UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LUCAS WALL,	:	
	:	
Plaintiff,	:	Case No. 6:21-cv-975-PGB-DCI
	:	
v.	:	District Judge Paul Byron
	:	
CENTERS FOR DISEASE CONTROL & PREVENTION *et al.*,	:	Magistrate Judge Daniel Irick
	:	
Defendants.	:	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AGAINST DEFENDANTS CDC & HHS
ON COUNTS 1-12 OF THE AMENDED COMPLAINT

COMES NOW plaintiff, *pro se*, and moves for summary judgment on all claims against Defendants Centers for Disease Control & Prevention ("CDC") and Department of Health & Human Services ("HHS") – collectively "the Federal Defendants." Summary judgment is appropriate because "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The Court should vacate the Federal Transportation Mask Mandate ("FTMM") and International Traveler Testing Requirement ("ITTR") as well as permanently enjoining CDC and HHS from issuing any future orders mandating transportation passengers and workers don face masks as well as that passengers flying to the United States present a negative COVID-19 test prior to check-in.

ARGUMENT

A. Counts 1 & 4: The Federal Transportation Mask Mandate exceeds the Federal Defendants' statutory authority under the Public Health Service Act and/or is an improper delegation of legislative power.

The Biden Administration has issued numerous mandates related to the COVID-19 pandemic attempting to coerce Americans to wear masks, get vaccinated, and/or endure regular virus testing. It also renewed a provision Congress enacted for a short period of time, but declined to extend, prohibiting landlords from evicting tenants. CDC also shut down the entire cruise industry and then issued a Conditional Sailing Order ("CSO") imposing so many onerous restrictions that many cruiselines were unable to resume operations.

Every significant Executive Branch pandemic mandate has been blocked in the courts except for three: The FTMM, ITTR, and HHS' requirement that all healthcare workers at facilities accepting Medicare and Medicaid get inoculated.[1] The judiciary has blocked these executive directives: 1) CDC's nationwide Eviction Moratorium ("EM"); 2) CDC's CSO restricting cruiseship operations; 3) CDC's order immediately expelling migrants due to COVID-19; 4) the president's executive order requiring that all federal contractors get vaccinated; 5) HHS' mask-and-vaccine mandate for Head Start programs; 6) the Navy's vaccine requirement; and 7) the president's executive order requiring all federal employees to get vaccinated.

[1] Lower courts enjoined the healthcare worker vaccine mandate, but the Supreme Court lifted the injunctions 5-4, narrowly holding that the statute authorized vaccines as part of patient-safety requirements. *Biden v. Missouri*, No. 21A240 (U.S. Jan. 13, 2022).

Notably the FTMM is the administration's only mask mandate that a court has not yet enjoined or stayed. The Court should take care of that anomaly now.

Just a month ago, the Supreme Court made it clear (again) that agencies may not dictate COVID-19 mandates without clear authorization from Congress.

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

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

Public Health Service Act ("PHSA") § 361 contains no authority to adopt a worldwide[2] mask mandate for the transportation sector. As part of its response to the COVID-19 pandemic, the Federal Defendants issued the nationwide EM relying on § 361. Likewise, as authority for the FTMM, the Federal Defendants invoked that statute and CDC regulations implementing it (42 CFR §§ 70.2, 71.31(b), and 71.32(b)).

[2] The FTMM applies aboard flights to and from the United States, even when the aircraft is outside U.S. airspace. It likewise applies to ships calling on U.S. ports even when such vessels are in the open sea thousands of miles from American shores, far outside U.S. jurisdiction.

> The HHS secretary "is authorized to make and enforce such ***regulations*** as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, 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 USC § 264(a) (emphasis added).

This law authorizes the HHS secretary only to "make and enforce such ***regulations***…" (emphasis added). The FTMM is an *order*, not a *regulation*. Orders are not promulgated by Administrative Procedure Act ("APA")-required procedures (proposed rulemaking, notice and comment, then final rulemaking). Importantly the title of this statute is "***Regulations*** to control communicable diseases." (emphasis added). "[S]tatutory titles and section headings are 'tools available for the resolution of a doubt about the meaning of a statute.'" *Fla. Dept. of Rev. v. Piccadilly Cafeterias*, 554 U.S. 33, 47 (2008). PHSA § 361 is contained in ""Part G – Quarantine and Inspection." Forced masking is not quarantining or inspecting.

Numerous federal courts struck down the EM, decisions the Supreme Court sustained, holding that Congress never gave CDC the staggering amount of power it claims to supposedly reduce the transmission of COVID-19. The Federal Defendants did not prevail on the merits in any case challenging the EM.[3]

> "It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened. Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old

[3] *Tiger Lily v. HUD*, No. 2:20-cv-2692, 2021 WL 1171887 (W.D. Tenn. March 15, 2021), aff'd 992 F.3d 518 (6th Cir. 2021); *Alabama Ass'n of Realtors v. HHS*, No. 20-cv-3377 (D.D.C. May 5, 2021); *Skyworks v. CDC*, No. 5:20-cv-2407 (N.D. Ohio March 10, 2021); and *Terkel v. CDC*, No. 6:20-cv-564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021).

> statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts. … the sheer scope of the CDC's claimed authority under § [264](a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast 'economic and political significance.'' … That is exactly the kind of power that the CDC claims here. … the Government's read of § [264](a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach…" *Alabama Ass'n of Realtors v. HHS,* No. 21A23 (U.S. Aug. 26, 2021).

> "Though the [PHSA] grants the Secretary broad authority to make and enforce regulations necessary to prevent the spread of disease, his authority is not limitless. … These 'other measures' must therefore be similar in nature to those listed in § 264(a). … And consequently, like the enumerated measures, these 'other measures' are limited in two significant respects: first, they must be directed toward 'animals or articles,' 42 U.S.C. § 264(a), and second, those 'animals or articles' must be 'found to be so infected or contaminated as to be sources of dangerous infection to human beings,' … In other words, any regulations enacted pursuant to § 264(a) must be directed toward specific targets 'found' to be sources of infection.' *Alabama Ass'n of Realtors v. HHS*, No. 20-cv-3377 (D.D.C. May 5, 2021).

