "urgency." The district court itself acknowledged that "CDC unreasonably delayed in promulgating these orders and thereby contributed to the exigent circumstances." App. 479.

There's no evidence in the record to support the district court's conclusion that

> "Delay in the issuance of the FTMM or the ITTR would do real harm to the public health – it only takes one traveler to start an outbreak and, because the SARS-CoV-2 virus is so persistent and mutable, the CDC must adopt a consistent, concerted approach. Accordingly, the good cause exception excuses the CDC's failure to adhere to the notice-and-comment rulemaking procedure." App. 480.

Passengers and workers in the transport sector had gone without a Federal Transportation Mask Mandate for more than a year, just as flyers had come into the United States without testing for the virus. The record contains no evidence that delay would have caused "harm to the public health" – because there was no evidence at all that masks and testing were reducing the circulation of COVID-19.

Moreover, the FTMM and ITTR were in effect for, respectively, 14½ months before being vacated and 16½ months before being voluntarily withdrawn (perhaps only temporarily). The agencies could have issued these policies as interim rules and then proceed with regular order required by the APA to publish a final regulation in the CFR. But they never submitted the FTMM or ITTR for public comment; they stayed in place for more than a year without hearing how devastating the policies are for the disabled, foreign travelers, the airline industry, and many others.

The Supreme Court drew this distinction in narrowly upholding an HHS *interim* mandate for healthcare workers at facilities that accept Medicare and Medicaid to get vaccinated against COVD-19 while the agency immediately provided notice and solicited comments as it worked on a *final rule*. *Biden v. Missouri*, 142 S.Ct. 647 (2022).

Also, OSHA issued the interim healthcare worker mandate soon after FDA

licensed the first fully approved COVID vaccine Aug. 23, 2021. It did not delay a year like CDC and HHS, then declare "good cause" to issue the Mask Mandate and Testing Requirement without notice and comment only days after a new president ordered them for purely political reasons.

CDC's failure to provide notice and comment was not harmless. When an agency utterly fails to allow public feedback, "even a minimal showing of prejudice may suffice to defeat a claim of harmless error." *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1383 (Fed. Cir. 2017). Courts "should be hesitant to conclude that complete failure to comply with § 553's requirements is harmless." *United States v. Reynolds*, 710 F.3d 498, 518 (3rd Cir. 2013).

The travel industry spoke loudly that the FTMM, ITTR, and other travel restrictions unauthorized by Congress have resulted in "devastating" consequences including a 50% drop in business travel and a 78% drop in foreign travel. App. 1,058-1,089. The agency's failure to take public comment certainly affected its decisionmaking and the outcome.

"Violation of the conditional sailing order triggers a serious consequence... The conditional sailing order is a rule ... The APA therefore obligates CDC to ... provide notice and comment. ... CDC lacked 'good cause' to evade the statutory duty of notice and comment." *Florida v. Becerra*.

**C. The district court erred in failing to rule on my arguments that the FTMM and ITTR are arbitrary and capricious.**

In its 29-page decision granting summary judgment to the government on all counts of the Amended Complaint, the district court failed to even consider Counts 3 and 11 alleging the FTMM and ITTR are arbitrary and capricious. App. 300 & 314. This exclusion is especially troubling because numerous pages of both parties' briefs were devoted to this subject. It's perplexing how the district court could have completely ignored this important question, which formed a large part of Judge Mizelle's decision to vacate the FTMM in *HFDF* 11 days earlier.

> "[T]he Court agrees with Plaintiffs that the CDC failed to adequately explain its reasoning… The CDC does not 'articulate a satisfactory explanation' – or any explanation at all – for its action and fails to include a 'rational connection between the facts found and the choices made.' … And so, the decision is arbitrary and capricious and due to be 'set aside'…" *HFDF*.

> "On the other side of the scales is the Executive's questionable claim that COVID-19's spread is slowed in a meaningful way by the CDC's § 265 Order… But this is March 2022, not March 2020. The CDC's § 265 order looks in certain respects like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty. … The evidence of the difference between then and now is considerable. … We cannot blindly defer to the CDC in these circumstances." *Huisha-Huisha v. Mayorkas*, No. 21-5200 (D.C. Cir. March 4, 2022) (partially enjoining CDC's Migrant Expulsion Order due to COVID-19).

In my case, Judge Byron touched on arguments both sides made regarding whether the FTMM and ITTR were arbitrary and capricious, but never

directly ruled one way or the other.

> "CDC explained the specific benefits of wearing a mask as (1) reducing the 'emission of virus-laden droplets … by blocking exhaled virus' and (2) reducing the 'inhalation of these droplets … through filtration.' 86 Fed. Reg. at 8,028. Then, citing to ***seven*** different studies that 'confirmed the benefit of universal masking in community level analyses,' the CDC concluded that masking would be beneficial when people are exposed to others for prolonged periods in places that are not amenable to social distancing. *Id.*" App. 472 (emphasis added).

The district court believed everything CDC said without taking a look at the thousands of pages of evidence I submitted into the record where countless scientists and medical professionals around the world reached the exact opposite conclusions. These 228 studies, articles, and videos are posted at https://bit.ly/masksarebad (App. 732-741) and a small sample of them are published at App. 742-998. I don't have space to summarize all these findings, but the district court's opinion makes it clear it did not even glance at any of these exhibits that contradict in dozens of ways the false information CDC wrote to justify the president's desire for a Mask Mandate. Seven studies saying "A" pales in comparison to 228 stating "Z" (and the 228 is just a sample of the 500+ papers I've read about how masks are totally ineffective in reducing COVID-19 spread but harm human health in at least 68 ways).

"[O]rdering masks to stop Covid-19 is like putting up chain-link fencing to keep out mosquitos." *Ridgeway Properties v. Beshear*, No. 20-CI-678

(Ky. Cir. June 8, 2021).

In the related action, Judge Mizelle recognized CDC had tunnel vision and failed to consider any contradictory evidence before ordering such harsh policies that resulted in millions of Americans such as myself being banned from using any mode of public transportation anywhere in the nation. "The Mask Mandate is Arbitrary and Capricious Because the CDC Failed to Adequately Explain Its Reasoning," she concluded. *HFDF*.

> "the Court agrees with Plaintiffs that the CDC failed to adequately explain its reasoning … the Mask Mandate fails this reasoned-explanation standard. Beyond the primary decision to impose a mask requirement, the Mask Mandate provides little or no explanation for the CDC's choices. Specifically the CDC omits explanation for rejecting alternatives…" *Id*.

The district court in this case did not address my arguments that CDC failed to consider less restrictive rules that could have minimized the risk to public health such as using CDC/DHS systems called "Do Not Board" and "Lookout" to alert airlines to bar passengers who have tested positive for a communicable disease from boarding. 80 Fed. Reg. 16,400 (March 27, 2015); App. 605-609. The government presented no evidence below that CDC and/or TSA are using Do Not Board and Lookout to stop passengers who have tested positive for COVID-19 from embarking. Targeting travelers who are a genuine threat to public health – those who are infected – can be done without infringing on the freedom to travel for everyone else.

An agency must "explain the rejection of an alternative that was within the ambit of the existing Standard and shown to be effective." *Clinton Mem'l Hosp. v. Shalala*, 10 F.3d 854, 859 (D.C. Cir. 1993) (cleaned up). CDC has never explained why masks are more effective than using two existing systems to stop those travelers *known* to be infected with a communicable disease from boarding a plane.

