No. 22-11532

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LUCAS WALL,

Plaintiff-Appellant,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

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STATEMENT REGARDING ORAL ARGUMENT

The central issue presented by this appeal is pending before this Court in *Health Freedom Defense Fund, Inc. v. President of the United States*, No. 22-11287 (11th Cir.), which is scheduled for oral argument on January 17, 2023. The plaintiffs in *Health Freedom* are represented by counsel. Mr. Wall is proceeding pro se. We respectfully suggest that this Court defer consideration of this appeal until it decides *Health Freedom*, which should allow the Court to resolve this appeal without oral argument.

The overlapping issue is the legality of the transportation mask order that was issued by the Centers for Disease Control and Prevention (CDC) to curb the spread of COVID-19. The district court in *Health Freedom* concluded that the order was unlawful and vacated it nationwide. The district court here disagreed and ruled that the order should be upheld.

Mr. Wall also challenged a since-rescinded CDC order requiring international air travelers to provide proof of a negative COVID-19 test before coming to the United States. The district court rejected that challenge, and a unanimous panel of this Court denied Mr. Wall's motion for an injunction pending appeal. *See* 5/12/22 Order (Circuit Judges Wilson, Jordan, and Luck). Mr. Wall also raised a host of other claims, which are insubstantial for reasons discussed in this brief.

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STATEMENT OF JURISDICTION

Mr. Wall invoked the district court's jurisdiction under 5 U.S.C. § 702 *et seq*. and 28 U.S.C. § 1331. Dkt. No. 188, at 4-5. The district court entered final judgment on May 2, 2022. Dkt. No. 275. Mr. Wall filed a timely notice of appeal on May 3, 2022. Dkt. No. 276. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Mr. Wall, acting pro se, challenged two CDC orders that were issued to prevent the spread of COVID-19. The transportation mask order required people to wear masks when traveling on public transportation and at transportation hubs. The international testing order required international air travelers to provide proof of a negative COVID-19 test before coming to the United States. The questions presented are:

1. Whether the district court correctly determined that the challenged orders fell within the CDC's statutory authority and were not arbitrary and capricious or procedurally invalid.

2. Whether the district court correctly rejected Mr. Wall's various other objections to the CDC orders.

3. Whether the district court correctly held that Mr. Wall's challenges to Transportation Security Administration (TSA) security

directives may proceed only by Mr. Wall's petition for review, which is pending before the D.C. Circuit. *See Wall v. TSA*, No. 21-1220 (D.C. Cir.) (oral argument scheduled for January 10, 2023).

STATEMENT OF THE CASE

I. Statutory Background

Section 361(a) of the Public Health Service Act authorizes the Secretary of Health and Human Services (HHS) 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." 42 U.S.C. § 264(a). The next sentence of that provision "informs the grant of authority by illustrating the kinds of measures that could be necessary." *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2488 (2021) (per curiam). It specifies that, in making and enforcing such regulations, the Secretary 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 U.S.C. § 264(a). The enumerated measures "directly relate to preventing

the interstate spread of disease by identifying, isolating, and destroying the disease itself." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2488.[1]

The Secretary delegated enforcement authority to the CDC, a division of HHS. The CDC Director may adopt "sanitation," "inspection," and other measures deemed necessary to prevent the spread of disease among States. *See* 42 C.F.R. § 70.2. With respect to international travel, longstanding regulations provide that the CDC Director may use non-invasive procedures at "U.S. ports of entry or other locations" to "detect the potential presence of communicable diseases." *Id.* § 71.20(a). The CDC also may issue a "controlled free pratique"—that is, "permission for a carrier to enter a U.S. port, disembark, and begin operation under certain stipulated conditions," *id.* § 71.1(b)—to prevent the introduction or spread of disease, *id.* § 71.31(b).

II. The CDC's Transportation Mask Order and International Testing Order

Pursuant to this statutory and regulatory authority, the CDC issued the public-health measures at issue here—the transportation mask order and the international testing order.

[1] The statute originally assigned authority to the Surgeon General, but these statutory powers and functions were later transferred to the Secretary of Health, Education, and Welfare, now the HHS Secretary. *See Reorganization Plan No. 3 of 1966*, 31 Fed. Reg. 8855 (June 25, 1966), *reprinted in* 80 Stat. 1610 (1966); *see also* 20 U.S.C. § 3508(b).

A. The transportation mask order generally required people to wear masks over the mouth and nose when traveling on conveyances (such as airplanes, trains, subways, buses, taxis, and ships) into or within the United States and at transportation hubs (such as airports, bus terminals, and subway stations). *Requirement for Persons To Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025, 8026-27 (Feb. 3, 2021). The order exempted children under age 2 and anyone with a disability who could not wear a mask or could not safely wear a mask. *Id.* at 8027. The mask requirement did not apply while eating, drinking, or taking medication "for brief periods," *id.*, nor did it apply to private conveyances operated for personal, non-commercial use, *id.* at 8028.

In issuing the order, the CDC described wearing a mask as "one of the most effective strategies available for reducing COVID-19 transmission." 86 Fed. Reg. at 8026. Because the virus is often transmitted through airborne droplets "produced when an infected person coughs, sneezes, or talks," masks provide a barrier that blocks uninfected people from breathing in the virus and infected people from spreading the virus to others. *Id.* at 8028. This source control was especially important "for asymptomatic or pre-symptomatic infected wearers who feel well and may

be unaware of their infectiousness" but by some estimates accounted for more than half of all transmissions. *Id.*

The CDC further described the particular reasons for requiring masks on airplanes, on other public transportation, and at transportation hubs. The CDC explained that in these settings, "[s]ocial distancing may be difficult if not impossible," and people are forced to be "in close contact with others, often for prolonged periods." 86 Fed. Reg. at 8029; *see also id.* (describing comparable exposure risks "in security lines and crowded airport terminals"). Scientific data demonstrated an increased risk of COVID-19 transmission "the more closely an infected person interacts with others and the longer those interactions." *Id.* at 8028. "[G]iven how interconnected most transportation systems are across the nation and the world," localized cases could rapidly grow "into interstate and international transmission when infected persons travel on non-personal conveyances without wearing a mask." *Id.* at 8029.