This Court enjoined CDC's CSO regulating cruiseship operations, another order (not a regulation) supposedly based on the PHSA. "[I]f CDC promulgates regulations the director finds 'necessary to prevent' the interstate or international transmission of a disease, the enforcement measures must resemble or remain akin to 'inspection, fumigation, disinfection, sanitation, pest extermination, destruction of infected animals or articles.'" *Florida v. Becerra,* No. 8:21-cv-839 (M.D. Fla. June 18, 2021); CDC's motion to stay PI denied, No. 21-12243 (11th Cir. July 23, 2021).

This Court declared CDC's interpretation of § 264(a) dead wrong, using strong language to condemn the agency for acting unlawfully:

> "[N]ever has CDC implemented measures as extensive, disabling, and exclusive as those under review in this action. However, in this action CDC claims a startlingly magnified power. … CDC's assertion of a formidable and unprecedented authority warrants a healthy dose of skepticism. … Both text

> and history confirm that the conditional sailing order exceeds the authority granted to CDC by Section 264(a). And if Section 264 fails to confer the statutory authority for the conditional sailing order, the regulations implementing Section 264 can grant no additional authority." *Id*.

Maskwearing does not comport to the statute's allowance for CDC to require the "sanitation … of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings." 42 USC § 264(a). Wearing a mask does not reduce the transmission of viral particles and the statute directs that any "sanitation" be directed at "animals or articles," not human faces. The use of the exact words "human beings" in the same sentence of § 264(a) conclusively shows Congress did not conceive the word "animals" as including humans. Plus "sanitation" measures may be directed solely to things "found to be so infected or contaminated…" not at every single person. *Florida*.

To sustain the government's interpretation, the Court would have to first find that an "order" is "regulation," then agree with Defendant HHS secretary's determination that the FTMM is "necessary." 42 USC § 264(a). But the scientific evidence shows otherwise: Masks do nothing to prevent coronavirus spread but harm human health. Doc. 188 at ¶¶ 163-214 & https://bit.ly/masksarebad. "[O]rdering masks to stop Covid-19 is like putting up chain-link fencing to keep out mosquitos." *Ridgeway Properties v. Beshear*, No. 20-CI-678 (Ky. Cir. June 8, 2021).

> "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance. …

> An agency has no power to tailor legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. … We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (citations and quotation marks omitted).

The Sixth Circuit spoke decisively regarding CDC's erroneous interpretation:

> "[§ 264(a)] does not grant the CDC the power it claims. … [T]he first sentence grants the Secretary rulemaking authority. But that authority is not as capacious as the government contends. When we interpret statutes, we must give effect to each clause and word. … Plainly, the second sentence narrows the scope of the first. … There is no clear expression of congressional intent in § 264 to convey such an expansive grant of agency power, and we will not infer one. … [CDC's] interpretation is both textually implausible and constitutionally dubious." *Tiger Lily v. HUD*, 992 F.3d 518, 520 (6th Cir. 2021).

Unlike the EM, which Congress did authorize for two short periods of time, Congress has never enacted a mandate that travelers wear masks. The Federal Defendants may not exercise their authority in a manner that is inconsistent with the administrative structure that Congress has created.

> "The Department's interpretation goes too far. The first sentence of § 264(a) is the starting point in assessing the scope of the Secretary's delegated authority. But it is not the ending point. While it is true that Congress granted the Secretary broad authority to protect the public health, it also prescribed clear means by which the Secretary could achieve that purpose. … An overly expansive reading of the statute that extends a nearly unlimited grant of legislative power to the Secretary would raise serious constitutional concerns, as other courts have found. … Congress did not express a clear intent to grant the Secretary such sweeping authority." *Alabama Ass'n of Realtors* (D.D.C. May 5, 2021).

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

The regulations the Federal Defendants cite to authorize the FTMM do no such thing. Like the statute, they only allows sanitation "of animals or articles," not measures such as forced masking of human beings.

> "This kind of catchall provision at the end of a list of specific items warrants application of the *ejusdem generis* canon, which says that 'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.' *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (citation omitted). The residual phrase in § 264(a) is 'controlled and defined by reference to the enumerated categories … before it,' *Id.* at 115, such that the 'other measures' envisioned in the statute are measures like 'inspection, fumigation, disinfection, sanitation, pest extermination' and so on, 42 U.S.C. § 264(a)." *Tiger Lily*.

Regulations cited in CDC's FTMM order don't help its case at all. When "the measures taken by health authorities of any State … are insufficient to prevent the spread of any of the communicable diseases … [the CDC director] may take such measures to prevent such spread of the diseases … including … sanitation … of animals or articles believed to be sources of infection." 42 CFR § 70.2. First, the director did not issue a determination that measures taken by the health authorities of any specific state are insufficient. There are 45 states that disagree with CDC that masking is necessary. Ex. 1. Also, like the statute, the regulation only allows sanitation "of animals or articles," not measures such as masking of humans.

42 CFR § 71.31(b) likewise provides no authority for the FTMM. This provision states the CDC director "may require detention of a carrier until the completion of the measures outlined in this part that are necessary to prevent the introduction or spread of a communicable disease." This applies *after* a plane or ship arrives in

the United States from abroad. It does not authorize masking during the international trip nor on any domestic flight. The government also points to 42 CFR § 71.32(b), which allows CDC's director when he/she "has reason to believe that any ***arriving carrier or article or thing*** on board the carrier is or may be infected or contaminated with a communicable disease, he/she may require detention, disinfection, disinfestation, fumigation, or other related measures…" (emphasis added). A human being is not a transportation "carrier" nor an "article or thing." And the regulation only applies to an arriving transportation carrier. No authorization for masking can be found here. The title of this subpart confirms my contentions: "42 CFR Subpart D – Health Measures at U.S. Ports: Communicable Diseases." The regulations apply only upon arrival at *U.S. ports of entry*, not to in-transit masking. Finally, the other three regs cited (42 CFR §§ 70.3, 70.6, and 70.12) only apply to "A person who has a communicable disease," not every single person traveling on any form of public transportation.