CDC "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Encino Motorcars v. Navarro*, 136 S.Ct. 2117, 2125 (2016). Here, the agency failed to articulate why the Mask Mandate was needed, what specific state measures were inadequate, and why it is not using Do Not Board and Lookout to flag infected travelers. An agency decision that doesn't consider "less restrictive, yet easily administered" regulatory alternatives (such as databases that already exist) fails the arbitrary-and-capricious test. *Cin. Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995).

"The Mandate does not address alternative (or supplementary) requirements to masking, such as testing, temperature checks, or occupancy limits in transit hubs and conveyances. It also does not explain why all masks – homemade and medical-grade – are sufficient." *HFDF*. This clearly shows the FTMM was rushed into place due to politics, not reasoned science. This

despite the fact President Biden himself said several times that "The federal government, there's a constitutional issue whether the federal government could issue such a mandate. I don't think, constitutionally, [it] could." App. 1,020-1,032. The president snubbed his nose at the Constitution and did so anyway.

An agency policy created due to politics and not reasoned science is arbitrary and capricious. *Midwater Trawlers Coop. v. Dep't of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002). Thus it's difficult to understand how Judge Byron concluded that

> "when issuing the FTMM and the ITTR, the CDC made permissive policy decisions, provided adequate evidence to support the decisions, and provided sound reasoning to connect the evidence with their policy decisions, and there is no reason to suspect the CDC passed the FTMM or the ITTR for pretextual reasons. ... Therefore, the CDC did not abuse its discretion in enacting the FTMM and the ITTR." App. 476.

But Judge Byron failed to explain how seven studies promoting maskwearing vs. 228+ showing they don't work and harm our health equals "adequate evidence" or "sound reasoning."

Tens of thousands of epidemiologists, scientists, doctors, industrial hygienists, and other experts strongly disagree with numerous CDC and TSA statements about masks. "CDC is doing enormous damage to science and scientists by ***allowing politics to dictate public health policy rather***

***than actual science***. Increasingly, and for good reason as we have illustrated, the public does not trust the CDC and its science; this must change." App. 984 (emphasis added).

CDC failed to take into account that airplanes are among the safest places you can be during the pandemic due to high-efficiency filters that bring fresh air into the cabin every 3-4 minutes. App. 1,091-1,115. Aircraft cabins have more sterile air than many hospital operating rooms. App. 1,092. CDC has not offered any evidence to support its determination that masks are necessary to reduce the transmission of COVID-19 in the aviation sector.

"Airplanes are already equipped with advanced air filtration systems, and airports have made large investments in air filtration, sanitation, and layouts. COVID-19 hospitalization rates have decreased significantly and ***the mask mandate should be lifted*** to reflect the improved public health environment," according to Airlines for America. App. 1,077 (emphasis added).

CDC's "conditional sailing order likely is by definition capricious. … An agency decision issued without adherence to its own regulations must be overturned as arbitrary and capricious…" *Florida v. Becerra*. Likewise, the Mask Mandate is by definition capricious for failing to consider vaccination, natural immunity, and community infection levels, Do Not Board, Lookout,

and other factors. The FTMM "therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil,' cf. *Cantwell v. Connecticut*, 310 U.S. 307." *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

CDC's claim that every single traveler is a direct threat is beyond absurd and is scientifically impossible.

> "[R]ather than a delicately handled scalpel, the Mandate is a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces (and workers) that have more than a little bearing on workers' varying degrees of susceptibility to the supposedly 'grave danger' the Mandate purports to address. … it is generally 'arbitrary or capricious' to 'depart from a prior policy *sub silentio*,' agencies must typically provide a 'detailed explanation' for contradicting a prior policy… Such shortcomings are all hallmarks of unlawful agency actions." *BST Holdings v. OSHA*, No. 21-60845 (5th Cir. Nov. 12, 2021).

An agency decision is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view…" *Motor Vehicle Manufacturers Ass'n v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). All three factors are in play here with the Mask Mandate. CDC's determination that transportation poses a greater risk than numerous other activities is arbitrary and capricious. There's no evidence that airplane cabins pose a special risk of respiratory virus transmission. The opposite is true. App. 1,091-1,115.

There's a simple conclusion from real-world data: Masks don't reduce COVID-19 transmission. "[T]he winter surge in COVID-19 cases coincided with high levels of mask-wearing, which undermines the evidence of masks' effectiveness." App. 749. Masks totally failed to contain COVID-19, as is obvious by the multiple massive surges that have occurred globally every few months regardless of whether countries/states had masking rules in place or not.

Based on these experiences, the district court had no grounds to opine that "the COVID-19 pandemic was exactly the type of situation imagined by Congress where courts should refrain from imposing its own judgment and give appropriate deference to the agency's scientific expertise in determining the best way to stem the spread of the unprecedented disease." App. 474. But again, CDC did not act based on "scientific expertise," but for purely political reasons. This does not meet the law's requirement that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 374 (1998). "It follows that agency action is lawful only if it rests 'on a consideration of the relevant factors.'" *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (Scalia, J.). A court has a duty to ensure "that the agency has acted within a zone of reasonableness."

*FCC v. Prometheus Radio Project*, 141 S.Ct. 1150, 1158 (2021). Nothing about the FTMM or ITTR is reasonable nor "necessary," as the PHSA requires.

Judge Byron upheld the ITTR, in part, because "the CDC addressed the new concern facing the United States during the pandemic: the emergence of the Omicron variant." App. 475. But neither the FTMM nor the ITTR did anything to stop the spread of Omicron. Despite these measures being in place, COVID-19 cases surged to record highs last winter, causing significant disruptions to the transportation system. App. 1,033-1,057.

The district court ignored that forcing travelers to wear masks and get tested for coronavirus did nothing to halt the spread of Omicron. Its decision is unreasoned that "When promulgating the ITTR, the CDC properly considered the relevant factors, assessed the evidence before it, and relied on its scientific expertise to determine the best way to prevent the Omicron variant from undermining the nation's progress in combating the pandemic." App. 475. But within a week of issuing the ITTR, the Omicron variant made up the vast majority of new COVID-19 infections in America.

Judge Byron bought hook, line, and sinker CDC's false claims that

> "'masks prevent dispersal of an infected person's respiratory droplets that carry the virus' and 'also provide some protection to the wearer by helping reduce inhalation of respiratory droplets,' and they 'prevent the introduction, transmission, and spread of COVID-19 into the United States and among the states

> and territories,' particularly as '[t]raveling on multi-person conveyances increases a person's risk of getting and spreading COVID-19 by bringing persons in close contact with others, often for prolonged periods, and exposing them to frequently touched surfaces.'" App. 480.

Thankfully, due to Judge Mizelle, we now have more than two months of real-world experience showing how erroneous the lower court's finding was in this case. Removal of the Mask Mandate since April 18 has not led to any cuts in transportation service. The reverse has happened: not having to obstruct one's oxygen intake as a mandatory condition of using public transportation has stimulated demand to levels so high airlines can't hire enough staff to adequately supply the desired flights.

Even before April 18, the district court should have known that, as we've seen tens of millions of times during the pandemic as maskwearing Americans test positive for COVID-19, placing a piece of cloth over the nose and mouth does nothing but make people feel like they are making a difference. This "virtue signaling" is not science, it's arbitrary and capricious.

