UNITED STATES COURT OF APPEALS
FOR THE 11th CIRCUIT

LUCAS WALL,	:	
	:	
Appellant,	:	
	:	
v.	:	Case No. 22-11532-BB
	:	
CENTERS FOR DISEASE CONTROL & PREVENTION *et al.*	:	
	:	
Appellees.	:	

BRIEF OF *AMICI CURIAE* 3 DUAL CITIZENS IN SUPPORT OF APPELLANT'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL AGAINST APPELLEES CDC & HHS

I. OUR INTEREST IN THE CASE

Friends of the Court are three dual citizens who are subject to Appellees Centers for Disease Control & Prevention ("CDC")'s and Department of Health & Human Services ("HHS")' International Traveler Testing Requirement ("ITTR") challenged by Appellant Lucas Wall: Uri and Yvonne Marcus, dual citizens of America and Israel; and Kleanthis Andreadakis, dual citizen of America and Greece.

MR. & MRS. MARCUS: Uri and Yvonne[1] Marcus, husband and wife, are U.S. citizens who reside most of the year at Shmu'el Lupo 6/18, Jerusalem, Israel 9355006. They maintain both a residential address and a business address in the United States. They are travelers subject to the ITTR.

Mr. Marcus was last in the United States from Nov. 20 to Dec. 9, 2020. He has not returned to his homeland since the initial ITTR version took effect Jan. 12, 2021, because he objects to having to undergo an invasive test as a condition of checking in for his flight, and is concerned about significant airline change fees if he can't find a test in time or receives a false positive result, stranding him for several days in Israel and missing planned time with family and business associates in America.

Mrs. Marcus was last in the United States from July 30 to Sept. 4, 2021. She was subjected to the ITTR upon her departure from Israel despite her lack of consent to use an Emergency Use Authorization or unauthorized medical device. She has not returned to the USA since September 2021 due to the same concerns as her husband regarding the unlawful ITTR.

[1] In Israel, Mrs. Marcus in also known as "Adi Marcus" – her legal Hebrew name on her Israeli passport – to her physicians, friends, family, and government authorities.

Mr. and Mrs. Marcus are challenging CDC's ITTR and the Federal Transportation Mask Mandate ("FTMM") along with three other plaintiffs. *Marcus v. CDC*, No. 2:22-cv-2383 (C.D. Calif.). Along with one other petitioner, Mr. Marcus is also attacking the Transportation Security Administration ("TSA")'s enforcement of the FTMM. *Marcus v. TSA*, No. 21-1225 (D.C. Cir.)

MR. ANDREADAKIS: Kleanthis Andreadakis maintains a permanent residence in Virginia but travels at least once per year to Greece to take care of required family business matters. His family also owns a home in Greece that requires annual maintenance. He is a traveler subject to the ITTR.

For his Nov. 26, 2021, flight from Athens, Greece, to Newark, New Jersey, he was forced to submit a negative COVID-19 test due to the ITTR over his objections. This test cost him €60 ($67), which CDC and HHS won't reimburse. Like the Marcuses, he objects to forced use of emergency or unauthorized medical products and is concerned about being stranded in Greece during his next trip there, which is likely to occur in June or July, because of the ITTR. He also objects to the cost of testing, which makes traveling to his ancestral homeland more expensive.

Mr. Andreadakis is challenging the ITTR and FTMM. *Andreadakis v. CDC*, No. 3:22-cv-52 (E.D. Va.). Along with one other petitioner, he is also attacking TSA's mask orders. *Andreadakis v. TSA*, No. 21-1237 (D.C. Cir.).

We support Mr. Wall's arguments, shared by *amici curiae* 309 Pilots & Flight Attendants, that the ITTR is *ultra vires* and should be enjoined world-wide, just as happened to the FTMM. *Health Freedom Defense Fund v. Biden*, No. 8:21-cv-1693 (M.D. Fla. April 18, 2022).