Numerous federal courts have enjoined several agencies' COVID-19 orders because they are totalitarian dictates, not laws passed by the people's elected representatives in Congress.

> "The lack of express terms within the statute is significant: even 'broad rulemaking power must be exercised within the bounds set by Congress,' *Merck & Co. v. HHS*, 385 F. Supp. 3d 81, 92, 94 (D.D.C. 2019), aff'd 962 F.3d 531 (D.C. Cir. 2020) (stating that 'agencies are 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes'); and the CDC 'does not [have the] power to revise clear statutory terms,' *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 327 (2014)." *Huisha-Huisha v. Mayorkas*, No. 21-cv-100 (D.D.C. Sept. 16, 2021) (enjoining CDC's migrant expulsion order).

"Furthermore, even for a good cause, including a cause that is intended to slow the spread of Covid-19, Defendants cannot go beyond the authority authorized by Congress. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2488–89; *see also Missouri v. Biden*, Case No. 4:21-cv-1329, at *3–4 (E.D. Mo. Nov. 29, 2021) (holding that Congress must provide clear authorization if delegating the exercise of powers of 'vast economic and political significance,' if the authority would 'significantly alter the balance between federal and state power,' or if the 'administrative interpretation of a statute invokes the outer limits of Congress' power'). Accordingly, the Court finds that the president exceeded his authority under the FPASA." *Kentucky v. Biden*, No. 3:21-cv-55 (E.D. Ky. Nov. 30, 2021) (enjoining vaccine mandate for federal contractors). *See also Georgia v. Biden*, No. 1:21-cv-163 (S.D. Ga. Dec. 7, 2021) (same).

"A federal agency cannot act absent Congressional authorization. It cannot confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. … Congress could have spoken directly to the issue of vaccination, masking, or other precautions in the last year when passing other COVID-19-related legislation, but it did not and has not. … The plain language of defendants' cited authority, the statutory context, and the existing regulations all confirm that the Secretary's interpretation … is not a permissible construction of the statute. … the identified sources of authority cannot fairly be construed so broadly as to include an unprecedented, nationwide requirement of a medical procedure or universal masking." *Texas v. Becerra*, No. 5:21-cv-300 (N.D. Tex. Dec. 31, 2021) (enjoining HHS' mask-and-vaccine mandate for Head Start).

"The powers that Congress afforded the Agency Defendants within the statute above do not include, or imply, the power to impose vaccine and/or mask mandates. … the Head Start Mandate is a decision of vast economic and political significance. … Like the CDC, the statute upon which Agency Defendants base their authority has never been used to impose a mandatory specific medical treatment… If the Executive branch is allowed to usurp the power of the Legislative branch to make laws, then this country is no longer a democracy – it is a monarchy. This two-year pandemic has fatigued the entire country. However, this is not an excuse to forego the separation of powers. If the walls of separation fall, the system of checks and balances created by the founders of this country will be destroyed." *Louisiana v. Becerra*, No. 3:21-cv-4370 (W.D. La. Jan. 1, 2022) (same).

"[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. … Courts must be guided by a degree of common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 151 (2000).

> "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The Federal Defendants are not entitled to *Chevron* deference. Where the statute is unambiguous, then "that is the end of the matter"; a court applies it as written. There is no ambiguity in the PHSA. Forced masking is not authorized, period. "[B]efore deferring to an administrative agency's statutory interpretation, courts 'must first exhaust the traditional tools of statutory interpretation and reject administrative constructions' that are contrary to the clear meaning of the statute.'" *Black v. Pension Benefit Guar. Corp.*, 983 F.3d 858, 863 (6th Cir. 2020).

Finally, if the Court finds the PHSA does authorize the FTMM, it should hold that § 361 is an unconstitutional delegation of legislative power. Doc. 188 at ¶¶ 331-339. *See Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019); *Touby v. United States*, 500 U.S. 160, 166 (1991); *Wayman v. Southard*, 23 U.S. 1, 10 (1825); *BST Holdings v. OSHA*, No. 21-60845 (5th Cir. Nov. 12, 2021).

> "The court declares that the challenged [EM] … exceeds the power granted to the federal government to 'regulate Commerce … among the several States' and to 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' U.S. Const. Art. 1, § 8. That [CDC eviction] order is held and declared unlawful as 'contrary to constitutional … power.' 5 U.S.C. § 706(2)(B)." *Terkel v. CDC*, No. 6:20-cv-564 (E.D. Tex. Feb. 25, 2021).

> "This practically unbounded interpretation causes separation-of-powers problems, discussed in greater depth below, and naturally stirs suspicion

> about the constitutionality of Section 264(a). … Forbidding that sort of delegation seems the least that is required by, and the least that is unmistakably implicit in, the Constitution's bestowing the entire legislative power on the legislative branch. … Unaccountable administrative law, unbounded by ascertainable directives from the legislative branch, is not the product of an ascendant and robust constitutional republic." *Florida*.

B. Count 2: The Federal Defendants failed to observe the notice-and-comment procedure required by law before ordering the FTMM.

The FTMM was issued without following APA procedures including notice and comment. "Legislative rules have the 'force and effect of law' and may be promulgated only after public notice and comment. *INS v. Chadha*, 462 U.S. 919, 986…" *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014). The Federal Defendants incorrectly argue the FTMM is not subject to APA's notice-and-comment requirements and that there was good cause to proceed without the required process because COVID-19 presents urgent circumstances. But violation of the FTMM carries severe legal consequences including fines starting at $500 and refusal to board flights, buses, trains, etc. The mandate is not an interpretive rule or policy statement that can evade public comment.

As this Court explained last June, COVID-19 began in December 2019 and was declared a global pandemic in March 2020. The Federal Defendants had almost 11 months to put the FTMM through APA's required notice-and-comment procedures, but failed to do so.