Although the mask order could theoretically have been enforced through criminal penalties, the CDC indicated at the outset that it did not intend to rely on criminal penalties and instead anticipated widespread voluntary compliance. 86 Fed. Reg. at 8030 n.33. To assist with the implementation and enforcement of the CDC's mask order, the TSA also

issued a series of security directives, which the D.C. Circuit upheld on direct review. *See Corbett v. TSA*, 19 F.4th 478, 480 (D.C. Cir. 2021).

As noted in the Statement Regarding Oral Argument, a district court in a parallel case vacated the CDC's transportation mask order nationwide. *See Health Freedom Def. Fund, Inc. v. Biden*, No. 21-CV-1693, 2022 WL 1134138 (M.D. Fla. Apr. 18, 2022), *appeal pending*, No. 22-11287 (11th Cir.) (oral argument scheduled for January 17, 2023). Because of that vacatur, the CDC's transportation mask order is not currently in effect, and the TSA has rescinded its related security directives.

B. The other public-health measure that Mr. Wall challenged is the CDC's since-rescinded requirement for international air travelers to provide proof of a negative COVID-19 test before coming to the United States. The most recent iteration of the order provided that passengers age 2 and older traveling to the United States from abroad generally had to take a COVID-19 test one day before their flight and present a negative test result to board. *Requirements 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. 69,256, 69,257 (Dec. 7, 2021). Passengers infected

with COVID-19 in the past 90 days could instead submit documentation showing proof of recovery. *Id.*

The CDC described testing as "a proactive, risk-based approach" that had been widely adopted "to monitor risk and control introduction and spread" of COVID-19. 86 Fed. Reg. at 69,260. Viral tests detect the genetic material of the virus itself or structures on the surface of the virus to identify whether a person is currently infected. *See id.* at 69,258. Citing scientific articles, the CDC explained that testing was especially important to identify "asymptomatic or pre-symptomatic" individuals who may have been unaware of their infectiousness but served as significant sources of transmission. *Id.* at 69,258 & nn.14-15.

The CDC emphasized the risk that passengers could bring new variants from foreign countries into the United States. The CDC noted that COVID-19 had spread globally and that, at the time of the order, the new Omicron variant had recently been detected in South Africa. *See* 86 Fed. Reg. at 69,258-59. Early evidence suggested that the Omicron variant had "several mutations that may have an impact on how easily it spreads or the severity of illness it causes." *Id.* at 69,259. The CDC also cited "recent findings suggest[ing] that antibodies generated during previous infection or vaccination may have a reduced ability to neutralize some variants" and

determined that variants might "decrease the effectiveness of available vaccines against severe or deadly disease." *Id.* And the agency explained that spread was more likely among persons in close contact in crowded settings, such as on long international flights. *See id.* at 69,258. Requiring a negative test within one day of departure would "provide less opportunity to develop infection with the Omicron variant prior to arrival into the United States." *Id.* at 69,260.

When it issued the testing order, the CDC determined that it was "necessary to reduce the risk of transmission of the SARS-CoV-2 virus, including the Omicron variant and other virus variants, and to protect the health of fellow passengers, aircraft crew, and U.S. communities." 86 Fed. Reg. at 69,260. Since that time, while continuing to "monitor[] circulating SARS-CoV-2 variants around the world," as well as developments regarding "the widespread uptake of effective COVID-19 vaccines" and "the availability of effective therapeutics," the CDC decided to rescind the international testing requirement effective June 12, 2022. *Rescinding 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*, 87 Fed. Reg. 36,129, 36,130-31 (June 15, 2022).

III. Prior Proceedings

Mr. Wall, acting pro se, has brought challenges within this Circuit and the D.C. Circuit to various pandemic-related travel measures. In this case, he challenged the CDC's transportation mask order and the CDC's international testing order on various grounds and also challenged related security directives issued by the TSA. Mr. Wall wished to fly to Germany without wearing a mask and without obtaining a negative COVID-19 test before his return. *See* Dkt. No. 255, at 4-6.

The district court dismissed the counts against the Department of Homeland Security (DHS), the Department of Transportation (DOT), and the TSA. The court explained that, under 49 U.S.C. § 46110(a), review of the TSA's security directives is vested exclusively in the court of appeals, Dkt. No. 187, at 21-24, where Mr. Wall already has a pending challenge, *see Wall v. TSA*, No. 21-1220 (D.C. Cir.) (oral argument scheduled for January 10, 2023). The court rejected Mr. Wall's arguments as improperly "conflat[ing] 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." Dkt. No. 187, at 22-23.

