No. 22-11532

United States Court of Appeals for the 11th Circuit

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

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

APPELLANT'S REPLY BRIEF

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I. CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. Rule 26.1-2(b), I certify that I am not aware of persons or entities with an interest in the outcome of this appeal that have been omitted from the Certificate of Interested Persons contained in the opening brief or in any other filed brief.

II. REBUTTAL STATEMENT REGARDING ORAL ARGUMENT

I strongly disagree with the government's contention that because "The plaintiffs in *Health Freedom*[1] are represented by counsel" and "Mr. Wall is proceeding *pro se*," "this Court defer consideration of this appeal until it decides *Health Freedom*, which should allow the Court to resolve this appeal without oral argument." Gov't Brief at ECF Page 21.

There is no reason to treat this case differently because in the related case appellees/plaintiffs have a lawyer and I do not. Our legal system does not penalize those who can't afford to hire an attorney. The government should be ashamed of suggesting that I don't deserve equal justice because I'm prosecuting this case myself. Likewise there is no reason to punish me by delaying consideration of my appeal until another case with some, but not all, similar issues is determined. The government, if it believed these cases were so intertwined, could have moved to consolidate, but failed to do so.

In support of its belief that oral argument is unnecessary, the government further states that "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 Wall also challenged a since-rescinded CDC order requiring international air travelers to provide proof of a negative COVID-19 test before coming to the United States." However, the International Traveler

[1] *Health Freedom Defense Fund v. Biden*, No. 8:21-cv-1693, 2022 WL 1134138 (M.D. Fla. Apr. 18, 2022); *appealed* No. 22-11287 (11th Cir.) (oral argument scheduled Jan. 17, 2023) ("*HFDF*")

Testing Requirement ("ITTR" or "Testing Requirement") goes back into effect tomorrow for travelers flying to the United States from one country and two foreign territories.[2] The government never argues that my claims against the ITTR are moot, but the reimplementation of the policy tomorrow defeats any contention that the policy's rescission counsels against allowing oral argument.

Finally, the government asserts that "Mr. Wall also raised a host of other claims, which are insubstantial for reasons discussed in this brief." But my arguments are indeed substantial and present numerous questions of first impression to any Court of Appeals nationwide. That means oral argument is necessary to assist the Court in determining this appeal – and argument should not be delayed because there is a somewhat similar case before this Court scheduled for hearing in two weeks.

[2] https://www.cdc.gov/media/releases/2022/p1228-COVID-china.html

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IV. ARGUMENT

A. CDC and HHS issued the Federal Transportation Mask Mandate and International Traveler Testing Requirement without statutory authority.

Appellees/Defendants Centers for Disease Control & Prevention ("CDC") and its parent agency, Department of Health & Human Services ("HHS"), wrongly contend that the Federal Transportation Mask Mandate ("FTMM" or "Mask Mandate") "fell easily within the CDC's statutory authority…" Gov't Brief at 14. They also want the Court to believe that the FTMM "directly relate[s] to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself." *Id.* at 12, quoting *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021). But masks do no such thing. They don't identify who is infected with COVID-19, face coverings don't isolate the virus, and they certainly don't destroy it.

It's a farce to believe that "Masks isolate the disease itself by trapping viral particles exhaled by infected travelers and preventing noninfected travelers from inhaling viral particles… The district court thus correctly recognized that masks … are conventional 'sanitation' … measures within the CDC's statutory authority." *Id.* at 12. As I'll explore below, masks do not trap viral particles exhaled nor do they prevent other travelers from inhaling them. Instead, particles travel through the poor-quality cloth face coverings and are

directed out or in the top, bottom, and sides.

The plain language of Public Health Service Act 42 USC § 264(a) has already been interpreted by the Supreme Court in *Ala. Ass'n of Realtors*. Although the government claims that § 264(a) gives CDC broad authority to take steps it deems necessary to control the spread of COVID-19, the second sentence severely limits such authority "by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles." *Ala. Ass'n of Realtors* at 2488; *see also Florida v. Becerra*, 2021 WL 2514138 (M.D. Fla. June 18, 2021).