> The CSO "carries identifiable legal consequences, such as the prospect of criminal penalties, substantial fines, and suspension of sailing. … [CSO] carries the force of law and bears all of the qualities of a legislative rule. Accordingly, the [CSO]'s prospective, generalized application invites the conclusion that the order is a 'rule.' In plain words, if it reads like a rule, is filed

> like a rule, is treated like a rule, and imposes the consequences of a rule, it's probably a rule. Because the [CSO] is a rule, CDC was obligated to follow the procedures applying to the promulgation of a rule…" *Florida*.

The government can't claim the "good cause" exemption found in 5 USC § 553(b)(3)(B) because it can't self-create an "emergency" 10½ months into a declared pandemic. COVID-19 has again recently surged despite the FTMM – proving this policy has failed and was never in the public interest. The government's beg for a "good cause" exception would be more plausible if the policy actually worked. But the evidence is clear: it doesn't.

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

Had the Federal Defendants put the FTMM through the required APA notice-and-comment period, I would have submitted the concerns listed in ¶ 317 of the Amended Complaint. Doc. 188. "[B]ald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice-and-comment procedures." *Action on Smoking & Health v. Civil Aeronautics Bd.,* 713 F.2d 795, 800 (D.C. Cir. 1983); *see also Nat. Res. Def. Council v. Evans*, 316 F.3d 904, 906 (9th Cir. 2003).

> "Violation of the [CSO] triggers a serious consequence… The [CSO] is a rule … The APA therefore obligates CDC to … provide notice and comment. … To

> satisfy its notice-and-comment obligations under the APA, 'an agency must consider and respond to significant comments received during the period for public comment.' *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Therefore, the [CSO] violates the APA…" CDC lacked 'good cause' to evade the statutory duty of notice and comment." *Florida*.

"There is a substantial likelihood that the Rule must be set aside for another reason: HHS did not have 'good cause' to skip the notice-and-comment procedures required by the APA…" *Texas*. "The situation was not so urgent that notice and comment were not required. … Notice and comment would have allowed others to comment upon the need for such drastic action." *Louisiana*.

C. Count 3: The FTMM is arbitrary, capricious, and an abuse of discretion, including ignoring federal laws and international treaties.

CDC's mandate forcing me to wear a mask (even though my medical condition prohibits it) as a condition of using any form of public transportation is the perfect example of arbitrary and capricious executive policies that the law demands be stopped. 5 USC § 706(2)(A). I incorporate by reference the facts in ¶¶ 144-271 of the Amended Complaint. Doc. 188.

The Federal Defendants' actions in promulgating the FTMM are not rational, reasonably considered, or reasonably explained. Although courts give a degree of deference to an agency when evaluating scientific data, a court may not ignore contrary evidence such as 227 scientific studies, medical articles, and videos demonstrating that masks are ineffective and harmful. https://bit.ly/masksarebad.

An agency decision is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view…" *Motor Vehicle Manufacturers Ass'n v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). All three factors are in play here with the FTMM. CDC's determination that transportation poses a greater risk than numerous other activities is arbitrary and capricious. Notably there's no evidence that airplane cabins pose a special risk of respiratory virus transmission. Doc. 188 at ¶¶ 144-162. The Federal Defendants have not presented any evidence, that flying presents more risk for COVID-19 transmission than, for instance, being an indoor banquet hall with 300 people at a wedding reception or other event.

An agency "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Encino Motorcars v. Navarro*, 136 S.Ct. 2117, 2125 (2016). Here, the Federal Defendants failed to articulate why the FTMM was needed, what specific state measures were inadequate, and why the exemptions under the FTMM (children younger than two) were not arbitrarily selected.

The FTMM is about politics, not public health. President Biden made a national mask mandate a top campaign pledge in 2020. Despite admitting he knew it was unconstitutional, Biden acted in bad faith by signing the FTMM executive order Jan. 21, 2021, (his second day in office) anyway. An agency policy created due to politics and not reasoned science is arbitrary and capricious. *Midwater Trawlers Coop. v. Dep't of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002).

1. Masks do not stop the spread of COVID-19 in the transportation sector, but they create chaos in the sky, endangering aviation security.

The government's own experience with the FTMM shows the policy doesn't stop infections. TSA admits that 21,824 of its employees – all of whom must wear masks – have tested positive for COVID-19. Ex. 2. That's 34% of TSA's workforce.[4] The Federal Defendants refuse to answer my question: If face masks prevent COVID-19 infections, why have so many TSA workers – who must always cover their faces – tested positive?

> "The government has not shown that an injunction in this case will have any serious detrimental effect on its fight to stop COVID-19. … Stopping the spread of COVID-19 will not be achieved by overbroad policies like the federal-worker mandate. …. All in all, this court has determined that the balance of the equities tips in the plaintiffs' favor, and that enjoining the federal-worker mandate is in the public interest." *Feds for Medical Freedom v. Biden*, No. 3:21-cv-356 (S.D. Tex. Jan. 21, 2022) (enjoining the president's vaccine mandate for federal employees).

Airline executives themselves recognize the FTMM is ineffective and should be abolished. There is no increased risk of exposure to COVID-19 by passengers not wearing face coverings, as airline leaders and the scientific community have said countless times. Doc. 188 at ¶¶ 144-162 and https://bit.ly/masksarebad.

> "Not only is there no evidence that the applicants have contributed to the spread of COVID-19 but there are many other less restrictive rules that could be adopted to minimize the risk to public interests. Finally, it has not been shown that granting the applications will harm the public. As noted, the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease. And the State has not shown that public

[4] Because many COVID-19 cases are mild or asymptomatic, health authorities estimate only half of infections are confirmed by testing. This means it's quite likely an astounding 68% of TSA's employees have been infected with coronavirus. Due to the FTMM, they have all been wearing masks for at least the last year. So how exactly do face coverings prevent the transmission of COVID-19? I really wish the government would answer this question. The numbers don't lie.

> health would be imperiled if less restrictive measures were imposed." *Roman Catholic Diocese of Brooklyn v. Cuomo,* No. 20A87 (U.S. Nov. 25, 2020).

The Federal Defendants 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. Aircraft cabins have more sterile air than many hospital operating rooms. Most importantly, there have not been any reported outbreaks of COVID-19 at airports or on board aircraft or other transportation hubs or conveyances.