On cross-motions for summary judgment, the district court entered final judgment in favor of the government. *See* Dkt. No. 275; *see also* Dkt. No. 274. The court explained that 42 U.S.C. § 264(a) authorizes the CDC Director to "make and enforce such regulations as . . . are necessary to prevent the introduction, transmission, or spread of communicable diseases," Dkt. No. 274, at 9 (alteration in original) (emphasis omitted), including "sanitation" and "inspection" measures, *id.* at 13. The court explained that masks "check[] the transmission of airborne viruses, such as SARS-CoV-2," by "protect[ing] the wearer from breathing in" and "from breathing out harmful air particles" and "thus fit within the definitions of 'sanitation.'" *Id.* at 18. The court further explained that COVID-19 tests are tools "to uncover the presence of the SARS-CoV-2 virus" that "qualify as 'inspections.'" *Id.* at 19. The court therefore upheld the masking and testing orders as within the CDC's statutory authority. *Id.* at 24.

The district court further held that the CDC orders were not arbitrary and capricious, as "the CDC made permissive policy decisions, provided adequate evidence to support the decisions, and provided sound reasoning to connect the evidence with [the] policy decisions." Dkt. No. 274, at 24. The court affirmed the CDC's finding of good cause to forgo notice-and-comment rulemaking based on "the level of urgency" needed due to "[t]he

highly contagious character and the devastating effects of the SARS-CoV-2 virus." *Id.* at 26. And the court rejected Mr. Wall's various other statutory and constitutional claims as "clearly lack[ing] merit." *Id.* at 6 & nn.6-10.

Mr. Wall filed an emergency motion in this Court to enjoin the international testing requirement pending appeal. A unanimous panel denied that motion. *See* 5/12/22 Order (Circuit Judges Wilson, Jordan, and Luck).

IV. Standard Of Review

The district court's rulings on motions to dismiss and motions for summary judgment are subject to de novo review in this Court. *Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247, 1253 (11th Cir. 2022) (motion to dismiss); *Brown v. Nexus Bus. Sols., LLC*, 29 F.4th 1315, 1317 (11th Cir. 2022) (summary judgment).

SUMMARY OF ARGUMENT

The two CDC orders that Mr. Wall challenged were issued to prevent the spread of COVID-19. The transportation mask order generally required people to wear masks when traveling on public transportation and at transportation hubs. The international testing order generally required international air travelers to provide proof of a negative COVID-19 test before coming to the United States. The testing order has since been

rescinded by the CDC. The mask order was vacated in the related *Health Freedom Defense Fund* litigation and is not currently in effect.

The district court correctly held that the CDC had statutory authority to issue those orders, which "directly relate[d] to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself." *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2488 (2021) (per curiam). Masks isolate the disease itself by trapping viral particles exhaled by infected travelers and preventing non-infected travelers from inhaling viral particles, and testing identifies infected people to prevent them from bringing COVID-19 into the United States. The district court thus correctly recognized that masks and viral tests are conventional "sanitation" and "inspection" measures within the CDC's statutory authority.

In rejecting Mr. Wall's arbitrary and capricious claims, the district court's reasoning is of a piece with the Supreme Court's decision in *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), which upheld the Centers for Medicare & Medicaid Services (CMS) requirement that workers at federally funded healthcare facilities be vaccinated against COVID-19 (subject to exemptions). There, the Supreme Court emphasized that the role of a court in reviewing an arbitrary and capricious claim is simply to ensure that the

agency acted within a zone of reasonableness. Here, the CDC reasonably explained and supported the need for the masking and testing orders to curb the spread of COVID-19 in transportation settings where the virus had a specific tendency to spread rapidly.

The district court also correctly echoed the Supreme Court's reasoning in *Biden v. Missouri* in upholding the agency's determination that there was good cause to make the orders effective without delay. In issuing the orders, the CDC documented the widespread infections and deaths caused by the COVID-19 virus as well as the emergence of new variants, including one with evidence of increased transmissibility. Accordingly, the CDC made immediately effective orders that were explicitly designed to preserve human life and maintain the safety of the transportation system.

Mr. Wall's other various statutory and constitutional challenges to the CDC orders lack merit. And the district court correctly held that the proper forum for Mr. Wall to challenge the TSA's security directives is in the D.C. Circuit, where his petition for review is pending. The district court's judgment should be affirmed.

ARGUMENT

I. The District Court Correctly Upheld The CDC's Transportation Mask Order And International Testing Order

A. The Masking And Testing Orders Were Within The CDC's Statutory Authority

1. The transportation mask order fell easily within the CDC's statutory authority, which, the Supreme Court explained, includes measures that "directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself." *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2488 (2021) (per curiam). That is precisely what the transportation mask order did: masks isolate the disease itself by trapping viral particles exhaled by infected travelers and preventing non-infected travelers from inhaling viral particles. *See* Dkt. No. 274, at 18 ("[M]asks 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.").

Section 361(a) of the Public Health Service Act authorizes the Secretary 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." 42 U.S.C. § 264(a). The next sentence of that provision "informs the grant of authority by illustrating the kinds of measures that could be necessary." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2488. Whatever the outer bounds of this authority, it explicitly includes "sanitation" measures and "other measures" akin to the enumerated measures. 42 U.S.C. § 264(a).

Masking is a paradigmatic sanitation measure, as the district court explained. Dkt. No. 274, at 18. Masks reduce the release of viral particles into the air, which easily meets the modern and contemporaneous definition of "sanitation" as "the promotion of hygiene and prevention of disease by maintenance of sanitary conditions." *Sanitation*, Merriam-Webster, https://perma.cc/JKR4-Z78Z; Dkt. No. 274, at 13 (citing Funk & Wagnalls New Standard Dictionary of the English Language 2172 (1946), which defines "sanitation" as "[t]he devising and applying of measures for preserving and promoting public health; the removal or neutralization of elements injurious to health; the practical application of sanitary science"). Accordingly, "doctors have been wearing medical-grade N95 or surgical masks . . . during surgeries or patient interactions as part of their daily routines, for many decades." *Why Doctors Wear Masks*, Yale Medicine (Sept. 1, 2020), https://perma.cc/9W9J-6F3U; *see also* Dkt. No. 274, at 18

(observing that "surgeons, nurses, and other operating room staff use masks for the patient's benefit"). And "the United States . . . led the world in mask wearing" to prevent the spread of the 1918 flu pandemic. Paul French, *In the 1918 Flu Pandemic, Not Wearing a Mask Was Illegal in Some Parts of America. What Changed?*, CNN, https://perma.cc/7UKE-4S9Y (last updated Apr. 4, 2020).