The Mask Mandate is nothing like the authorized actions that precede the catchall provision – inspection, fumigation, disinfection, sanitation, pest extermination, destruction of contaminated animals or articles. Unlike the previously listed actions, the FTMM does not directly target the disease, but instead is a sweeping decree that extends to all individuals whether they are infected or not and fails to take account of any likelihood of such persons being infected. Indeed, in most cases, the Mask Mandate imposes its requirements where the disease is not present at all.

Giving § 264(a) a broad and untethered grant of authority, as CDC demands, would grant the agency's director legislative authority by giving her

the power to "make and enforce" regulations without providing any meaningful boundaries. The only "boundary" is what "in [her] judgment are necessary," which is not a meaningful constraint.

1. Masks are not "sanitation" and testing is not "inspection."

It's pure baloney that "Masking is a paradigmatic sanitation measure, as the district court explained. Masks reduce the release of viral particles into the air, which easily meets the modern and contemporaneous definition of 'sanitation'…" Gov't Brief at 15.

The Supreme Court recently disagreed with the government's position. The justices went through two pages of examples where despite a basis for claimed agency authority, it was obvious that the power was not what Congress meant and thus the Court rejected an agency's over-reach. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). This Court must do the same here in vacating the FTMM and ITTR. Reliance on archaic references to ambiguous terms such as "sanitation" and "inspection" in a statute enacted nearly 80 years ago is not enough to bootstrap authority today for multiple federal agencies to impose unprecedented requirements on American travelers.

> "[T]hese regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, common sense as to the manner in which Congress would have been likely to delegate such power to the agency at issue made it very unlikely

> that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices. Nor does Congress typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme. Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line. We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* at 2609 (cleaned up).

"This mask mandate did not require use of an effective mask; cheap, ineffective masks incapable of blocking the tiny Covid-19 particles were commonly worn to satisfy the mandate," according to the *amicus* brief filed by the American Association of Physicians & Surgeons in *HFDF*. AAPS Br. at 3.

"Masks are inherently unsanitary. ***Masks are a sanitation problem, not a sanitation solution***." American Frontline Doctors ("AFD") Br. at 13 (emphasis original), filed in *HFDF*.

Doctors, the government claims, "have been wearing medical-grade N95 or surgical masks … during surgeries or patient interactions as part of their daily routines, for many decades." Gov't Brief at 15. "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." Gov't Brief at 16.

But wearing medical-grade N95 masks in an operating room to prevent splashes and sprays of the patient's bodily fluids from entering the surgeon's

nose and mouth doesn't relate to masking the traveling public with no control over mask quality or use (removing masks for several reasons was explicitly permitted in the FTMM). Many studies have shown that any type of face covering doesn't reduce transmission of respiratory diseases in hospital operating rooms. And there's scant scientific evidence to support a claim that masks trap infectious respiratory droplets; they simply penetrate the fabric and go up, down, and sideways.

The government's misinformation about mask use and efficacy aside, the statute's plain text merely authorizes CDC to take sanitation measures with respect to ***goods***, not to intrusively interfere with the constitutional right to travel by demanding the cleaning of human beings. Masks don't clean/sanitize anything. 42 USC §§ 264(c)-(d) establish that CDC has more limited authority to restrict the liberty of persons than it does to regulate infected property or articles.

Likewise virus testing in foreign airports is not an "inspection" measure because the statute directs inspections of animals and articles whereas any testing of a human falls under the term "examine" or "examination." For instance, CDC itself defines "medical examination" as "the assessment of an individual by an authorized and licensed health worker to determine the individual's health status and potential public health risk to others." 42 CFR §

70.1. Virus testing is thus a medical examination, not an inspection. And the ITTR does not require that an authorized and licensed health worker carry out the testing. CDC can't control who in foreign countries is administering COVID-19 tests as it has no jurisdiction to authorize and license healthcare workers outside the United States.

"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…" Gov't Brief at 19. But this is the meaning of "sanitation" in the context of other measures CDC may direct at property such as animals and articles. It doesn't apply to masking human faces.

"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. … And the Section 361(a) authority has long been used for measures directed to individuals." Gov't Brief at 20. These are more false claims.

> "§ 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*.

Many doctors assert masks are not sanitation at all. “The claim that masks are safe and effective against viral micro-particulates is inaccurate. Masks are ineffective, ***unsanitary***, and in many ways they harm the wearer physically and psychologically.” AFD Br. at 3 (emphasis added). “Numerous studies conclude that masks do not prevent virus respiratory illness and only offer a false sense of security as they do not prevent transmission of viral particles.” AFD Br. at 6.