The FTMM negatively impacts transportation security because it has created chaos in the sky and on the ground with several thousand reports of unruly passenger and crew behavior as a direct result of the mask mandate.

2. The FTMM violates the Food, Drug, & Cosmetic Act.

The FTMM is an abuse of discretion because it forces Americans to use a medical device (face masks), most of which are approved by the Food & Drug Administration (part of HHS) under Emergency Use Authorization ("EUA") or not authorized at all. Individuals to whom any EUA product is offered must be informed "of the option to accept ***or refuse*** administration of the product…" 21 USC § 360bbb-3(e)(1)(A)(ii)(III) (emphasis added). The Federal Defendants can't force travelers to use EUA products including masks. CDC may only recommend masks

(as it has done for the rest of society excluding the transportation sector) and advise passengers if they refuse to wear a mask, the consequence *might* be a higher risk for contracting COVID-19.[5]

There's good reason for the law prohibiting forced use of EUA medical devices. Requirements for EUA products are waived for, among other things, "current good manufacturing practice otherwise applicable to the manufacture, processing, packing … of products subject to regulation under this chapter…" 21 USC § 360bbb-3(e)(3)(A). "Nothing in this section provides the [HHS] Secretary any authority to require any person to carry out any activity that becomes lawful pursuant to an authorization under this section…" 21 USC § 360bbb-3(l). This is consistent with HHS regulations requiring that participants in trials of experimental medical devices must be informed that "participation is voluntary, refusal to participate will involve no penalty…" 45 CFR § 46.116(a)(8).

FDA – the very agency charged with researching and understanding the efficacy of medical devices – has never been able to state whether the kinds of face masks being used by the public to comply with the FTMM provide any benefit for preventing the spread of a virus such as COVID-19.

The law is crystal clear: The Federal Defendants have no authority to require any passenger wear a mask authorized under EUA. But most masks being used by Americans to comply with the FTMM meet the legal definition of an EUA "eligible

[5] In reality, masks do nothing to stop the spread of a respiratory virus but harm human health. Doc. 188 at ¶¶ 163-195 & https://bit.ly/masksarebad.

product" that is "intended for use to prevent … a disease…" 21 USC § 360bbb-3(a). FDA regulates most face masks under EUAs. Doc. 1 at ¶¶ 229-254 & Exs. 103-116. HHS and FDA state:

> "On April 18, 2020, in response to concerns relating to insufficient supply and availability of face masks, [FDA] issued an [EUA] authorizing the use of face masks for use by members of the general public… A face mask is a device … that covers the user's nose and mouth and may or may not meet fluid barrier or filtration efficiency levels. It includes cloth face coverings as a subset. … Face masks are regulated by FDA when they meet the definition of a 'device' under section 201(h) of the Act. Generally, face masks fall within this definition when they are intended for a medical purpose. … Face masks are authorized under this EUA when they are intended for use as source control, by members of the general public … to cover their noses and mouths, in accordance with CDC recommendations, to help prevent the spread of SARS-CoV-2 during the COVID-19 pandemic."

The HHS secretary authorized EUAs for COVID-19 countermeasures (85 Fed. Reg. 17,335) including respiratory devices (85 Fed. Reg. 13,907). FDA published the EUA for face masks July 14, 2020. 85 Fed. Reg. 42,410. Another mask EUA was published Nov. 20, 2020. 85 Fed. Reg. 74,352. HHS Secretary Xavier Becerra renewed the public-health emergency for COVID-19 on Jan. 14, 2022, allowing EUAs for masks and other medical devices to continue. FDA confirms my argument that face masks are worthless. Masks must not be

> "labeled in such a manner that would misrepresent the product's intended use; for example, the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or related uses or is for use such as infection prevention or reduction… No printed matter, including advertising or promotional materials, relating to the use of the authorized face mask may represent or suggest that such product is safe or effective for the prevention or treatment of patients during the COVID-19 pandemic."

The instruction manual for a 3M N95 respirator mask, which is FDA approved, makes clear its wearing still has risks: "Misuse may result in sickness or death. …

[It] cannot eliminate the risk of contracting infection, illness, or disease… Individuals with a compromised respiratory system, such as asthma or emphysema, should consult a physician and must complete a medical evaluation prior to use." Doc. 188 at Ex. 109.

Despite the lack of data that masks are effective, FDA issued an umbrella EUA for 41 types of surgical masks, many of which are used by passengers to comply with the FTMM. Notably five types of masks have been withdrawn from the EUA after FDA found them to be defective. FDA has also revoked the EUA for respirator masks made in China for being faulty. CDC's National Institute for Occupational Safety & Health ("NIOSH") found many masks made in China "authorized under the April 3, 2020, EUA did not meet the expected performance standards." An astounding 167 respirator mask brands from China had their EUAs revoked by FDA last summer. Another 54 were previously revoked. FDA revokes EUAs when "appropriate to protect the public health or safety." Surgical masks (typically light blue in color) made in China are also not authorized by FDA, yet are widely distributed to passengers by CDC's partner TSA and airlines.

So not only are quality masks worthless in CDC's goal of reducing transmission of COVID-19, but the vast majority sold in the United States are actually ***defective***, according to FDA. "The 'may be effective' standard for EUAs provides for a lower level of evidence than the 'effectiveness' standard that FDA uses for product approvals." Even a well-informed consumer would find it nearly impossible to understand what types and brands of face masks have been authorized and which –

if any – are regarded as safe to use for extended periods of time by NIOSH. The administrative record shows no indication these issues were considered.

When a mask manufacturer applies for an EUA, it must agree it may not "misrepresent the product or create an undue risk in light of the public health emergency. For example, the labeling must not include any express or implied claims for: … antimicrobial or antiviral protection or related uses, (3) infection prevention, infection reduction, or related uses, or (4) viral filtration efficiency."