Earlier this month (June 15), the nation's most prominent mask advocate and wearer, Dr. Anthony Fauci, tested positive for COVID-19. The poster boy for masks got infected with coronavirus. This sums up the worthlessness of masks. They do not stop the spread of an airborne respiratory virus – no matter how many layers of them a person dons like Dr. Fauci. Therefore CDC

and TSA's mandate forcing me to wear a mask (even though my medical conditions prohibit it) as a condition of using any form of public transportation is the perfect example of executive policies that the law demands be stopped. A court must "hold unlawful and set aside agency action … found to be … arbitrary, capricious, [or] an abuse of discretion." 5 USC § 706(2)(A).

The FTMM is so onerous it applies to people who are not traveling interstate, employees working at facilities and on conveyances that only serve intrastate travelers, people at a transportation hubs for purposes other than traveling interstate (e.g. buying tickets for future travel, waiting on a train platform for a family member to arrive, etc.), and so on.

> "[T]he extent of any … problem, past or future, attributable to COVID-19 is undemonstrated and is merely a hastily manufactured but unproven hypothesis about recent history and a contrived speculation about the future. Obviously, no massive extension and expansion of presidential power is necessary to cure a non-existent problem… the executive order results in an application of dizzying expansiveness." *Florida v. Nelson*.

A court must "not defer to the agency's conclusory or unsupported suppositions." *Texas v. Biden*, 10 F.4th 538, 555 (5th Cir. 2021). But in a conclusory fashion, the Mask Mandate asserts, without supporting evidence, that "[a]ppropriately worn masks reduce the spread of COVID-19…" CDC's own data shows no evidence that the Mask Mandate has done anything to reduce COVID spread. "Stopping the spread of COVID-19 will not be achieved by

overbroad policies…" *Feds for Medical Freedom v. Biden*, No. 3:21-cv-356 (S.D. Tex. Jan. 21, 2022) (enjoining the president's vaccine mandate for federal employees).

If CDC's catastrophic fearmongering were true, where in its May 31, 2022, brief in the *HFDF* appeal does it offer the Court facts that the striking down of the Mask Mandate has led to any increase in COVID-19 cases, hospitalizations, or deaths among travelers and transport workers? That brief contains not a shred of argument or evidence that the sudden termination of the FTMM has created any harm. This proves my argument that the FTMM did nothing to reduce COVID-19 transmission in the transit sector; all it caused was chaos in the sky with passengers fighting back against forced muzzling and the prohibition of many disabled from traveling.

I have not found not a single government report, nor any news articles, discussing a surge in coronavirus cases among transportation passengers and/or employees since the Mask Mandate went away more than two months ago. The fact CDC offered none in its brief is clear and conclusive evidence that forced masking does not change the number of infections. The policy was arbitrary and capricious from the beginning.

"CDC does not 'articulate a satisfactory explanation' – or any explanation at all – for its action' and fails to include a 'rational connection between the

facts found and the choices made.'" *HFDF*.

Concerning the ITTR, CDC and HHS did not consider the devastating consequences of being stranded in a foreign nation without access to rapid testing to meet the strict one-day timeframe. They also failed to explain why fully vaccinated Americans flying home need a COVID-19 test to enter the country but not illegal aliens (who are much more likely to be unvaccinated)[11] and others crossing the land borders from Mexico and Canada. Nor why the requirement doesn't apply to travelers arriving by sea when cruiseships have long been a hotbed of coronavirus infections.

Numerous travel-industry organizations repeatedly called on CDC to repeal the Testing Requirement, noting the economic destruction it caused with foreign travel down 75% compared to 2019, in large part due to the two restrictions I challenge because flyers don't want to be muzzled or have to worry about being stranded in a foreign nation due to virus testing unavailability. CDC failed to consider the damage the ITTR causes two of the economy's sectors most impacted by the virus (travel and tourism).

[11] U.S. Customs & Border Protection apprehended 2,975,135 illegal immigrants at the southern border since the ITTR took effect in January 2021. https://tinyurl.com/4286et4h (visited June 27, 2022). Not subjecting these land crossers to the ITTR but enforcing it on American citizens flying into the country is the utter definition of a severe abuse of agency discretion.

**D. The district court erred in ruling that the FTMM does not violate the Air Carrier Access Act by allowing airlines to discriminate against the disabled who can't tolerate wearing face masks.**

Health experts say tens of millions of Americans with a variety of medical conditions can't safely wear a mask. App. 1,001-1,019. CDC agrees, noting

> "that a person who has trouble breathing or is unconscious, incapacitated, or otherwise unable to remove the face mask without assistance should not wear a face mask or cloth face covering. … Additionally, people with post-traumatic stress disorder, severe anxiety, claustrophobia, autism, or cerebral palsy may have difficulty wearing a face mask." App. 120 & 292-293.

Yet the FTMM blatantly discriminates against all of us with medical conditions who can't wear masks in violation of the Air Carrier Access Act. 49 USC § 41705(a). CDC and TSA may not issue orders that are contrary to statute.

The district court brushed aside this argument in a footnote, wrongly finding that

> "Plaintiff's ACAA claim fails on several grounds. First, the ACAA only applies to 'air carriers' and the CDC is not an 'air carrier.' 49 U.S.C. § 41705(a). Second, Plaintiff alleges that the FTMM discriminates against handicapped individuals; however, the FTMM explicitly exempts any "person with a disability who cannot wear a mask … because of a disability." 86 Fed. Reg. at 8,027. Further, the Eleventh Circuit has explained that the ACAA does not provide a private right of action… *See Love v. Delta Air Lines*, 310 F.3d 1347, 1354, 1360 (11th Cir. 2002)." App. 458 at FN 10.

Yet it should be obvious to this Court that the FTMM violates the ACAA

and other federal nondiscrimination laws including the Americans with Disabilities Act (which applies to ground transportation) and the Rehabilitation Act (which applies to all entities that accept federal funds, including all U.S. airlines during the pandemic).

The district court deceitfully states that the FTMM exempts the disabled. Although it's true the text of the Mask Mandate does not prohibit the disabled who can't wear masks from traveling, the way the government told airlines and other transit providers to consider medical exemptions certainly does. Despite the FTMM's textual allegation that travelers with disabilities are exempt, the order's language includes six illegal provisions:

1. "medical consultation by a third party"
2. "medical documentation by a licensed medical provider"
3. "require evidence that the person does not have COVID-19 such as a negative result from a SARS-CoV-2 viral test"
4. "scheduling travel at less crowded times or on less crowded conveyances"
5. "seating or otherwise situating the individual in a less crowded section of the conveyance"
6. "Operators may further require that persons seeking exemption from

the requirement to wear a mask request an accommodation in advance." App. 494 at FN 8-9.

Regulations these FTMM provisions violate include 14 CFR §§ 382.11(a)(1), 382.17, 382.19(a), 382.19(c)(1), 382.21, 382.23(a), 382.23(c)(1), 382.23(d), 382.25, and 382.87(a).

Placing an exemption on paper and actually permitting it in real life are separate things. CDC and TSA allow private companies and nonfederal transit authorities to attempt to practice medicine by judging solely for themselves who has a qualified disability and who does not. I applied to numerous airlines for medical waivers from the FTMM and was always denied. App. 666-729. This despite my medical records clearly stating "Lucas Wall … has a longstanding history of generalized anxiety disorder. As a result, he is unable to wear a face covering…" App. 662-665.

The Mask Mandate for 14½ months prohibited millions of people with disabilities from using public transportation. When I attempted to enter a TSA security checkpoint June 2, 2021 – showing my medical exemption paperwork – TSA prohibited me from passing through.[12] But TSA may only deny boarding to "a passenger who does not consent to a search." 49 USC § 44902(a). It can't stop someone not wearing a mask from embarking.