CDC paid no attention to the plethora of unsanitary aspects of mask wearing, including harmful repercussions to a person’s physical health.

> “A recent study published in July 2022 concluded that both sides of a mask get quickly contaminated with pathogenic bacteria, growing fungi colonies that can be a direct source of infection to the respiratory and digestive tracts and skin. Additionally, toxic mold, fungi, and bacteria can pose a significant threat to the immune system by potentially weakening it. And alarming reports reveal that extremely dangerous graphene, fiberglass, and plastic fibers from masks are being absorbed into the lungs. In essence, masks are potentially dangerous medical devices that can put an individual at risk for viral infection… deep re-inhalation of droplets and virions caught in masks may make COVID-19 infection more likely or severe.” AFD Br. at 9-11.

If “sanitation” were read as CDC suggests – to mean anything that may promote cleanliness – then much of the statute is superfluous. For example,

the same subsection of the statute also permits CDC to require "disinfection" or "fumigation" measures. But on CDC's reading, those measures are already justified by the term "sanitation." Moreover, the statute joins "sanitation" in a list with "inspection, fumigation, disinfection, . . . pest extermination, [and] destruction" of infected animals and articles. Those terms are all focused on identifying a disease-causing condition, isolating it, and then destroying it, while the Mask Mandate merely impedes the breathing of individuals without regard to whether they are diseased. CDC's view of its authority to mandate masks and virus testing for airline passengers only was not only unprecedented,

> "it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of … regulation' into an entirely different kind. … here is little reason to think Congress assigned such decisions to the Agency. … 'Even if Congress has delegated an agency general rulemaking or adjudicatory power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions.'" *West Virginia* at 2612.

With regard to the ITTR, the government claims it "was squarely within the CDC's statutory authority. … 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 USC § 264(a), and viral

testing is just such a measure." Gov't Brief at 16-17. Sounds like a good argument, except testing is not "inspection," as explained *supra*.

CDC goes on to falsely argue that its "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." Gov't Brief at 17. Not at all. Before undertaking any action, CDC must reasonably belief someone is infected. That does not authorize universal testing of every airplane passenger flying to America. A person must exhibit symptoms or have been reported by a healthcare provider as having been diagnosed with a communicable disease.

"The CDC has previously implemented screening procedures for passengers entering the country from abroad, including during the Ebola outbreak." Gov't Brief at 18. But CDC fails to inform the Court these "screening procedures" took place upon arrival at U.S. ports of entry and did not condition boarding a flight to the United States on the presentation of a negative Ebola test. The ITTR is absolutely unprecedented in its scope.

"[P]ast practice does not, by itself, create power." *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). Past regulations CDC cites are of dubious relevance to the issues here

anyway. CDC does not claim that those previous regulations were "sanitation" or "inspection" measures like the Mask Mandate and Testing Requirement. The regulations CDC's appellate lawyers unearthed are best understood as being authorized by inapposite parts of 42 USC § 264 or other statutes. The remaining regulations CDC cites are justified by other statutes entirely.

CDC outright lied to the Court in claiming that "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." Gov't Brief at 21, FN 2. False. Passengers could not submit at-home antigen tests because there was no healthcare provider verification of who took the test and when. Travelers had to pay out of pocket for often expensive PCR lab tests in foreign countries – the reliability of which could not be verified by CDC – or pay hefty fees for a healthcare provider in America to monitor the administration of an at-home antigen test and then provide the traveler with a certificate of negative testing. This came at great expense and time within one day of boarding a flight to America – and yet these policies did not apply to land and sea border crossings, which represent a much higher percentage than inbound international air passengers.

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

The government argues that "Mr. Wall is plainly wrong to suggest (Br. 60-63) that the masking and testing orders raised concerns under the major questions doctrine…" Gov't Brief at 20. But they certainly do.

In *West* Virginia, the Supreme Court expressly embraced this doctrine, which requires clear, unambiguous congressional authorization before federal agencies decide issues of major significance. It can hardly be doubted that requiring all American travelers and transport workers (about 37 million every day) to wear a mask and undergo virus testing as a condition of exercising our constitutional right to travel and/or employment is a "major question."

Cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *West Virginia* at 2608.

Courts are required to invalidate agency decision-making on major questions in the absence of express congressional authorization. Such is the case here. Mask mandates are more politics than science, and politics is to be sorted out in the halls of Congress rather than at a politically unaccountable administrative agency.

> "[B]oth separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims." *Id.* at 2609.

The invalidation of an attempt by the Food & Drug Administration to regulate tobacco is conceptually similar to the case at bar. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). There, as here, public-health authorities insisted that their regulation would save lives. There, as here, the authorities insisted on an expansion in their power far beyond anything they had done before. There, as here, the agency went beyond anything expressly authorized by statute. There, as should occur here, the Supreme Court struck down the attempt by the agency to expand its authority.

Convincing a court that the problem an agency wants to solve is a significant threat to public health is not enough to justify an asserted expansion in agency control over the American public.

In CDC's view, Congress gave the agency vast power to infringe on the constitutional right to travel in the fourth term of a seven-word list buried in the second sentence of a 79-year-old statute. The Court should presume that Congress did not give CDC sweeping authority in such a backhanded fashion. Congress can act quickly and decisively as exigencies may require. CDC fails

to address that Congress passed more than 20 bills in response to the COVID-19 pandemic, but none of those authorized forced masking or virus testing as a condition of travel. Several bills were introduced to require masks in the transportation sector, so Congress was clearly debating the issue. The only floor vote came when the Senate decided 57-40 to kill the FTMM.

Where, as here, there are strong political overtones – presidential candidate Biden supported mask mandates while candidate Trump opposed them – the need for CDC to justify a draconian burden on the right to travel is heightened. 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.

Tens of thousands of epidemiologists, scientists, doctors, industrial hygienists, and other experts strongly disagree with numerous CDC and HHS 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). *See also* Brief of *Amici Curiae* 3 Industrial Hygiene Experts.

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.

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.

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.

"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*.

CDC tries to argue the mask and testing requirements are a "negligible" burden. Not so. I was banned from flying and using all modes of public transportation for more than a year because of my medical condition precluding

me from covering my face, and because I would not condition my constitutional right to travel abroad to having to submit to virus testing to return home to my country of citizenship – a right guaranteed by international law.

As efforts to overturn the FTMM and ITTR by all major airlines and hundreds of other travel companies and organizations illustrate, the economic pain of severely discouraging travel was felt far and wide. These two challenged policies had a major negative financial impact on the U.S. travel sector.

Although the Supreme Court forcefully asserted the Major Questions Doctrine this year, it is not a new concept in our jurisprudence that vague terms such as "sanitation" and "inspection" in an 80-year-old law may not be used by CDC to *post hoc* justify masking and testing. The orders at issue never mentioned "sanitation" or "inspection." These terms were only offered by CDC lawyers during litigation.

> "That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and if Congress had intended to grant such a power to the [agency], it cannot be doubted that it would have used language open to no misconstruction, but clear and direct." *ICC v. Cincinnati*, 167 U.S. 479, 499 (1897).

B. CDC and HHS illegally issued the FTMM and ITTR without notice and comment.

The government's argument is wrong that

> "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." Gov't Brief at 13.

This Court has been clear that the mere existence of a pandemic does not always justify an agency bypassing notice and comment. *Florida v. HHS*, 19 F.4th 1271, 1290 (11th Cir. 2021). CDC's statement of good cause in the Mask Mandate consisted of a single sentence: "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 [the] Order." 86 Fed. Reg. 8,030.

That naked invocation of the pandemic is exactly the type of generic reasoning that this Court said in *Florida v. HHS* is not enough. CDC's perfunctory explanation is especially insufficient here because there are good reasons to think that a short delay in imposing masking and testing mandates would not be harmful. Indeed, CDC's own delay of a year in promulgating

these policies undercuts any claim that there was an emergency justifying waiver of notice and comment.

> "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] engaged in reasoned decisionmaking.'" *HFDF*.

"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." *Id*. Nor did CDC cite any evidence of COVID-19 hotspots attributed to the transport sector.

Coronavirus cases were actually going down when the FTMM and ITTR were issued in early 2021. The science didn't change. All that did was the inauguration of President Biden. That did not create an "urgency." "CDC unreasonably delayed in promulgating these orders and thereby contributed to the exigent circumstances." App. 479.