3. The FTMM violates two international treaties the U.S. ratified.

The FTMM is an abuse of discretion because it violates the International Covenant on Civil & Political Rights and the Convention on International Civil Aviation. Doc. 188 at ¶¶ 255-267. Congress requires these treaties be enforced in the U.S. aviation sector. In carrying out all federal aviation laws, the transportation secretary and FAA administrator "shall act consistently with obligations of the United States Government under an international agreement." 49 USC § 40105(b)(1)(A).

D. Count 5: The FTMM violates the 10th Amendment.

The mask mandate applies to noncommercial intrastate transportation and commandeers state employees to enforce a federal order. There are presently 45 states that don't require maskwearing. Ex. 1. CDC and HHS have no power to override the sovereign decisions of state governments regarding public health and intrastate transport. Congressional intent has been clear throughout the COVID-19 pandemic: It has left decisionmaking about masks, lockdowns, business closures

and restrictions, school shutdowns, limits on the size of public gatherings, and other mitigation measures up to the states.

The Supreme Court last month found OSHA's mask-or-vaccine policy unconstitutional because states possess the general police power to regulate public health. Likewise, the FTMM unconstitutionally pre-empts the laws of the 45 states including Florida that don't require face coverings. "[T]he emergency regulation purports to pre-empt state laws to the contrary." *NFIB* (per curiam).

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

In the Eviction Moratorium case, the Sixth Circuit spoke forcefully about the 10th Amendment's restrictions on CDC and HHS mandates.

> "Our reading of the statute's text accords with the principle that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. That principle has yet greater force when the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power" such as public health and intrastate transportation. "Agencies cannot discover in a broadly worded statute authority to supersede state … law. Instead, Congress must 'enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property'" such as rideshare cars and privately owned buses, trains, ferries, airplanes, etc. *Tiger Lily*.

When an "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," there must be "a

clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001). "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230." *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 720 (1985).

CDC and HHS can't overrule mask laws such as those in at least 14 states including Florida that ***prohibit*** public entities from requiring face coverings. Ex. 1. Mask mandates have been the subject of "earnest and profound debate across the country." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). The Federal Defendants unconstitutionally commandeer state officials such as the heads of airport and transit authorities (as well as their subordinates) to require face coverings on state-owned transportation conveyances and in state-operated transport hubs. Hundreds of thousands of state workers such as bus drivers, train conductors, airport staff, and police officers have been commandeered to enforce a mask mandate that goes against the law in 45 states.

> "[E]ven if the law could be interpreted as … the United States suggest[s], it would still violate the anticommandeering principle … The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

> "It is an 'ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.' *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotation marks and citation omitted); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001). … As the district court noted, the broad construction of § 264 the government proposes raises not

> only concerns about federalism, but also concerns about the delegation of legislative power to the executive branch. … We will not make such an unreasonable assumption." *Tiger Lily*.
>
> "If the federal government were to radically readjust the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit about it. The Supreme Court is unlikely to assume Congress has meant to effect a significant change into the sensitive state and federal relations. Congress does not normally intrude upon the police power of States." *Louisiana*.

E. Count 6: The FTMM violates the Fifth Amendment.

I have attempted to obtain medical exemptions from the FTMM from multiple airlines, but all have denied me. Doc. 188 at ¶¶ 13 & 65-99. The due-process problem is that the Federal Defendants delegate enforcement of the FTMM to private companies with no opportunity to appeal to a neutral federal decisionmaker. *Id*. at ¶¶ 108-121. The purported disability exemption in the FTMM is in reality a farce. It is futile to demand exemptions from the airlines.

If the Federal Defendants mandate masks and claim to allow disability exceptions, they constitutionally must provide due process in the form of a rapid pre-deprivation hearing to determine whether an airline wrongly applied the FTMM in denying a disabled person transportation.

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

As the Supreme Court has held many times in the past two years, the Constitution can't be suspended because we are in a global pandemic.

> "[C]ourts nearly always face an individual's claim of a constitutional right pitted against the government's claim of special expertise in a matter of high importance involving public health or safety. It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty." *South Bay United Pentecostal Church v. Newson*, No. 20A136 (20-746) (U.S. Feb. 5, 2021) (Gorsuch, Thomas, and Alito, JJ., concurring).

F. Count 7: The FTMM violates the constitutional right to freedom of travel for Americans who medically can't wear a face mask.

The right to travel is one of the implied and unenumerated rights reserved under the Constitution to the people. Travel embodies a broadly based personal, political, and economic right that encompasses all modes of transportation and movement. The right to travel, inherent in intercourse among the states, is one of the implied and unenumerated rights reserved under the Constitution to the people. *See Crandall v. Nevada*, 73 U.S. 35, 48-49 (1867). The FTMM unreasonably imposes a difficult or impossible burden on millions of travelers with disabilities such as myself – having to wear a face covering that is medically dangerous and intolerable – for no public benefit since masks don't reduce the spread of respiratory viruses and harm human health. https:// bit.ly/masksarebad. My next scheduled trip is to Germany to visit my brother – a trip delayed since June 2021 because of the FTMM and ITTR. There is no way for me to get from Florida to Germany other than by airplane.

> "To make one choose between flying to one's destination and exercising one's constitutional right appears to us, as to the Eighth Circuit, *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973), in many situations a form of coercion, however subtle. *Cf. Lefkowitz v. Turley*, 414 U.S. 70, 79-82 ... (1973). While it may be argued there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all." *United States v. Albarado*, 495 F.2d 799 (2nd Cir. 1974).

The Eighth Circuit held in *Kroll* that "flying may be the only practical means of transportation;" when limited, it deprives an individual of the right to travel. And a district court held:

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

The FTMM forces me to wear a mask despite the detriment to my health. But Congress affirmed the constitutional right to fly for disabled Americans by enshrining it into statute:

> "A citizen of the United States has a public ***right*** of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board ... before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals." 49 USC § 40103 (emphasis added).

"The constitutional right to travel from one State to another, and necessarily to use the highways ***and other instrumentalities of interstate commerce*** in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United*

States v. Guest, 383 U.S. 745, 757 (1966) (emphasis added).