Furthermore, the temporary requirement to wear masks on public transportation is comparable to (or more modest than) the measures enumerated in Section 361(a). It is thus among the "other measures" authorized by the second sentence of Section 361(a). It is difficult to imagine a more direct way to control the spread of communicable disease than a measure that traps infectious particles to prevent their spread.

2. For similar reasons, the international traveler testing order was squarely within the CDC's statutory authority. The testing order was expressly geared at preventing the international "spread of disease by identifying, isolating, and destroying the disease itself." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2488. Indeed, the testing requirement isolated the disease itself by identifying people who were infected and preventing them from bringing COVID-19 into the United States.

Congress specifically authorized the CDC to impose "inspection" measures, 42 U.S.C. § 264(a), and viral testing is just such a measure. A COVID-19 test detects the presence of the virus in a collected sample and thus qualifies under the ordinary definition of "inspection" as "a checking or testing of an individual against established standards." *Inspection*, Merriam-Webster, https://perma.cc/3F52-C9A3; *see also* Dkt. No. 274, at 14 (citing Webster's New International Dictionary of the English Language (2d ed. 1942), which defines "inspection" as the "[a]ct or process of inspecting; a strict or prying examination").

Other features of Section 361 reinforce that conclusion. While the testing order did not provide for the apprehension, detention, or conditional release of individuals, the CDC's explicit statutory authority to order such measures for individuals "reasonably believed to be infected," 42 U.S.C. § 264(d), presupposes that the CDC can require testing to identify such individuals. Moreover, Section 361(c) expressly permits, among other things, the "examination[] . . . of . . . individuals coming into a State or possession from a foreign country" to determine whether they are infected with a communicable disease. *Id.* § 264(c). Under longstanding regulations, an examination may include procedures that are more

intrusive than a COVID-19 testing requirement, which is a non-invasive procedure. *See* 42 C.F.R. § 71.1(b) (defining "non-invasive").

Accordingly, the CDC has long recognized that travelers destined for the United States may be subjected to testing. *See* 42 C.F.R. § 71.20(a) (providing that the CDC Director may use non-invasive procedures at "U.S. ports of entry or other locations" to "detect the potential presence of communicable diseases"); *Control of Communicable Diseases*, 82 Fed. Reg. 6890, 6932 (Jan. 19, 2017) (characterizing § 71.20 as a codification of existing authority). The CDC has previously implemented screening procedures for passengers entering the country from abroad, including during the Ebola outbreak. *See* Nicole J. Cohen et al., *Travel and Border Health Measures to Prevent the International Spread of Ebola*, CDC (July 8, 2016), https://perma.cc/5CUS-7Z3E.

3. Mr. Wall has offered no sound basis for ruling otherwise. With no supporting authority, Mr. Wall insists (Br. 58-60) that the masking and testing orders are invalid because Section 361(a) solely authorizes promulgation of "regulations." In fact, Section 361(a) grants the power to issue "sanitation," "inspection," and "other measures" as a means to "carry[] out and enforc[e]" regulations. 42 U.S.C. § 264(a). Here, the masking and testing orders were precisely the sort of permissible measures

issued pursuant to longstanding regulations. *See, e.g.*, 42 C.F.R. §§ 70.2, 71.20(a), 71.31(b). As the district court recognized, the statute should be understood to preserve "the CDC's ability to expediently address health crises, such as the COVID-19 pandemic." Dkt. No. 274, at 19.

Mr. Wall's observation (Br. 66) that sanitation can refer to garbage disposal, sewage treatment, and waste management in the context of a wastewater program is not a reason to import that concept when interpreting a statute that expressly authorizes measures to prevent the spread of communicable disease, *see* 42 U.S.C. § 264(a). Consistent with this statutory authority, CDC and Food and Drug Administration (FDA) regulations issued under Section 361(a) require that perishable food or drink on interstate conveyances be stored at or below 50 degrees, 21 C.F.R. § 1250.27; prohibit the interstate sale of milk products made with unpasteurized dairy ingredients, *id.* § 1240.61(a); impose detailed requirements for current good manufacturing practices and other criteria for blood and blood components, *id.* parts 606, 630; and impose detailed requirements to prevent salmonella in eggs, *id.* part 118. The regulations that provide for vaccination clinics are an exercise of authority under Section 361(a). 42 C.F.R. §§ 70.9, 71.3. Similarly, the Section 361(a) authority has been used to prohibit the capture, distribution, or release of

animals to prevent the spread of monkeypox. *See Control of Communicable Diseases; Restrictions on African Rodents, Prairie Dogs, and Certain Other Animals*, 68 Fed. Reg. 62,353 (Nov. 4, 2003).