[12] Watch videos of this incident at https://bit.ly/LucasMaskLawsuitPL

As Judge Mizelle observed, I was detained by TSA solely due to my disability.

> "The opposite of conditional release is 'detention' or 'quarantine.' Anyone who refuses [or is medically unable] to comply with the condition of mask wearing is – in a sense – detained or partially quarantined by exclusion from a conveyance or transportation hub under authority of the Mask Mandate. … In short, their freedom of movement is curtailed in a way similar to detention and quarantine…" *HFDF*.

CDC and TSA unconstitutionally did not offer any review of transportation providers' decisions to deny medical exemptions, which I will explore in Section E below.

The district court's statement that CDC is not an "air carrier" and therefore is not required to obey the ACAA is preposterous. No federal agency may ignore a law enacted by Congress. One federal agency by fiat may not authorize airlines to discriminate against the disabled when Congress has prohibited that in statute. And again the district court focused only on the words of the FTMM, not the way CDC, TSA, and DOT instructed regulated parties to carry out the "narrow" exemption process. For nearly all disabled travelers, the mask exemption exists only in theory, as evidenced by the piles of medical-waiver denials I received, only a selection of which are exhibited here. App. 666-729.

"*Chevron* deference does not apply when an agency interprets a statute 'in

a way that limits the work of a second statute' that a different agency administers. *Epic Systems*, 138 S. Ct. at 1629. Here, the CDC administers § 265, but the Department of Homeland Security administers § 1158, as well as the two types of relief under § 1231…" *Huisha-Huisha*.

When courts review the legal interpretations of an agency regarding its compliance with statutes it does not administer, "such review can be more stringent: Courts sometimes review such matters *de novo*, or without any deference at all to the agency's interpretation." *Freeman v. DirecTV*, 457 F.3d 1001, 1004 (9th Cir. 2006).

It's not enough for CDC and TSA to assert that their Mask Mandate claims to exempt those with disabilities from the requirement to wear masks. The actual language includes several illegal provisions, therefore the entire FTMM must be declared *ultra vires*.

Finally, the district court's citation to *Love v. Delta Air Lines* is inapposite. In this case, I did not bring a lawsuit against an airline for disability discrimination. My claims regarding the ACAA involve how CDC and TSA violate it. This is clearly distinguishable from a disabled person's attempt to sue an airline for monetary damages due to discrimination in *Love*.

**E. The district court erred in ruling that CDC's complete delegation of evaluating medical exemptions to the FTMM to nonfederal entities doesn't violate travelers' Fifth Amendment right to due process.**

In rejecting my Fifth Amendment claim in a footnote, the district court completely ignored the crux of my argument:

> "To qualify as a constitutionally protected, due process liberty interest, the interest must be 'objectively, deeply rooted in history and tradition of the United States, and must be implicit in concept of ordered liberty, so that neither liberty nor justice would exist if it were sacrificed.' Trying to fit the 'right to travel free of a mask' into this definition is a useless endeavor." App. 458 at FN 8.

But only part of Count 6 of the Amended Complaint argues there is a constitutional right to travel free of a mask. App. 306 at ¶ 354. The main part of Count 6 asserts a claim for: "deprivation of due process by assigning FTMM enforcement and exemption powers to private companies as well as state, regional, and local agencies with no ability to appeal to a federal decisionmaker." App. 305.

The medical-waiver provisions of the Mask Mandate violate not only the ACAA but also the Constitution. "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. 5. Because the restriction of a citizen's movement from state to state infringes upon that person's liberty, the Supreme Court has held that such restrictions are subject to the protections of the Fifth Amendment's Due Process Clause. When

a government action deprives an individual of a protected liberty, the Due Process Clause requires, at minimum, an opportunity to be heard.

The deprivation of the right to travel via public transport should be treated similarly to suspension or revocation of a driver's license. Both involve denial by the government to move about. The ability to travel "may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by" the Constitution. "This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' *Bell v. Burson*, 402 U.S. 535, 539 (1971).

When the government obstructs the liberty to travel, due process requires the opportunity for a hearing before a federal decisionmaker prior to the deprivation. CDC and TSA have never explained why they fail to offer the disabled denied a medical waiver from the Mask Mandate by a private company the right to appeal to the agency that issued the order. "While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process." *Id.* at 540-541.

As I argued in the Amended Complaint:

> "The FTMM deprives travelers of our liberty without satisfying the requirements of due process. CDC and HHS have improperly delegated to private businesses as well as state, regional, and local transportation authorities the sole enforcement power to determine whether a disabled traveler should be granted a mask exemption. There is no right to a hearing – yet alone a rapid pre-deprivation hearing – before a neutral federal decisonmaker to challenge a denial of an exemption." App. 306 at ¶ 355.

The district court's opinion never addressed this claim, which I argued in summary-judgment briefing: "If the Federal Defendants mandate masks and claim to allow disability exceptions, they constitutionally must provide due process in the form of a rapid pre-deprivation hearing to determine whether an airline wrongly applied the FTMM in denying a disabled person transportation." Doc. 230 at 24.

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. ... Freedom of movement is basic in our scheme of values. *See Crandall v. Nevada*, 6 Wall. 35, 44; *Williams v. Fears*, 179 U. S. 270, 274; *Edwards v. California*, 314 U.S. 160. ... Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary ... unbridled discretion to grant or withhold it." *Kent v. Dulles*, 357 U.S. 116 (1958).

It's fundamental due-process jurisprudence that when the government seeks to revoke a person's liberty (such as freedom to travel) or property (such as airline tickets), it must provide the opportunity to be heard before the deprivation occurs. That is especially true here where the agency fully delegates all exemption decisions to private companies, which denied nearly

all disability waivers despite travelers' supporting medical records. A person deprived of his/her constitutional right to travel must have the ability to immediately appeal to CDC and/or TSA and obtain a decision before the flight departs. "The hearing required by the Due Process Clause must be 'meaningful,' and 'appropriate to the nature of the case.'" *Bell* at 541-42. "[H]owever weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero." *Propert v. Dist. of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991).

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Ralls Corp. v. CFIUS*, 758 F.3d 296, 315 (D.C. Cir. 2014). Due process means that before the government deprives an American of liberty such as the freedom to travel, the government must give notice, an opportunity to be heard, and the ability to object to the deprivation. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). But CDC and TSA provide no such process when transportation providers refuse medical exemptions.

"[D]ue process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell* at 542.

If high-school students must receive a pre-deprivation hearing prior to being suspended for 10 days, surely disabled travelers must receive the same due process prior to be banned for more than 14 months from using public transportation because we can't medically wear a mask. "The Due Process Clause also forbids arbitrary deprivations of liberty" such as prohibiting travel due to the inability to wear a mask because of a medical disorder.

> "'[W]hether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake.' ... Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind." *Goss v. Lopez*, 419 U.S. 565, 574-76 (1975).

"[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty, or property ... be preceded by notice and opportunity for hearing appropriate to the nature of the case.' 'The fundamental requisite of due process of law is the opportunity to be heard.'" *Id.* at 579 (internal citations omitted).

"[T]he deprivation by state action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or

property." *Zinermon v. Burch*, 494 U.S. 113, 125-126 (1990) (cleaned up).

Here, based on my medical records, it's obvious the airlines who deprived me of my constitutional right to travel did so at the behest of government actors (CDC and TSA). A hearing prior to my flights before one of those agencies would have determined the deprivation of my liberty was "mistaken or unjustified" based on the FTMM's disability exemption.