II. STATEMENT OF FACTS

1. Without providing public notice or soliciting comment, on Jan. 12, 2021, Appellee CDC announced an order (the ITTR) requiring all passengers flying to the United States from a foreign country to get tested no more than three days before their flight departs and to present the negative result (or documentation of having recovered from COVID-19) to the airline before boarding the plane.
2. The day after taking office (Jan. 21, 2021), President Biden issued "Executive Order Promoting COVID-19 Safety in Domestic & International Travel." E.O. 13998, 86 Fed. Reg. 7,205 (Jan. 26, 2021). This Executive Order directed the ITTR be continued.
3. The slightly revised ITTR (Biden Administration Version 1) took effect Jan. 26, 2021. 86 Fed. Reg. 7,387 (Jan. 28, 2021).
4. Version 2 of the ITTR took effect Nov. 8, 2021. It made a minor change: modifying the requirement for unvaccinated flyers to get tested within one

day of departure (keeping the mandate at three days for fully vaccinated passengers).

5. CDC amended the ITTR order again, effective Dec. 6, 2021. This is Version 3[2] that is presently in effect and is challenged in this case: CDC Order "Requirements for Negative Pre-Departure COVID–19 Test Result or Documentation of Recovery from COVID–19 for All Airline or Other Aircraft Passengers Arriving into the United States from Any Foreign Country." 86 Fed. Reg. 69,256 (Dec. 7, 2021).
6. This latest edition made another slight change: requiring all passengers, regardless of vaccination status, to submit a negative COVID-19 test taken within one day of departure.
7. Before checking in for an international flight to the United States, CDC requires travelers to complete a "Passenger Disclosure & Attestation to the United States of America" form. All airlines must provide the disclosure to their passengers and collect the attestation prior to embarkation.
8. CDC prohibits airlines from boarding any passenger who does not submit the form with an accompanying negative COVID-19 test taken within one

[2] These three editions (January 2021, November 2021, and December 2021) apply worldwide. There were prior iterations of the ITTR that applied only to airline passengers departing certain foreign countries.

day of departure, detaining and quarantining such a traveler in a foreign country.

9. Congress has explicitly declined to require COVID-19 testing of international air travelers. There is no law authorizing the ITTR.

III. ARGUMENT

A. The International Traveler Testing Requirement is not authorized by the Public Health Service Act.

As part of their response to the COVID-19 pandemic, CDC and HHS issued a nationwide Eviction Moratorium ("EM") based on 42 USC § 264(a), which is part of the Public Health Service Act ("PHSA"). Likewise, as authority for the ITTR, the agencies invoked that statute and two regulations implementing it.

Numerous federal courts struck down the EM, which 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. This Court also strongly signaled it disagrees with CDC's broad reading of § 264(a). Although not a merits decision, the dissenting judge on a 2-1 panel concluded CDC exceeded its authority by ordering the EM. And the two judges who denied a PI wrote: "We have doubts about the district court's rul-

ing on the first factor: whether the plaintiffs are likely to succeed on the merits. … the second sentence of § 264(a) appears to clarify any ambiguity about the scope of the CDC's power under the first." *Brown v. HHS*, No. 20-14210 (11th Cir. July 14, 2021). The government 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 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).

The Middle District of Florida enjoined CDC's Conditional Sailing Order ("CSO") regulating cruiseship operations. "[I]f CDC promulgates regulations

[3] *Tiger Lily v. HUD*, No. 2:20-cv-2692, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021), aff'd 992 F.3d 518 (6th Cir. July 23, 2021); *Alabama Ass'n of Realtors v. HHS*, No. 20-cv-3377 (D.D.C. May 5, 2021), aff'd No. 21A23 (U.S. Aug. 26, 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).

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). "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." *Id.*

Virus testing does not comport to the statute's allowance for CDC to require the "inspection … 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). 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.

> "[§ 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 into law a requirement that airline travelers undergo virus testing before departing a foreign country. Executive agencies 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 v. HHS*, No. 20-cv-3377 (D.D.C. May 5, 2021).

The regulations CDC and HHS cite to authorize the ITTR do no such thing. Like the statute, they only allows inspection "of animals or articles," not measures such as forced testing directed at human beings.

Mandatory virus testing means CDC is imposing quarantine and detention of travelers in foreign nations. But the statute CDC relies on to justify the requirement permits no such thing. Virus testing is not an enumerated measure in 42 USC § 264(a). CDC cited only § 264(a) as authority for the

ITTR, not any other sections. 86 Fed. Reg. 69,260. So the Court need not consider them.

Also important is that § 264(d) allow CDC and HHS to "provide for the apprehension and examination of any individual ***reasonably believed to be infected with a communicable disease***." (emphasis added). But the ITTR applies to all passengers, not those reasonably believed to be infected with COVID-19.