Mr. Wall's alternative claim (Br. 64) that measures issued under Section 361(a) may be directed only at "property" rather than "people" is likewise contrary to the statute's plain text and longstanding agency practice. The word "property" does not appear anywhere in Section 361(a), which is broadly titled "Promulgation and enforcement by Surgeon General." Only one enumerated measure, "destruction," is textually limited to "animals or articles." 42 U.S.C. § 264(a). And the Section 361(a) authority has long been used for measures directed to individuals. For example, regulations issued under Section 361(a) require that individuals be tested for communicable disease before donating cells or tissue. 21 C.F.R. § 1271.80. They prohibit any person who is known or suspected of having a communicable disease from engaging in the preparation, handling, or serving of food on interstate conveyances. *Id.* § 1250.35. And they require signs directing food-handling employees to wash their hands after each use of toilet facilities on those conveyances. *Id.* § 1250.38.

Mr. Wall is plainly wrong to suggest (Br. 60-63) that the masking and testing orders raised concerns under the major questions doctrine akin to

those raised by the eviction moratorium. Whereas the eviction moratorium was novel, masks and testing are a longstanding means to prevent the spread of communicable disease. Whereas the eviction moratorium imposed a large economic burden on landlords, *see Alabama Ass'n of Realtors,* 141 S. Ct. at 2489, the masking and testing requirements "place[d] negligible financial burdens on travelers," Dkt. No. 274, at 10.[2] And whereas the eviction moratorium addressed a matter of traditional state concern (landlord-tenant relations), *see Alabama Ass'n of Realtors,* 141 S. Ct. at 2489, the orders at issue here addressed the nation's transportation system, which is an area of traditional federal jurisdiction. Dkt. No. 274, at 10; *see Corbett v. TSA*, 19 F.4th 478, 480 (D.C. Cir. 2021) (noting that the COVID-19 pandemic poses "one of the greatest threats to the operational viability of the transportation system and the lives of those on it seen in decades"). The masking and testing requirements were grounded in the CDC's express statutory authority under Section 361(a) and similar to longstanding exercises of the Section 361(a) authority.

[2] The testing order allowed passengers to submit the results of antigen tests, including authorized at-home COVID-19 tests, that were widely available in the United States. *See* 86 Fed. Reg. at 69,258.

B. The CDC Reasonably Found Masking And Testing Necessary To Prevent The Spread Of COVID-19

The CDC amply satisfied its obligation to "examine the relevant data and articulate a satisfactory explanation for" its judgment that the masking and testing orders were necessary to prevent the spread of COVID-19 in transportation corridors. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As the Supreme Court in *Biden v. Missouri* stressed in upholding the CMS COVID-19 vaccination requirement for healthcare workers in federally funded facilities, "the role of courts in reviewing arbitrary and capricious challenges is to 'simply ensur[e] that the agency has acted within a zone of reasonableness.'" 142 S. Ct. 647, 654 (2022) (per curiam) (alteration in original) (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)). The CDC's transportation mask order and international testing order clearly met that standard.

The CDC detailed its rationale for requiring people to wear masks in transportation hubs and conveyances. *See* Dkt. No. 274, at 20-21. Citing scientific journals and studies analyzing the effects of masking on infection and mortality rates, it described wearing a mask as "one of the most effective strategies available for reducing COVID-19 transmission," particularly because "asymptomatic or pre-symptomatic infected wearers

who feel well and may be unaware of their infectiousness" were estimated to account for most transmissions. 86 Fed. Reg. at 8028-29. The CDC also explained the significant exposure risk in indoor transportation settings where people are forced to be "in close contact with others, often for prolonged periods," as they stand in security lines, wait at crowded transportation hubs, and sit aboard multi-person conveyances. *Id.* at 8029; *cf. Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 919 (D.C. Cir. 2017) (noting in the context of e-cigarette vapor that airline passengers have little ability to protect themselves due to "the involuntary nature of secondhand exposure" in this confined space (quotation marks omitted)).

The CDC's decision to require a pre-departure COVID-19 test for international air travelers was also fully explained and supported. *See* Dkt. No. 274, at 23-24. Viral tests identify whether a person is currently infected, which was especially important for "asymptomatic or pre-symptomatic" individuals who could be unaware of their infectiousness. *See* 86 Fed. Reg. at 69,258. The CDC documented the new threat from the emergence of the Omicron variant, which was first detected abroad and showed signs of being "more transmissible, even among those who are vaccinated." *Id.* at 69,258-59. Due to the "potential danger to public health posed by this newly identified variant," the CDC determined that persons

traveling from abroad had to obtain a negative COVID-19 test result no more than one calendar day before sitting next to fellow passengers for extended durations on flights destined for the United States. *Id.* at 69,259.

The COVID-19 pandemic is "exactly the type of situation" in which a court "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." Dkt. No. 274, at 22. None of Mr. Wall's quarrels with the CDC orders came close to showing that the CDC acted outside the "zone of reasonableness." *Biden v. Missouri*, 142 S. Ct. at 654 (quoting *Prometheus Radio*, 141 S. Ct. at 1158). As a preliminary matter, Mr. Wall's suggestion (Br. 70) that the district court "completely ignored" his arbitrary and capricious arguments is baseless. Even assuming that Mr. Wall identified contemporaneous countervailing evidence (Br. 70-71), the court thoroughly explained that the CDC "did not act arbitrarily and capriciously" because the orders were based on and supported by the record before the agency. Dkt. No. 274, at 17-18, 20-24.

Mr. Wall declares (Br. 71) that the CDC did not adequately consider alternatives to the mask order like adding "passengers who have tested positive" to a list for "airlines to bar" their boarding. But the CDC explained that mask wearing was an effective strategy that was easy to implement.