> "It is a familiar and basic principle, recently reaffirmed in *NAACP v. Alabama*, 377 U.S. 288, 307; 84 S.Ct. 1302, 1314; that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. … Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Aptheker*.

"[T]he 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence. … the right is so important that it is 'assertable against private interference as well as governmental action … a virtually unconditional personal right, guaranteed by the Constitution to us all.'" *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

The Supreme Court consistently applies strict scrutiny to restrictions on the right to interstate and international travel. It has long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). "Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. *Fisher v. University of Texas*, 570 U.S. 297, 310 (2013). Specifically, the government must establish that a mandate is "justified by a compelling governmental interest and … narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-532 (1993). Strict scrutiny is appropriate if the challenged order burdens the exercise of a fundamental right

(freedom to travel, due process, 10th Amendment). *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Artway v. Att'y Gen.*, 81 F.3d 1235, 1267 (3rd Cir. 1996).

My right to freedom of movement can't be restricted when there is no evidence that airplanes or other modes of transit have contributed to the spread of COVID-19. And there are less restrictive rules that could be adopted to minimize the risk to public health such as using CDC systems called "Do Not Board" and "Lookout" to alert airlines to bar passengers who have tested positive for a communicable disease. There's no evidence that CDC is using Do Not Board and Lookout to stop passengers who have tested positive for COVID-19 from embarking. Targeting travelers who are a genuine threat to public health – those who are infected with the virus – can be done without infringing on the freedom to travel for everyone else. Doc. 1 at ¶¶ 138-143.

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

"[T]he government has the burden to establish that the challenged law satisfies strict scrutiny. … [N]arrow tailoring requires the government to show that measures less restrictive of the [constitutionally protected] activity could not address its interest in reducing the spread of COVID." *Tandon v. Newsom*, No. 20A151 (U.S. April 9, 2021).

G. Count 8: The FTMM violates the Air Carrier Access Act.

The FTMM blatantly discriminates against Americans with medical conditions who can't wear masks in violation of the ACAA. 49 USC § 41705(a). CDC and HHS may not issue an order that is contrary to statute. The Federal Defendants are disingenuous when claiming that a medical exemption is already provided. As explained in detail in the Amended Complaint, the mask mandate allows airlines to violate the ACAA by requiring numerous hurdles for a disabled person to jump through that aren't allowed under DOT regulations (14 CFR Part 382), making it pretty much impossible for anyone with a medical condition who can't tolerate wearing a mask to get such an exemption. I've applied for exemptions many times and been denied.

> "The Navy provides a religious accommodation process, but by all accounts, it is theater. … It merely rubber stamps each denial. … Religious exemptions to the vaccine requirement are virtually non-existent. … the record indicates the denial of each request is predetermined. As a result, Plaintiffs need not wait for the Navy to engage in an empty formality. … The Court finds that exhaustion is futile and will not provide complete relief… The facts overwhelmingly indicate that the Navy will deny the religious accommodations. … In essence, the Plaintiffs' requests are denied the moment they begin. … Plaintiffs need not exhaust military remedies when doing so would be futile. … That the Navy has predetermined denial of the religious accommodations may indicate that the administrative process is both inadequate and futile. … Thus, the available administrative remedies are inadequate. … The record overwhelmingly demonstrates that the Navy's religious accommodation process is an exercise in futility." *U.S. Navy SEALs 1-26 v. Biden*, No. 4:21-cv-1236 (N.D. Tex. Jan. 3, 2022) (enjoining Navy's vaccine mandate).

Just like the Navy's automatic denial of requests for vaccine exemptions, CDC's FTMM allows airlines and other transportation providers to rubber-stamp every demand for a mask waiver "DENIED," as has occurred to me on many occasions.

Unlike with the Navy's vaccine mandate, the FTMM doesn't even provide the disabled any process for seeking a medical waiver from the government agency. CDC instead gives private companies the power to "consider" mask exemptions, virtually all of which are refused, making it a futile gesture to seek an exemption.

Regulations the FTMM violate include 14 CFR §§ 382.11(a)(1), 382.17, 382.19(a), 382.19(c)(1), 382.21, 382.23(a), 382.23(c)(1), 382.23(d), 382.25, and 382.87(a). Congress enacted the ACAA to protect passengers such who suffer from medical impairments. The Federal Defendants have a legal responsibility not to issue orders that violate statutes and duly promulgated regulations, but have done so here with the FTMM. When courts review the legal interpretations of an agency such as CDC regarding its compliance with statutes it does not administer, "such review can be more stringent: Courts sometimes review such matters *de novo*, or without any deference at all to the agency's interpretation." *Freeman v. DirecTV*, 457 F.3d 1001, 1004 (9th Cir. 2006).

H. Count 9 & 12: The International Traveler Testing Requirement exceeds the Federal Defendants' statutory authority under the Public Health Service Act and/or is an improper delegation.

Almost all of my arguments against the FTMM also apply to the ITTR. I will address where the testing requirement differs materially from the mask mandate.

I incorporate by reference my arguments in Section A *supra*. No portion of the PHSA authorizes CDC and HHS to make every person flying into the United States obtain a negative COVID-19 test within one day of departure. Congress has never

enacted an ITTR. The PHSA authorizes "inspection … of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings." 42 CFR § 264(a). Humans are not animals or articles, and the testing is directed at *all* international air passengers, not those "found to be so infected or contaminated" with a disease. Even if the statute did authorize testing as "inspection," it would only be allowed for "arriving passengers," not those air travelers *departing* foreign nations. 42 CFR § 71.32(b).

> "[T]he [PHSA] codifies the limited regulatory power typical of preventing diseases caused by a discrete item or a person at ***a major port of entry***. … The text of the [PHSA] lends support to a narrower quarantine power for CDC. … The second sentence of Section 264(a) discloses, illustrates, exemplifies, and limits to measures similar in scope and character the measures contemplated and authorized by Congress when enacting the statute. *Yates v. United States*, 574 U.S. 528, 546 (2015) (applying specific statutory terms to cabin the meaning of a broad statutory term)." *Florida* (emphasis added).