"'Once it is determined that due process applies, the question remains what process is due.' Though the required procedures may vary according to the interests at stake in a particular context, '[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Brock v. Roadway Exp.*, 481 U.S. 252, 261 (1987).

Furthermore, the decision whether or not to obstruct the nose and mouth, a human's only two sources of breathing – an activity fundamental to the preservation of life – is a private determination for the individual, not the government. The Supreme Court has long recognized a person's right to privacy, which should include the ability to decide whether to cover the face. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others..." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

**F. The district court erred in ruling that the FTMM does not run afoul of the 10th Amendment by overruling the mask policies and laws of all 50 states as well as because it commandeers state employees to enforce federal orders.**

Although coronavirus is still circulating at low levels in the United States – as it likely always will – the public-health system is not under any strain. Mask decisions must be left up to states, all 50 of which have decided face coverings are unnecessary. App. 1,090.

The district court again briefly waived off this challenge, alleging "the CDC's regulations do not intrude into a particular domain of state law. … Instead, the [FTMM] deal[s] with a matter of public health relating to uniquely federal issues – interstate and foreign commerce." App. 462. But this ignores the fact that more than 90% of trips taken by public transportation every day are *intrastate*. My first two deprivations of travel due to the FTMM were for *intrastate* trips – a flight from Orlando to Fort Lauderdale and then a bus ride from the Orlando airport to downtown. App. 677-680. Even if the Mask Mandate could be upheld on other grounds, it clearly violates the 10th Amendment for CDC and TSA to enforce it for trips that never cross state lines – intrastate flights and nearly all rides on school buses, transit buses, subways, commuter trains, taxis, rideshare cars, ferries, etc.

Judge Byron also inappropriately rejected my anti-commandeering argument, holding that it "does not apply when the government 'evenhandedly

regulates an activity in which both States and private actors engage.' Because the FTMM applies to public and private mass transportation systems, Plaintiff's Tenth Amendment challenge falls flat." App. 458 at FN 7.

But the Mask Mandate violates the 10th Amendment because it applies to intrastate travel, including taking a taxi or transit bus just one mile, during which there is no nexus to interstate commerce. Requiring individuals to wear a mask compels them to engage in an activity that is not even commercial in nature. Intrastate travel "is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function." *Johnson v. Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002).

Courts have concluded in nearly every COVID-19 case similar to this one that these types of federal orders "intru[de] … into a state prerogative with which even Congress likely cannot interfere…" *Florida v. Nelson*.

As the 10th Amendment makes clear, "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good – what [courts] have often called a 'police power.' The Federal Government, by contrast, has no such authority…" *Bond v. United States*, 572 U.S. 844, 854 (2014) (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995).

Areas reserved to the states include public health and intrastate transportation. Indeed, Judge Mizelle correctly determined that the Mask Mandate "appl[ies] even in settings with little nexus to interstate disease spread, like city buses and Ubers. Such a definition reverses the import of history as well as the roles of the States and the federal government." *HFDF*.

In vacating CDC's Mask Mandate, Judge Mizelle did not specifically address the 10th Amendment because plaintiffs didn't raise the issue. But she left no doubt how she would have ruled:

> "Section 264(a) has no 'unmistakably clear' language indicating that Congress intended for the CDC to invade the traditionally State-operated arena of population-wide, preventative public-health regulations. Or that Congress intended to 'delegate a decision of such economic and political significance to an agency in so cryptic a fashion' as to tie it to 'sanitation.'" *HFDF*.

And contrary to Judge Byron's opinion, the FTMM unconstitutionally commandeers state and local officials to enforce federal orders. Private actors do not engage in nearly all modes of public ground transportation in America. While the airline industry is fully privatized, almost every single airport is owned and operated by state authorities. The same goes for city/regional buses, subways, and commuter trains. These are called "public" transportation for a good reason – they are, with rare exception, all operated by state and local governments. That means CDC and TSA may not commandeer state employees (including police officers) to enforce the FTMM.

Of particular concern here is that CDC and TSA can't overrule mask rules such as those in 14 states that ***prohibit*** public entities from requiring face coverings. App. 1,090. The federal agencies may not rely "on only a conclusory and dubious but self-serving generalization that non-federal measures are inherently insufficient to protect public health and safety." *Florida v. Becerra*.

22 states are suing to strike down the Mask Mandate. *Van Duyne v. CDC*, No. 4:22-cv-122 (N.D. Tex.); *Florida v. Walensky*, No. 8:22-cv-718 (M.D. Fla.). As 21 of them argued in filing a challenge to the Mask Mandate, it

> "harms Plaintiffs' sovereign interests. Many Plaintiffs have laws or policies prohibiting or discouraging mask requirements in contexts where the mask mandate applies. … the mask mandate harms the Plaintiffs' quasi-sovereign interests in the health, safety, and welfare of their citizens. Forced masking … causes a variety of negative health consequences, including psychological harms, reduced oxygenation, reduced sanitation, and delayed speech development." Complaint, *Florida v. Walensky*.

CDC's eviction "moratorium intrudes into an area that is the particular domain of state law … 'Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power…'" *Alabama Ass'n of Realtors*.

There is no language in the U.S. Code indicating Congress' intent to invade the traditionally state-controlled realms of intrastate transportation and public health by forcing all passengers and workers to wear a mask. The

Court requires "a clear indication" from Congress that it meant to "override[] the usual constitutional balance of federal and state powers" before interpreting a statute "in a way that intrudes on the police power of the States." *Bond* at 858, 860. The Mask Mandate

> "intrudes into an area traditionally and principally reserved to the states. … The federal government is one of limited, enumerated powers. … This principle is implicit in both the structure and text of the Constitution and was made express by the 10th Amendment. … [States have the] power to prohibit vaccination from being compelled. Consistent with that authority, Arizona has enacted laws prohibiting State and local government entities from imposing vaccine mandates." *Brnovich v. Biden*, No. 21-cv-1568 (D. Ariz. Jan. 27, 2022) (enjoining vaccine mandate for federal contractors).

Congressional intent has been clear throughout the pandemic: It has left decisionmaking about masks, lockdowns, business closures and restrictions, school shutdowns, limits on the size of public gatherings, and other mitigation measures up to the states.

> "'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' … if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that [the federal government] is without power to regulate. … To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*.

The Mask

> "Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power. A person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity. Cf. *NFIB v. Sebelius*, 567 U.S. 519, 522 (2012) (Roberts, C.J., concurring); *see also Id.* at 652–53 (Scalia, J., dissenting). And to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power. *Zucht v. King*, 260 U.S. 174, 176 (1922)..." *BST Holdings*.

Furthermore, the Mask Mandate requires states and their political subdivisions that operate transit systems, airports, train stations, etc. to enforce federal orders mandating masks – even when those federal orders directly conflict with the laws and policies of all 50 sovereign states.

> "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States. ... [T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs..." *Printz v. United States*, 521 U.S. 898, 919-920 (1997).

The FTMM applies not only to travelers, but all employees working in the transportation sector – most of whom never cross state lines and many of whom work for state governments and their subdivisions. But "The Federal Government ... may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992).

> "[E]ven if the law could be interpreted as ... the United States suggest[s], it would still violate the anticommandeering principle ... The anticommandeering doctrine may sound arcane, but it is

> simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S.Ct. 1461 (2018).
>
> "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. ... even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness. ... The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz.*

In Florida, for example, it's illegal for any governmental agency to require any person wear a mask. "Whether Congress could enact such a sweeping mandate under its interstate commerce power would pose a hard question. ... Whether OSHA can do so does not. *BST Holdings* (Duncan, J., concurring).

If Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001).

There is no "unmistakably clear" language in any statute indicating Con-

gress' intent for CDC and TSA to invade the traditionally state-operated arenas of public health and intrastate transportation by forcing travelers and employees to don masks.

> "Our reading of the statute's text accords with the principle that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. That principle has yet greater force when the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power" such as public health and intrastate transportation. "Agencies cannot discover in a broadly worded statute authority to supersede state ... law. Instead, Congress must 'enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power..." *Tiger Lily v. HUD*, 5 F.4th 666 (6th Cir. 2021).

Mask requirements have been the subject of "earnest and profound debate across the country." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). There have been statewide mask mandates put into place at some point during the pandemic by 40 states. However, every state has ended those requirements.

> "[T]he Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. ... Accordingly, the Federal Government may act only where the Constitution authorizes it to do so. ... The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority." *Printz* at 936-937 (Thomas, J., concurring).

"Where the federal government seeks to preempt state law in an area that the States have traditionally occupied, there is a strong presumption that the

historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." *Brnovich* (cleaned up), citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). "A power not delegated [to the federal government] includes the state's police power, which 'is defined as the authority to provide for the public health, safety, and morals' of the state's population." *Florida v. Nelson*, quoting *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991). "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230." *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 720 (1985).

Even if masks were effective at reducing COVID-19 spread,

> "People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures – joined with the similar failures of others – can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act. That is not the country the Framers of our Constitution envisioned." *NFIB v. Sebelius* at 554 (2012).

And here the Court reviews not an act of Congress, but orders of executive agencies, which must be given even less weight when considering encroachment on powers the 10th Amendment reserves to the states and to the people.

> "This Court is not a public health authority. But it is charged with

> resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land. … There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the 'general power of governing,' including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. … The federal government's powers, however, are not general but limited and divided. … Historically, such matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers." *NFIB v. Dept. of Labor* (Gorsuch, Thomas, & Alito, JJ., concurring).

### G. The district court erred in ruling that the FTMM and ITTR do not impermissibly interfere with the constitutional guarantee of freedom to travel among the states and internationally.

The Mask Mandate and Testing Requirement restrict the free movement of disabled Americans who can't wear face masks as well as those who choose not to obstruct their natural breathing, causing dozens of documented health harms. https://bit.ly/masksarebad. The right to travel includes more than the ability to drive one's own car. I don't even own a motor vehicle. I rely solely on public transportation to travel interstate and internationally.

The district court insultingly erred in holding that "Plaintiff is not barred from traveling to another state by virtue of not wearing a mask. A mere inconvenience caused by a reasonable government regulation is not enough to amount to a denial of this fundamental right." App. 458 at FN 9. But this is precisely what happened: Because airlines rejected my medical disability that precludes me from covering my face, I was barred from traveling to other

states and nations based solely on that reason. Being prohibited from traveling interstate and internationally for more than 14 months is not "a mere inconvenience," it's debilitating and disastrous. I could not, *inter alia*, see my father in New Mexico nor my brother in Germany. I could not even return home to the District of Columbia.

"The constitutional right to travel from one State to another, and necessarily to use the highways ***and other instrumentalities of interstate commerce*** in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757 (1966) (emphasis added). *See also Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972). "Other instrumentalities of interstate commerce" include airplanes, buses, trains, ferries, etc. – all of which are subject to the Mask Mandate.

The district court affirmed "the lost opportunity to go to Germany, alone, constitutes a concrete, particularized, actual injury in fact. *Cf. Kent v. Dulles*, 357 U.S. 116 (1958) (recognizing a liberty right to international travel subject to regulation within the bounds of the Fifth Amendment's Due Process Clause." App. 439.

> "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. Our nation . . . has

> thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." *Kent* at 126 (internal quotations omitted). App. 439.

The district court acknowledged that both the Mask Mandate and Testing Requirement stopped me from going to visit my brother in Germany, "Thus, the record demonstrates that Plaintiff also possesses a concrete, particularized, imminent injury in fact." App. 439. Yet it still perplexingly concluded that these orders didn't interfere with my constitutional right to travel.

The FTMM and ITTR prevented many millions of Americans from traveling at all. And the requirement is not a "reasonable government regulation," as Judge Mizelle held in declaring the FTMM arbitrary and capricious. *HFDF*. Once again, she didn't address this topic because plaintiffs didn't raise it. But had they, Judge Mizelle would have surely found the Mask Mandate an unconstitutional restraint on our freedom to travel.

"Since the Mask Mandate regulates an individual's behavior – wearing a mask – it imposes directly on liberty interests… The Mandate requires a traveler to do something to have the privilege of passing a checkpoint and continuing on his journey." *Id*.

Thanks to Judge Mizelle's decision, after being stranded more than 14 months at my mother's in Florida due to the FTMM, I was able to fly to New Mexico to visit my father last month and then in early June finally flew home

to Washington. Absent *vacatur* of the Mask Mandate, I would still be stuck in Florida. I'm planning to fly to Germany next month to see my brother now that both the FTMM and ITTR are no longer in effect. This Court must ensure they can never be reimposed, subjecting me again to the loss of my constitutional right to travel.

Agency rules affecting constitutional rights must be drawn with precision. *NAACP v. Button*, 371 U.S. 415, 438 (1963); *United States v. Robel*, 389 U.S. 258, 265 (1967). They must be tailored to serve legitimate objectives. But the Mask Mandate and Testing Requirement violate the constitutional freedom to travel without undue governmental interference. An American citizen who can't find a rapid test abroad is essentially detained by CDC and prohibited from returning to our country of citizenship in violation of the Constitution and international law (discussed below in Section I).

The Supreme Court elevated the right to travel to a sacrosanct level in American jurisprudence: a fundamental right. *United States v. Wheeler*, 254 U.S. 281 (1920). As a result, the high court consistently applies strict scrutiny to restrictions on the right to interstate and foreign travel. It has long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel through-

out the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). *See also Chicago v. Morales*, 527 U.S. 41, 53-54 (1999) (identifying "the right to move 'to whatsoever place one's own inclination may direct'").

Strict scrutiny is appropriate if the challenged order burdens the exercise of a fundamental right such as freedom to travel. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Artway v. Att'y Gen.*, 81 F.3d 1235, 1267 (3rd Cir. 1996).

Our constitutional right to freedom of movement can't be restricted when there is no evidence that airplanes or other modes of transit have contributed to the spread of COVID-19. And there are less restrictive policies that could be adopted to minimize the risk to public health such as using CDC and TSA systems called "Do Not Board" and "Lookout" to alert airlines to bar passengers who have tested positive for a communicable disease. App. 605-609.

> "To make one choose between flying to one's destination and exercising one's constitutional right appears to us, as to the Eighth Circuit, *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973), in many situations a form of coercion, however subtle. ... While it may be argued there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all." *United States v. Albarado*, 495 F.2d 799 (2nd Cir. 1974).

Our free movement isn't restricted to driving cars on highways. The large distances covered rapidly by airplanes aren't feasible by ground transportation. To drive from my home in Washington to my father's residence in Farmington, New Mexico, would take an estimated 30 grueling hours each way, not counting stops to eat, get gas, use the bathroom, and sleep.

> "The impact on a citizen who cannot use a commercial aircraft is profound. He is restricted in his practical ability to travel substantial distances within a short period of time, and the inability to fly to a significant extent defines the geographical area in which he may live his life. … An inability to travel by air also restricts one's ability to associate more generally, and effectively limits educational, employment, and professional opportunities." *Mohamed v. Holder*, 2014 WL 243115 at *6 (E.D. Va. Jan. 22, 2014).