See 86 Fed. Reg. at 8030. The CDC further explained why a requirement limited to interstate and international travel would be unworkable given that "passengers who may themselves be traveling only within their state or territory commonly interact with others traveling between states or territories or internationally." *Id.* at 8029; *see also id.* at 8029-30 (explaining that state and local measures had been inadequate to prevent interstate transmission of the virus). Mr. Wall's assertions about "natural immunity" (Br. 72) ignore the CDC's recommendation that "people who have recovered from COVID-19 [should] continue to take precautions to protect themselves and others, including wearing masks," 86 Fed. Reg. at 8029; *see also* 86 Fed. Reg. at 69,259 (explaining that "antibodies generated during previous infection or vaccination may have a reduced ability to neutralize some variants," like the Omicron variant).

Mr. Wall's quibbles with the international testing order were similarly flawed. His suggestion that the one-day time window was too "strict" (Br. 75) disregards the CDC's explanation that obtaining a test close in time to departure would minimize the opportunity for passengers "to develop infection with the Omicron variant prior to arrival into the United States," 86 Fed. Reg. at 69,260. His suggestion that the order should also have covered travelers "crossing the land borders" or "arriving by sea" (Br. 75)

disregards that each of the CDC's actions need not address all aspects of the problem, *see Mobil Oil Expl. & Producing Se., Inc. v. United Distribution Cos.*, 498 U.S. 211, 231 (1991). Indeed, the CDC established separate protocols for land border entries and cruise ship operations. *See, e.g.*, *Public Health Reassessment and Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 42,828 (Aug. 5, 2021); *Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew*, 85 Fed. Reg. 70,153 (Nov. 4, 2020).

Nor does it matter that the masking and testing orders did not completely "halt the spread of the Omicron variant." Pl. Br. 73-74. The CDC acknowledged that wearing a mask provided greater protection when implemented with other preventative measures, 86 Fed. Reg. at 8029, and that requiring a pre-departure negative COVID-19 test would "not eliminate all risk," 86 Fed. Reg. at 69,260. Nevertheless, the CDC adopted these proven measures with the goal of reducing COVID-19 spread in transportation settings. *See, e.g.*, *id.* ("Most countries now use testing in some form to monitor risk and control introduction and spread of SARS-CoV-2."). In short, the CDC "reasonably considered the relevant issues and reasonably explained the decision." *Prometheus Radio*, 141 S. Ct. at 1158.

C. The CDC Reasonably Found Good Cause To Make The Orders Effective Without Delay

The CDC's findings likewise established good cause to proceed without advance notice and comment (assuming that those procedures were required). *See* 5 U.S.C. § 553(b)(B). As the district court recognized, "[t]he highly contagious character and the devastating effects of the SARS-CoV-2 virus demanded expeditious action by the CDC." Dkt. No. 274, at 26.

At the time of the mask order in January 2021, "there ha[d] been over 25,000,000 cases identified in the United States and over 415,000 deaths due to the disease." 86 Fed. Reg. at 8028. In addition to "the rapid and continuing transmission of the virus across all states," the CDC described the recent emergence of "[n]ew SARS-CoV-2 variants," including "at least one with evidence of increased transmissibility." *Id.* at 8028-29. And the CDC emphasized the "interconnected" nature of "transportation systems," where "local transmission can grow even more quickly into interstate and international transmission when infected persons travel on non-personal conveyances without wearing a mask." *Id.* at 8029. "Considering the public health emergency caused by COVID-19," the CDC determined that "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" the transportation mask order. *Id.* at 8030.

The situation was similarly grave when the CDC updated the international testing order in December 2021. By that time, there had been "more than 48,000,000 cases" of COVID-19 in the United States and "over 775,000 deaths attributed to the disease." 86 Fed. Reg. at 69,258. The CDC further described the newly detected Omicron variant that could "decrease the effectiveness of available vaccines against severe or deadly disease." *Id.* at 69,259. "Considering the rapid and unpredictable developments in the public health emergency caused by COVID-19, including the recently identified emergent Omicron variant," the CDC determined that delay threatened "transmission and importation of additional undetected cases of SARS-CoV-2 Omicron variant or other emerging variants through passengers." *Id.* at 69,260. These findings provided the requisite "brief statement of reasons," 5 U.S.C. § 553(b)(B), and constituted "the 'something specific' required to forgo notice and comment," *Biden v. Missouri*, 142 S. Ct. at 654 (citation omitted).

The CDC's explicit discussion of the high risk of COVID-19 transmission in transportation settings underscored its determination that "delay would do real harm." *United States v. Dean*, 604 F.3d 1275, 1281 (11th Cir. 2010). The CDC explained that travelers are "in close contact with others, often for prolonged periods," in transportation hubs and

conveyances. 86 Fed. Reg. at 8029; *see also* 86 Fed. Reg. at 69,258; *Corbett*, 19 F.4th at 488 (recognizing COVID-19's "specific tendency to spread at high rates in transportation areas"). And the CDC explained that local cases could quickly expand to national and global spread "given how interconnected most transportation systems are." 86 Fed. Reg. at 8029; *see also* 86 Fed. Reg. at 69,260. These statements undermine Mr. Wall's contention (Br. 69) that the agency did not provide "specific reasons why in the environment of [the masking and testing orders] the ongoing pandemic constituted good cause." *Florida v. Department of Health & Human Servs.*, 19 F.4th 1271, 1290 (11th Cir. 2021).