B. The International Traveler Testing Requirement is an improper delegation of legislative power.

If the Court upholds the lower court's decision that the Public Health Service Act does authorize the ITTR, then it must declare the PHSA unconstitutional as an improper delegation of legislative power by Congress to the Executive Branch.

The U.S. Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. Under the nondelegation doctrine, Congress cannot transfer legislative power to the Executive Branch. Acts of Congress must supply an intelligible principle to guide the Executive Branch's enforcement discretion.

If the Court finds it does authorize the ITTR, PHSA § 361 (42 U.S.C. § 264) violates Article I's Vesting Clause and the separation of powers because Congress delegated legislative power to CDC and HHS with no intelligible principle to guide their discretion. That section authorizes CDC "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases … from one State or possession into any other State or possession." 42 U.S.C. § 264(a). The statute further provides that CDC may take certain specific measures as well as "other measures, as in [its] judgment may be necessary." *Id.*

If § 264 is so broad as to authorize the ITTR, then Congress provided no intelligible principle to guide CDC's discretion to take actions that "are" or "may be necessary" to "prevent the introduction, transmission, or spread of communicable diseases." *Id.* Vesting CDC with such broad authority and discretion without an intelligible principle violates the nondelegation doctrine.

Notably Congress has declined numerous times during the 26-month-long COVID-19 pandemic to enact into law any traveler testing requirement. Therefore, the Court should enjoin the ITTR because it is "found to be … contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

C. The International Traveler Testing Requirement violates the Administrative Procedure Act's requirements for notice and comment.

The ITTR is an "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 USC § 704. It represents the consummation of CDC's decision-making process with respect to requiring testing for anyone flying into the United States. And it affects our legal rights and obligations because it prevents us from flying into the USA without obtaining an expensive, time-consuming, and demonstratively unreliable COVID-19 test.

The APA requires agencies to issue rules through a notice-and-comment process. 5 USC § 553. The ITTR is a rule within the meaning of the APA because it is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 USC § 551(4). CDC issued the ITTR without engaging in the notice-and-comment process. 5 USC § 553. Good cause does not excuse CDC's failure to comply with the notice-and-comment process. 5 USC § 553(b)(3)(B).

> "Precedent demonstrates how infrequently the exception should receive acceptance. *See, e.g., Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981) ('[A]dministrative agencies should remain conscious that such emergency situations are indeed rare.'); *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) (explaining that the circumstances permitting reliance on the 'good

> cause' exception are exceedingly 'rare'). ... The 'good cause' exception, 'narrowly construed and only reluctantly countenanced,' *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)), excuses the APA's notice-and-comment procedures in an 'emergency situation.' *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)." *Florida v. Becerra*.

Had the agency permitted comments as required, thousands of dual citizens such as ourselves would have objected to the ITTR because the requirement is an unreasonable restriction on our constitutional right to travel and our right to enter and leave our countries of citizenship under international law.

We join Mr. Wall's and the other *amici*'s contention that good cause does not excuse CDC's failure to comply with the notice-and-comment process for the ITTR because the agency had 10 months to give notice, solicit comments, respond to those comments, and publish a regulation in the Code of Federal Regulations from the date the World Health Organization declared COVID-19 a global pandemic (March 11, 2020) until the date the ITTR first took effect in January 2021. 5 USC § 553(b). *Health Freedom Defense Fund*. And Version 3 of the ITTR took effect in December 2021, 21 months into the pandemic.

> "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 fur-

> ther 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." *Health Freedom Defense Fund*.

The Court should hold unlawful and enjoin the ITTR because it violates the APA's notice-and-comment requirement. 5 USC § 706(2)(D).

D. The International Traveler Testing Requirement is arbitrary and capricious because CDC and HHS fail to explain why it doesn't apply to travelers entering the United States by land and sea, they don't acknowledge it imposes significant financial and time burdens on travelers for no discernable benefit, and refuse to consider that the policy can leave American citizens detained and quarantined abroad indefinitely.

The administrative record shows that CDC and HHS failed to consider the burden of requiring all airline passengers to obtain a negative COVID-19 test within one day of departure. CDC and HHS have not explained why the ITTR applies only to air travel, not to those entering the United States by land or sea, including illegal aliens crossing the southern border from Mexico to the United States, who are much more likely to be unvaccinated than U.S. citizens flying home from abroad.