And of course there is no other mode of transportation other than airplane to visit my brother in Germany. The FTMM and ITTR are deprivations of fundamental rights under the Constitution blocking my freedom of movement. "At the very least, even if the statutory language were susceptible to OSHA's broad reading – which it is not – these serious constitutional concerns would counsel this court's rejection of that reading. *Jennings v. Rodriguez*, 138 S.Ct. 830, 836 (2018)." *BST Holdings*.

**H. The district court erred in declining to rule on whether the FTMM and ITTR violate travelers' rights under the Food, Drug, & Cosmetic Act to refuse use of medical devices such as face masks and virus tests unauthorized by the Food & Drug Administration or permitted only an Emergency Use Authorization.**

The Mask Mandate and Testing Requirement must be declared illegal because they violate federal law prohibiting the mandatory use of any medical device approved under an EUA by FDA. Face masks (except N95s) are authorized by FDA during COVID-19 under an EUA. App. 610-616. Likewise all COVID-19 tests are experimental and only approved under EUAs. But individuals to whom any EUA device is offered must be informed "of the option to accept ***or refuse administration of the product***..." 21 USC § 360bbb-3(e)(1)(A)(ii)(III) (emphasis added). CDC and TSA can't force travelers to use EUA products such as masks and virus tests. The agencies may only *recommend* masks/tests and advise passengers if they refuse to wear a mask, the consequence *might* be a higher risk for contracting COVID-19 (although this is greatly disputed).

The district court failed to even entertain this argument because it wasn't mentioned in the original Complaint – and Judge Byron improperly banned me from raising them in the Amended Complaint. In ordering a second complaint, the court, ignoring long-standing Supreme Court precedent on liberally construing *pro se* pleadings and giving self-represented litigants more

leeway than lawyers, wrote: "The Court notes that repleader is not an opportunity to add new claims; rather, it is a chance for Plaintiff to remedy the pleading deficiencies identified herein. … The addition of new claims in violation of this Order will result in the Court striking the Amended Complaint without further notice." App. 450-451.

That improper order deprived me of the ability to state claims in the Amended Complaint that I hadn't known about when I filed the first Complaint six months prior. A *pro se* litigant should not be banned from asserting material learned during six months of legal research.

Nonetheless, I still argued the FDCA claim in summary-judgment briefing because it's arbitrary, capricious, and an abuse of discretion for an agency to issue an order that violates a statute. The district court, continuing its never-ending hostility against me, also rejected that argument:

> "To the extent that Plaintiff's Motion for Summary Judgment raises claims that do not appear in his Amended Complaint, the Court properly disregards them. Plaintiff's position – that his contentions regarding the … FDCA, the International Covenant on Civil and Political Rights ("ICCPR"), and the Convention on International Civil Aviation ("CICA") merely 'buttress[]' some of the claims raised in his Amended Complaint – is weak; evaluation of those contentions would require the Court to undertake an independent review of the FDCA and the treaties at issue – it is not part and parcel of the arbitrary and capricious analysis." App. 456 at FN 5 (internal citations omitted).

But there can be no doubt that an agency abuses its discretion by entering

orders that violate federal law, so this Court must toss out Judge Byron's misguided analysis. Congress specifically carved out only one exception for when an individual would not have the option to accept or refuse administration of an EUA product and it only applies to the military:

> "In the case of the administration of a product authorized for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act to members of the armed forces, the condition described … designed to ensure that individuals are informed of an option to accept or refuse administration of a product, may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security." 10 USC § 1107a.

*See Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003); 341 F. Supp. 2d 1 (D.D.C. 2004).

But when I refused the offer of an EUA surgical mask June 2, 2021, from a TSA worker at Orlando airport, I was denied passage through the checkpoint and deprived of the ability to board an intrastate flight to Fort Lauderdale. App. 677-680. This clearly violates the FDCA's freedom to choose whether to use an emergency medical device.

## I. The district court erred in failing to consider that that the FTMM and ITTR violate travelers' fundamental human rights under two international treaties the United States has ratified.

The Mask Mandate and Testing Requirement violate the Convention on International Civil Aviation (App. 625-643) and the International Covenant

on Civil & Political Rights[13] (App. 650-659), issues the district court impermissibly refused to review. Although treaties might not normally be self-executing, Congress requires by statute that these two be enforced. In carrying out all federal aviation laws, the Executive Branch "shall act consistently with obligations of the United States Government under an international agreement." 49 USC § 40105(b)(1)(A).

**J. The district court erred in ruling that it lacks subject-matter jurisdiction to determine the legality of Health Directives issued by TSA and DHS acting under the direction of CDC and HHS.**

In dismissing my claims against TSA and DHS, the district court cited this statute:

> "a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the [TSA] ***with respect to security duties*** and powers designated to be carried out by the Administrator of the TSA . . . ) in whole or in part under this part [i.e., Part A], part B, or subsection (l) or (s) of section 11410 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. . . . the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order…" 49 USC § 46110 (emphasis added); App. 443-444.
>
> "Counts 9, 11, and 12 challenge the Security Directives and the Emergency Amendment issued by the TSA, explicitly, under § 114 and Part A, and Count 15 asserts that the DOT neglected its

[13] Treaty Doc. 95-20 (ratified by the Senate April 2, 1992)

> duties under the ACAA, which falls within Part A. Thus, this Court quite simply lacks jurisdiction to adjudicate these Counts. And although Count 15 challenges the DOT's failure to act under Part A – rather than an action taken under Part A – this claim, at the very least, may affect the Eleventh Circuit's future jurisdiction and therefore is subject to its exclusive review." App. 444 (internal citations omitted).

This determination is wrong because TSA's Health Directives and Emergency Amendment carrying out CDC's FTMM order do not relate "to security duties," therefore the exclusive jurisdiction of the Court of Appeals does not apply. The district court should not have dismissed the charges against TSA and DHS because mandating face masks has nothing whatsoever to do with "security duties" such as ensuring planes aren't hijacked.

The district court erred in determining that

> "Plaintiff conflates the *substantive* question of whether the TSA exceeded its statutory authority in taking the challenged regulatory actions with the *procedural* question of whether the Eleventh Circuit has exclusive subject matter jurisdiction over these claims. This Court simply cannot reach the substantive question because, as a matter of procedure, only the Eleventh Circuit has the power to do so." App. 444-445.

That's simply not true based on the plain language of the statute. A Health Directive is not issued by TSA "with respect to security duties." 49 USC § 46110. It doesn't take complex substantive legal analysis to understand that. Therefore the district court had jurisdiction to determine the legality of the Health Directives.

It's obvious that TSA, like CDC, doesn't have any authority from Congress to mandate what travelers must place on our faces. TSA isn't assigned the job of health inspector or disease preventer. Its mission is transportation security, period. Congress named respondent the Transportation ***Security*** Administration, not the Transportation ***Health & Disease Control*** Administration. TSA, trying to become THDCA, has massively exceeded its statutory authority by, for the first time, claiming authority to regulate nonsecurity matters such as face masks.

TSA may only issue security directives when "additional security measures are necessary to respond to a threat assessment or to a specific threat against civil aviation." 49 CFR §§ 1542.303(a), 1544.305(a). It was arbitrary and capricious for TSA to issue Health Directives without ever performing an assessment to conclude that COVID-19 constitutes a specific threat against transportation security. Relying on another agency's erroneous, unexplained, threadbare conclusions does not satisfy the statute's requirement that TSA itself conduct the threat assessment.