Contrary to Mr. Wall's suggestion (Br. 68-69), the length of the pandemic did not call into question the CDC's good cause finding. The Supreme Court upheld an analogous finding of good cause for a vaccination requirement issued over a year and a half after the pandemic began. *Biden v. Missouri*, 142 S. Ct. at 654 (reciting the agency's finding that "accelerated promulgation of the rule . . . would significantly reduce COVID-19 infections, hospitalizations, and deaths"). Like the CMS vaccination rule, the CDC's masking and testing orders relied on "the emergence of [COVID-19] variants with increased transmissibility," which threatened to spread rapidly and infect the traveling public. *See* Dkt. No. 274, at 27; *accord*

86 Fed. Reg. at 8028; 86 Fed. Reg. at 69,259-60; *see also Livingston Educ. Serv. Agency v. Becerra*, 35 F.4th 489 (6th Cir. 2022) (upholding good cause finding for HHS rule requiring staff in the federally funded Head Start program to be vaccinated against COVID-19). Because the COVID-19 virus was "persistent and mutable" and just "one traveler [could] start an outbreak," the CDC acted expeditiously to avoid "real harm to the public health." Dkt. No. 274, at 28.

D. Mr. Wall's Other Challenges To The CDC Orders Are Meritless

Mr. Wall raises a host of other statutory and constitutional issues with respect to the masking and testing orders. As the district court explained, these claims "all clearly lack merit." Dkt. No. 274, at 6.

The district court correctly explained that the Air Carrier Access Act did not apply because "the CDC is not an 'air carrier'" within the ambit of 49 U.S.C. § 41705(a). Dkt. No. 274, at 6 n.10. And in any event, the mask order did not "discriminate against" disabled individuals, 49 U.S.C. § 41705(a), because it specifically exempted any "person with a disability who [could not] wear a mask, or [could not] safely wear a mask, because of the disability," 86 Fed. Reg. at 8027. To the extent that Mr. Wall believed that airlines violated the statute by improperly denying his requests for a medical exemption (Br. 78), the proper course was to utilize the complaint-

resolution procedures prescribed by statute and regulation, *see Love v. Delta Air Lines*, 310 F.3d 1347, 1354-58 (11th Cir. 2002) (detailing the "elaborate and comprehensive enforcement scheme that belies any congressional intent to create a private remedy").

Mr. Wall's claims (Br. 95-97) under the Food, Drug, and Cosmetic Act and two international treaties were not properly asserted in district court. Those claims did not appear in Mr. Wall's 206-page, 23-count original complaint, *see* Dkt. No. 1, which was dismissed as a shotgun pleading. The district court permitted Mr. Wall to submit an amended complaint "to remedy the pleading deficiencies identified" but made clear that "[t]he addition of new claims" would result in "striking the Amended Complaint without further notice." Dkt. No. 187, at 28-29. Mr. Wall nonetheless added these new grounds in his amended complaint. *See* Dkt. No. 188, at 50-57, ¶¶ 229-67; *see also* Dkt. No. 263-5, at 2. Pursuant to its discretionary authority to impose such filing restrictions, *cf. Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1317-18 (11th Cir. 2021), the district court properly disregarded the newly raised claims, Dkt. No. 274, at 4 n.5.

Even if this Court were to consider these new claims, they lack merit. Mr. Wall cannot derive (Br. 95) a substantive prohibition on requiring masks or testing for public transportation from a provision of the Food,

Drug, and Cosmetic Act that empowers the FDA to establish conditions to provide individuals with information about products subject to Emergency Use Authorization, including "the option to accept or refuse administration of the product" and "the consequences, if any, of refusing administration of the product," 21 U.S.C. § 360bbb-3(e)(1)(A). And the sole paragraph in Mr. Wall's opening brief about the Convention on International Civil Aviation and the International Covenant on Civil and Political Rights fails to explain (Br. 97) their import in this case. Regardless, Mr. Wall's invocation (Br. 97) of a general statutory directive governing how federal actors who are not party to this lawsuit carry out certain statutory provisions of federal aviation law, *see* 49 U.S.C. § 40105(b)(1)(A), does not establish that the cited treaty provisions create legal obligations that are privately enforceable in a challenge to the CDC's public-health measures. *See Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (explaining that international agreements "generally do not create private rights or provide for a private cause of action in domestic courts" (quoting Restatement (Third) of Foreign Relations Law § 907 cmt. a (Am. Law Inst. 1987))).

Mr. Wall's constitutional assertions fare no better. He contends (Br. 84-89) that the mask order implicated the Tenth Amendment, but the order addressed "a matter of public health relating to uniquely federal

issues—interstate and foreign commerce," Dkt. No. 274, at 10. The order set minimum protections, allowing state and local authorities to "impose additional requirements that provide greater public health protection and are more restrictive," in accordance with Section 361's express preemption provision. 86 Fed. Reg. at 8030 (citing 42 U.S.C. § 264(e)). Furthermore, the mask order was generally applicable to both "public and private mass transportation systems." Dkt. No. 274, at 6 n.7. Where the government "evenhandedly regulates an activity in which both States and private actors engage," the anticommandeering doctrine does not come into play. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

Nor has Mr. Wall established (Br. 80-83, 90-95) a constitutional right to travel on public transportation without wearing a mask or to travel into the United States without presenting a negative COVID-19 test. *See* Dkt. No. 274, at 6 n.8.[3] Mr. Wall was "not barred from traveling to another state" or a foreign country by virtue of the requirement to wear a mask or take a COVID-19 test. *Id.* at 6 n.9. Moreover, the rights to interstate and

[3] Not only did Mr. Wall fail to demonstrate any deprivation of a protected liberty interest, but his related objection to airlines handling medical exemption requests (Br. 80-83) fails to acknowledge that allowing private companies to assist with implementation of a regulatory order is neither unusual nor unlawful. *See Cospito v. Heckler*, 742 F.2d 72, 87 n.25 (3d Cir. 1984) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)).

international travel are "subject to reasonable governmental regulation." *Haig v. Agee*, 453 U.S. 280, 306 (1981). Any inconvenience that was attributable to the masking and testing requirements could not overcome the strong government interest in ensuring that infected individuals did not spread the deadly COVID-19 virus to fellow travelers or bring the deadly COVID-19 virus into the United States. *See* Dkt. No. 274, at 6 n.9 (citing *Doe v. Moore*, 410 F.3d 1337, 1348 (11th Cir. 2005)).