> "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*.

Moreover, the FTMM and ITTR were in effect for 14½ months before being vacated and 16½ months before being voluntarily withdrawn (only temporarily as the ITTR takes effect again tomorrow), respectively. 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 Code of Federal Regulations. 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 so many travelers and businesses.

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).

C. The FTMM and ITTR are arbitrary and capricious.

CDC and HHS incorrectly claim that they "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." Gov't Brief at 13.

But health experts already knew pre-coronavirus that "Mask mandates failed to work during the 1918 flu pandemic… there is no science in support

of requiring intermittent use of porous masks by travelers." AAPS Br. at 7.

It's not true that "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." Gov't Brief at 22.

The FTMM and ITTR failed to meet that standard. The district court erred in agreeing that "CDC looked at extensive scientific research supporting the use of masks to prevent the spread of COVID-19…" App. 473. CDC just cherry picked seven flawed studies to support President Biden's political viewpoint, ignoring thousands of pages of contrary studies. https://lucas.travel/masksarebad.

CDC ignored that commercial air travel never posed an acute risk of spreading the COVID-19, as noted by Brief of *Amici Curiae* 313 Airline Workers ("There's nothing in the administrative record showing that CDC or TSA considered the ample evidence provided by the aviation industry and others that masks aren't necessary and do nothing to reduce COVID-19 transmission, especially in the sterile environment of a jet aircraft.") *See also* study at App. 1,094-1,115. Notably all major airlines lobbied for almost a year to abolish the Mask Mandate. And there has never been any evidence showing that the FTMM reduced COVID-19 spread in the transport sector.

> "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).

"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."" Gov't Brief at 28. But no evidence supported this conclusion. At least 228 studies and articles show masks are ineffective at reducing virus transmission but can actually harm human health in at least 68 ways. https://lucas.travel/masksarebad.

Thanks to Judge Mizelle's April 2022 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. The government has provided the Court no evidence that masks ever 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 (but angry the ITTR takes effect again tomorrow for three foreign destinations). People are voting with their faces – the vast majority of which since April 2022 have been uncovered on transportation conveyances across the nation. This Court must ensure these restrictions on our liberty to travel may never be reimposed.

> "[M]ask mandates on travelers have not limited the spread of Covid-19 … Intermittent use of masks, which is how travelers use them, is useless because the virus spreads while travelers eat, drink, and otherwise take off their masks. Moreover, the masks commonly used are porous to the Covid-19 virus, as Dr. Fauci implicitly concedes. … The CDC mask mandate lacked medical justification, and cannot withstand a merely cursory logical or scientific analysis." AAPS Br. at 14-16.

> "An objective and dispassionate review of the medical and scientific literature surrounding mask wearing reveals that masks are ineffective for preventing infection from COVID-19 or other viruses. Masks are also ineffective in preventing transmission of the COVID-19 or other viruses to others. … This is because the tiny virus micro-particles are so much smaller than the mask pore openings. It is akin to the oft-cited analogy of putting up a chain link fence in the vain hopes of keeping out mosquitos." AFD Br. at 1.

Mandatory mask wearing has also become the source of numerous disruptive and sometimes violent conflicts between passengers and transportation workers, and among transportation workers themselves, creating veritable chaos in the skies. *See* Brief of *Amici Curiae* 313 Airline Workers.

As 23 states told this Court in *HFDF*: "the mandate violates CDC's own regulations. CDC regulations say that it cannot act unless it finds local measures inadequate. But here, CDC never even studied local measures, much less developed a method to determine whether those measures are adequate." States Br. at 5.

"Reasoned decisionmaking" demands that agencies explain not only their baseline policy choice, but also any exceptions offered to that policy. Thus, "[a]gency action is arbitrary and capricious if 'the agency offers insufficient reasons for treating similar situations differently.'" *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013). To have an exception in one case – such as exempting land and sea border crossers from the ITTR or children under 2 from the FTMM – an agency "must either make an exception in a similar case or point to a relevant distinction between the two cases." *Westar Energy v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007).

Although CDC is entitled to deference when it draws lines, it must still "explain" why it is drawing the lines in a particular place in light of the "underlying regulatory concerns." *Nat'l Shooting Sports Found. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013). CDC did not do that here.