"Congress directed the actions set forth in Section 361 to certain ***animals or articles***, those so infected as to be a dangerous source of infection to people. On the face of the statute, the agency must direct other measures to specific targets 'found' to be sources of infection – not to amorphous disease spread but, for example, to ***actually infected animals*** …" *Skyworks v. CDC*, No. 5:20-cv-2407 (N.D. Ohio March 10, 2021) (emphasis added).

> "Neither the plain language of § 7301 nor any traditional notion of personal liberty would tolerate such a sweeping grant of power. … no arm of the federal government has ever asserted such power. … A lack of historical precedent tends to be the most telling indication that no authority exists. … The government has offered no answer – no limiting principle to the reach of the power they insist the President enjoys. For its part, this court will say only this: however extensive that power is, the federal-worker mandate exceeds it." *Feds for Medical Freedom*.

Government "actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner." *South Bay* (Gorsuch, J.).

If the Court finds the PHSA does authorize the ITTR, it should find that § 361 is an unconstitutional delegation of legislative power. Doc. 188 at ¶¶ 404-412.

I. Count 10: The ITTR does not comply with the notice-and-comment process that is mandatory under the APA.

I incorporate by reference my arguments in Section B *supra*. The ITTR suffers the same fatal procedural flaw as the FTMM. It's a legislative rule – but hasn't been adopted into the Code of Federal Regulations – because it prevents me from flying into my country of citizenship without obtaining an expensive, time-consuming, and unnecessary COVID-19 test. Any U.S. citizen who is unable to submit a negative COVID-19 test taken within a day before boarding a flight to the United States is ***banned from entering our own country*** in violation of international law. Doc. 188 at ¶¶ 255-260. Such rapid testing is not available in many countries in the world, including regions of the United States. *Id*. at 288-297 & Ex. 134.

> "Violation of the [CSO] triggers a serious consequence… The [CSO] is a rule … The APA therefore obligates CDC to … provide notice and comment. … To satisfy its notice-and-comment obligations under the APA, 'an agency must consider and respond to significant comments received during the period for public comment.' *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Therefore, the [CSO] violates the APA…" CDC lacked 'good cause' to evade the statutory duty of notice and comment." *Florida*.

Good cause does not excuse CDC's failure to comply with the process. 5 U.S.C. § 553(b)(3)(B). The latest version challenged in my Amended Complaint was put

into place to supposedly stop the Omicron variant of COVID-19 from entering the United States, but public comments would have revealed this plan was destined to fail. CDC admits that 99% of new coronavirus infections in the past month are the Omicron variant. The ITTR did not stop it from entering America. Public comments would have made this clear. Doc. 219.

J. Count 11: The ITTR is arbitrary, capricious, and an abuse of discretion.

I incorporate by reference my arguments in Section C *supra*. I also incorporate the facts stated in ¶¶ 285-303 & 397-403 of the Amended Complaint. Doc. 188. The Federal Defendants' actions in promulgating the ITTR are not rational, reasonably considered, or reasonably explained. Interestingly the ITTR directly contradicts the FTMM. If masks are effective in stopping COVID-19 transmission as the government argues, then there's no need for a testing requirement because everyone flying muzzled would not spread the virus. The Federal Defendants did not consider the devastating consequences of being stranded in a foreign nation without access to rapid testing to meet the strict one-day timeframe.

The Federal Defendants also fail to explain why fully vaccinated and/or boosted Americans flying home need a COVID-19 test to enter the country but not illegal aliens (who are mostly unvaccinated and much more likely to be infected)[6] and

[6] U.S. Customs & Border Protection apprehended 1,855,023 illegal immigrants at the southern border since the ITTR took effect in January 2021. https://tinyurl.com/4286et4h (visited Dec. 28, 2021). Not subjecting these illegal aliens to the ITTR but enforcing it on American citizens flying into the country is the utter definition of a severe abuse of agency discretion.

others crossing the land borders from Mexico and Canada. Nor why the requirement doesn't apply to travelers arriving by sea when cruiseships have long been a hotbed of coronavirus infections. Yet studies have shown airplanes are among the safest places you can be during the pandemic. Doc. 188 at ¶¶ 144-162.

Numerous travel-industry organizations have called on CDC to repeal the ITTR, noting the destruction it has caused with foreign travel down 75% in 2021 compared to 2019, in large part due to the ITTR. Doc. 219. CDC failed to consider the damage the ITTR causes one of the economy's sectors most impacted by the virus. Also the groups agree with my argument that the ITTR is completely ineffective in stopping the spread of new COVID-19 variants from foreign countries into the United States, another important factor CDC failed to consider. *Id*.

1. The ITTR interferes with the constitutional right to travel.

The ITTR is an abuse of discretion because an agency may not issue orders that violate constitutional rights. I incorporate by reference my arguments in Section F *supra*. Like the FTMM, the ITTR violates my constitutional right to travel internationally, a right this Court has already recognized. Doc. 187 at 17. The ITTR also violates international law. Doc. 188 at ¶¶ 298-303. The ITTR "therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil,' *cf. Cantwell v. Connecticut*, 310 U.S. 307." *Aptheker v. Secretary of State,* 378 U.S. 500 (1964).

2. The ITTR violates the Food, Drug, & Cosmetic Act.

I incorporate by reference my arguments in Section H *supra*. Like the FTMM, the ITTR violates the FDCA because most COVID-19 tests available in the United States – including the ones being sent by the Biden Administration free to any American household who requests them – are approved by FDA only for emergency use. Therefore, I have to right to refuse to use the product. Since the ITTR applies only overseas, FDA has no oversight on what types of tests are used in foreign countries and has no way to verify whether they meet any U.S. standards.

CONCLUSION

WHEREFORE, I request this Court grant me summary judgment on Counts 1-12 against Defendants CDC and HHS and enter an order granting Sections A-F and I-K in the Amended Complaint's Prayer for Relief. Doc. 188 at 86-89. Worldwide *vacatur* is the appropriate remedy under the Administrative Procedure Act since the agency acted unlawfully. *Alabama Ass'n of Realtors*.

Respectfully submitted this 16th day of February 2022.

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