II. The District Court Correctly Dismissed Mr. Wall's Challenges To The TSA's Security Directives

The district court correctly held that it lacked jurisdiction to address Mr. Wall's claims against the TSA, DHS, and DOT related to the TSA's security directives because review is vested exclusively in the courts of appeals. As relevant here, 49 U.S.C. § 46110(a) specifies that challenges to certain orders issued by the DOT Secretary, or by the TSA Administrator "with respect to security duties and powers designated to be carried out by" him, proceed via petitions for review filed in the D.C. Circuit or the regional circuit where the petitioner resides. The court of appeals "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order." 49 U.S.C. § 46110(c).

As the district court explained, § 46110 is precisely the sort of "statute commit[ting] review of agency action to the Court of Appeals" that

precludes a district court action. Dkt. No. 187, at 22 (quoting *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1420 (11th Cir. 1993) (per curiam)). This Court and other circuits have recognized that challenges to directives like those at issue here are not properly filed in district court. *See Corbett v. United States*, 458 F. App'x 866, 868 (11th Cir. 2012) (per curiam) (TSA security screening procedure); *Green v. Brantley*, 981 F.2d 514, 519-21 (11th Cir. 1993) (Federal Aviation Administration letter); *see also, e.g.*, *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006) (TSA security directive). Indeed, Mr. Wall filed a petition for review of the TSA's security directives in this Court, which, following transfer and consolidation with other similar petitions, is pending in the D.C. Circuit. *See Wall v. TSA*, No. 21-1220 (D.C. Cir.) (oral argument scheduled for January 10, 2023).

There is no basis for allowing Mr. Wall to maintain a parallel challenge to the TSA security directives here. The challenged directives were issued pursuant to the authority delegated in 49 U.S.C. § 114 and provisions in Part A ("Air Commerce and Safety") of Title 49 to address threats to transportation, *see Corbett*, 19 F.4th at 486, and thus fall squarely within the channeling provision, *see* 49 U.S.C. § 46110 (covering orders issued "in whole or in part under this part [Part A]" or under "subsection (*l*) or (s) of section 114"). As the district court explained,

Mr. Wall must pursue his claims that the security directives exceeded the TSA's statutory authority (*see* Br. 99-100) on direct review in the court of appeals. *See* Dkt. No. 187, at 22-23.

The same is true of Mr. Wall's contention (Br. 100-02) that the DOT's notice of its enforcement policy regarding accommodations for disabled persons violated the Air Carrier Access Act (ACAA), 49 U.S.C. § 41705. Even if the essence of Mr. Wall's claim is that the agency failed to issue an order or take an action (*see* Br. 102), that challenge still does not belong in district court because at base it alleges "the DOT's failure to comply with the ACAA." Dkt. No. 187, at 23-24; *see George Kabeller, Inc.*, 999 F.2d at 1421-22 (concluding that courts of appeals have exclusive jurisdiction to review claims alleging that an agency has failed to act).

III. Any Relief Must Be Limited To Mr. Wall

Assuming arguendo that there is a basis to issue any relief, there is plainly no basis for the "worldwide permanent injunction" (Br. 103) that Mr. Wall requests. Article III requires that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). When a court orders "the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of

resolving cases and controversies." *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay). These constitutional limitations are reinforced by traditional principles of equity, which dictate that relief should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

The type of universal injunction that Mr. Wall seeks also "frustrate[s] foundational principles of the federal court system," including by "encourag[ing] gamesmanship" and "disturb[ing] comity." *Georgia v. President of the United States*, 46 F.4th 1283, 1305 (11th Cir. 2022). As this Court recently explained, such relief "undermines the judicial system's goals of allowing the 'airing of competing views' and permitting multiple judges and circuits to weigh in on significant issues." *Florida*, 19 F.4th at 1283 (quoting *Department of Homeland Sec.*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay)). It impedes the government's ability to implement its policies because the government must "prevail in all 94 district courts and all 12 regional courts of appeals" while one plaintiff can derail a nationwide policy with a single victory. *Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring). And it may erode

confidence in the Judiciary by creating an impression that an Article III judge, who is unaccountable due to life tenure, is setting national policy.

Mr. Wall offers no sound reason to depart from these principles. Contrary to his assertion (Br. 104), "[n]othing in the language of the [Administrative Procedure Act (APA)]" requires that an unlawful regulation be "set[] aside . . . for the entire country." *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 394 (4th Cir. 2001). The remedies authorized by the APA are equitable in nature and may be no broader than necessary to redress the injuries of the parties before the court. *See Arizona*, 40 F.4th at 397 (Sutton, C.J., concurring). Mr. Wall's further contentions that relief should extend beyond him "to promote the uniform enforcement of federal law" (Br. 103) and to cover "the tens of millions of other Americans who use and/or work in the transportation sector every day" (Br. 104) are directly contrary to this Court's teachings that universal relief is not justified by "the general interest of national uniformity" or "the need to protect nonparties," *Georgia*, 46 F.4th at 1306-07.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,161 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Georgia 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer
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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

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