A respiratory virus does not infect infrastructure and thus can't possibly pose a "threat" to transportation security. COVID-19 does not shut down airplane engines. Trains do not stop running if they encounter COVID-19. A disease is a threat to human beings, not transportation.

Finally, the district court's interpretation creates manifest injustice. Congress never intended that a litigant challenging five agencies' implementation of the same policy (FTMM) would have to file three separate lawsuits – one against CDC/HHS in a district court and two against TSA/DHS and DOT in a Court of Appeals. This result would create the most crazy opposite to the goal of judicial economy and fairness.

### K. The district court erred in ruling that DOT can't be ordered to enforce the Air Carrier Access Act.

The district court went astray in dismissing Count 15 of the original Complaint, which charged DOT with "allow[ing] airlines to prohibit all passengers with disabilities who can't wear face masks from flying and/or impose numerous onerous requirements to obtain an exemption that violate the ACAA and its accompanying regulations." App. 222. A court has the authority to issue a writ of mandamus compelling DOT to enforce the ACCA and rescind a Notice of Enforcement Policy (App. 500-507) that violates the law in numerous ways. 28 USC § 1361.

> "As to Count 15, Plaintiff objects that the Report 'mislabels DOT's Feb. 5, 2021, Notice of Enforcement Policy regarding the FTMM as an enforcement order issued under the ACAA' and reasons that this Court has jurisdiction because the DOT only issued a policy 'telling the airlines not to enforce the ACAA' instead of an 'order' under § 46110. The difference between the Report's discussion of the DOT's *inaction* and Plaintiff's discussion of the

> DOT's *policy of inaction* seems to be one without distinction: regardless of the semantics used to describe the claim, the challenge is to the DOT's failure to comply with the ACAA, and therefore the Eleventh Circuit has exclusive jurisdiction over Count 15." App. 445-446 (internal citations omitted).

But as with the district court's determination regarding jurisdiction over TSA's Health Directives, there is no support for this conclusion. Again we turn to the plain language of the statute:

> "a person disclosing a substantial interest in an ***order*** issued by the Secretary of Transportation … may apply for review of the order by filing a petition for review in the United States Court of Appeals … the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the ***order*** and may order the Secretary… to conduct further proceedings." 49 USC § 46110 (emphases added).

DOT's Feb. 5, 2021, Notice of Enforcement Policy (App. 500-507) is not an "order" under the meaning of the statute. It is what it says it is – a "notice" offering "guidance" to airlines on how to implement the FTMM. Since it's not an order, the Court of Appeals does not have exclusive jurisdiction. Furthermore, it was not issued by the transportation secretary but by DOT's assistant general counsel for the Office of Aviation Consumer Protection. App. 507.

The district court should have issued a writ of mandamus compelling DOT to enforce the ACAA and rescind its Notice of Enforcement Policy because: 1) The agency has a statutory duty to protect disabled travelers against discrimination: "The Secretary ***shall*** investigate each complaint of a violation

of" the ACAA. 49 USC § 41705(c)(1) (emphasis added). But there's no evidence DOT has investigated any of my numerous complaints of airline disability discrimination related to masking (a sample of which are at App. 683-684, 687-690, & 693-694). All it's done is acknowledge receipt of the complaints; and 2) an agency may not issue a "Notice" to the companies it regulates that they are free to break the law.

Yet that's exactly what DOT did, violating the ACAA and its own regulations by allowing airlines to prohibit all passengers with disabilities who can't wear face masks from flying and/or impose numerous onerous, illegal requirements to obtain an exemption.

DOT failed to advise airlines that the disability-exemption procedures contained in the FTMM are unlawful. The department even went so far as to inform airlines they may break the law. The Court must not approve the Executive Branch's coordinated assault on passengers with disabilities.

## X. CONCLUSION & PRAYER FOR RELIEF

Judge Byron's decisions should be reversed. The Court should uphold the three determinations Judge Mizelle made in *HFDF* and declare the FTMM is *ultra vires* because it was issued beyond CDC and HHS' statutory authority, violated the APA's notice-and-comment procedures, and is arbitrary and capricious. The Court must go farther and invalidate TSA's Health Directives and Emergency Amendment as well as the ITTR for the same three reasons.

Beyond that, the Court must declare the FTMM and ITTR to be unconstitutional; inconsistent with international law; and in violation of other federal statutes and regulations including the Air Carrier Access Act and Food, Drug, & Cosmetic Act.

Equitable principles favor a worldwide permanent injunction against these policies ever being reimposed as "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, the Mask Mandate is effective worldwide, including on flights to/from the United States that are thousands of miles from U.S. airspace. The ITTR also applied in foreign countries. Thus, the illegal agencies' actions are worldwide, and the *vacatur* and injunction should be too to promote the uniform enforcement of federal law. *See Texas v. United States*, 787 F.3d 733, 768-69

(5th Cir. 2015). It would make little sense if this Court, having found that the Mask Mandate and Testing Requirement are unconstitutional and/or unlawful, merely set aside and enjoined their application to me while allowing the government to again in the future enforce the *ultra vires* orders against the tens of millions of other Americans who use and/or work in the transportation sector every day.

The plain text of the APA states a court must "hold unlawful and set aside agency action" that is "not in accordance with law." 5 USC § 706(2). There is no option to set aside agency action for just one appellant/plaintiff. Nationwide stays were the result of the Supreme Court's decisions doing away with CDC's Eviction Moratorium and OSHA's Vaccine or Mask/Test Mandate.

A worldwide permanent injunction banning CDC, HHS, TSA, DHS, and DOT from ever reissuing mask and testing orders – and "guidance" that airlines may break the law – are needed because these are the only ways to guarantee the government doesn't again engage in this unlawful and unconstitutional conduct. Universal injunctions against agency actions are appropriate when "the public interest would be ill-served .... by requiring simultaneous litigation of this narrow question of law in countless jurisdictions." *Chicago v. Sessions*, 888 F.3d 272, 292 (7th Cir. 2018). Constitutional violations sup-

port a worldwide injunction. "[T]he executive's usurpation of the legislature's power … implicates an interest that is fundamental to our government and essential to the protection against tyranny." *Chicago v. Barr*, 961 F.3d 882, 919 (7th Cir. 2020).

When "regulations are unlawful, the ordinary result is that the rules are vacated — not that their application to the individual petitioner is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). "[R]ecently, the Supreme Court confirmed that 'our system does not permit agencies to act unlawfully even in pursuit of desirable ends.' *Alabama Ass'n of Realtors*…; *see also NFIB v. Dept. of Labor*, 142 S. Ct. 661, 666 (2022)." *Huisha-Huisha*.

Respectfully submitted this 27th day of June 2022.

*Lucas Wall*

Lucas Wall, appellant/plaintiff
3601 Cosmos Way
The Villages, FL 32163
Telephone: 202-351-1735
E-Mail: Lucas.Wall@yahoo.com

## XI. CERTIFICATE OF COMPLIANCE

I certify that this brief complies with FRAP because it has been prepared in 14-point Georgia, a proportionally spaced font. Also, this document contains 17,991 words of Argument, in compliance with my Motion to Exceed Word Limits for Opening Brief & Reply Brief, filed June 22, which requested leave to submit an opening brief up to 18,000 words.

The Court has yet to rule on that motion. Should it be denied in whole or in part, I will resubmit a condensed version of this brief in compliance.