"The CDC's decision to require a pre-departure COVID-19 test for international air travelers was also fully explained and supported." Gov't Brief at

23. Not true, because CDC acted outside the "zone of reasonableness." No explanation was given for the decision to exempt all land and sea border crossers or why airline passengers would be more likely to carry COVID-19 into the country than those driving into America or arriving by cruise or other ship.

"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." Gov't Brief at 24. But that's not enough. CDC didn't explain why it failed to use existing government systems known as Do Not Board and Lookout to target actually infected travelers rather than mandating that every passenger, most of whom are not ill, obstruct their breathing. Do Not Board and Lookout actually identify and isolate travelers who are infected. The Mask Mandate does not.

> "[T]he 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…" *HFDF*.

The government cites a migrant expulsion order for illegal land crossers and a Conditional Sailing Order for cruiseships, failing to note the expulsion order doesn't apply to legal crossings of our land borders and the cruiseship

order was enjoined as unlawful. Notably neither order contained a provision mandating showing a proof of a negative COVID-19 test to travel into the United States from abroad.

D. The FTMM violates the 10th Amendment.

"He contends (Br. 84-89) that the mask order implicated the 10th Amendment, but the order addressed 'a matter of public health relating to uniquely federal issues – interstate and foreign commerce…'" Gov't Brief at 32-33. But the Mask Mandate applied whether I wanted to take a city bus one mile or board an 8,000-mile flight to the other end of the world. Its application to interstate and international travel might pass constitutional muster, but the FTMM's broad sweep covering all trips not using a privately owned vehicle violates the 10th Amendment. The federal government has no ability to dictate a public-health policy to intrastate travel such as taking a taxi or subway within a city.

> "One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain 'clear-statement' rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts 'act as faithful agents of the Constitution.'" *West Virginia* at 2616 (Gorsuch & Alito, JJ., concurring).

The government contends that

> "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)." Gov't Brief at 25.

That interstate travelers might mingle with intrastate travelers in some settings such as airports doesn't change the fact that the 10th Amendment doesn't permit the federal government to impose health rules on intrastate travelers, especially those who do not mix with interstate travelers such as by taking a taxi, transit bus, subway, or commuter train that run only within one state. The FTMM notably applied to people at transportation hubs even if they were not traveling – for example, waiting at a train station for a family member to arrive.

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*.

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, testing, and other mitigation measures up to the states.

As 23 states told this Court in their *amicus* brief filed in *HFDF*, they "share an interest in protecting their sovereign authority to enact quarantine measures of their choosing to combat the spread of disease in the manner best adapted to their distinctive local conditions – authority historically reserved to the States…" States Br. at 2-3. Both public health and intrastate transportation have always been state concerns. CDC can't constitutionally require masks on intrastate trips. In Florida, for example, it's illegal for a governmental agency to require a person wear a mask – but CDC mandated that Florida ignore its own policy and enforce the FTMM instead.

> "[T]his Court has said that the major questions doctrine may apply when an agency seeks to 'intrud[e] into an area that is the particular domain of state law.' Of course, another longstanding

> clear-statement rule – the federalism canon – also applies in these situations. To preserve the 'proper balance between the States and the Federal Government' and enforce limits on Congress's Commerce Clause power, courts must 'be certain of Congress's intent' before finding that it 'legislate[d] in areas traditionally regulated by the States.' ... But unsurprisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States." *West Virginia* at 2621 (Gorsuch & Alito, JJ., concurring).

E. Universal *vacatur* and a permanent injunction are the proper remedies.

The government contends that "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." Gov't Brief at 36. Not true.

The APA permits a court to "set aside" an unlawful rule. 5 USC § 706(2). That language allows a court to invalidate a rule entirely without respect to the parties before it. Congress chose those words deliberately. The APA was drafted to mirror appellate review. The Administrative Procedure Act contemplates nationwide relief from invalid agency action. APA remedies are plainly not limited to one named plaintiff.

If vacated worldwide, it then follows that the Court must permanently enjoin CDC and HHS from ever mandating masks and virus testing in the future absent specific congressional authorization passed in a new law.

Respectfully submitted this 4th day of January 2023.

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V. 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 6,437 words in Section IV (Argument) in compliance with the 6,500-word limit.