CDC and HHS have not presented any evidence that air travelers pose a greater risk to bringing COVID-19 into the country than land and sea passengers. Numerous COVID-19 outbreaks among illegal immigrants detained

by the U.S. Border Patrol along the Mexican border as well as passengers and crew aboard cruise ships docking in the United States illustrate this point.

The ITTR imposes significant financial and time burdens on international air travelers. However, there is no benefit as the purported reason for the latest version of the ITTR – to stop the Omicron coronavirus variant from entering the United States – is moot because the variant was already widely circulating domestically in December 2021.

If a passenger is in a country or region where rapid COVID-19 testing is not available and it's impossible to obtain a test result within a day of departure, the ITTR prohibits that person (including U.S. citizens) from flying to the United States indefinitely because the ITTR contains no exemption process for such a situation.

When an American citizen visits a foreign country, he/she has no guarantee that he/she will ever be able to return home due to the ITTR's stringent one-day testing requirement. This is a major concern for the three of us.

The ITTR provides no exemptions in the case a country or region that normally does have rapid coronavirus testing availability experiences a shortage of available COVID-19 tests.

Unavailability of rapid testing is hardly speculative. It has occurred right here in the United States. "[T]he U.S. finds itself in the midst of yet another

coronavirus test shortage, with consumers facing limited sales at retailers and long lines at testing centers." "The confusion has frustrated some public health professionals who say there simply aren't enough kits to permit people who are sick, those exposed to someone who has been infected with the virus, and people who want to travel and attend gatherings to get tested."

President Biden admitted finding rapid COVID-19 tests is a "real challenge" and "the need is great to do more in terms of the rapid tests and the availability of it."

CDC does not reimburse travel expenses as a result of canceled or delayed travel because of COVID-19 testing requirements for air passengers flying to the United States. CDC won't pay travelers the costs of new plane tickets, lodging, meals, and other expenses as a result of being detained in a foreign country as a result of the ITTR.

CDC also does not reimburse travelers for COVID-19 testing fees, which can cost as much as $200 depending on the location and type of test. If an airline passenger pays $200 for a coronavirus test and the results do not come back within a day, not only does that person have to pay for another airline ticket, lodging, and meals, he/she must also pay $200 for another virus test – with no guarantee the results will come in time.

If a flight is canceled or delayed until the next day, an airline passenger is forced to obtain another expensive COVID-19 test. The ITTR makes no exceptions for situations like this wholly outside passengers' control.

The Court should hold unlawful and set aside the ITTR because it is arbitrary, capricious, and an abuse of discretion. 5 U.S.C. § 706(2)(A). *Health Freedom Defense Fund.*

E. The International Traveler Testing Requirement interferes with Americans' constitutional right to travel internationally.

The ITTR imposes unnecessary government restrictions on our constitutional right to travel internationally. This is especially a concern because we are dual citizens of the United States and another country. If we are abroad and can't obtain a rapid COVID-19 test, we are prohibited from flying home to the United States despite holding a U.S. passport.

> "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. There are no other reasonably modes of traveling between the United States, Germany, Greece, Israel, and most other foreign countries besides airplanes.

> "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 Supreme Court has spoken forcefully on the issue of pandemic restrictions that violate constitutional rights. An American is "irreparably harmed by the loss of [constitutionally protected] rights 'for even minimal periods of time'; the State has not shown that 'public health would be imperiled' by employing less restrictive measures." *Tandon v. Newsom*, No. 20A151 (April 9, 2021).

The Court should declare the ITTR is unconstitutional because it violates the freedom to travel. An injunction should then follow because the ITTR is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

F. The International Traveler Testing Requirement violates the International Covenant on Civil & Political Rights by interfering with several fundamental human rights established by treaty.

As recognized in the ITTR, most – if not all – COVID-19 tests are experimental medical products authorized by FDA only for emergency use. The federal government provides rapid-test kits to U.S. citizens at no cost through the mail. However, these tests are issued by FDA under an EUA, making their use optional. They are also not accepted by airlines to comply with the ITTR because they are self-administered, with no paperwork from a doctor's office, hospital, clinic, or testing center to confirm the specimen.

Not only does forced use of an emergency medical product without our consent violate the Food, Drug, & Cosmetic Act, it breaks America's commitment to basic human rights under international law: "[N]o one shall be subjected without his free consent to medical or scientific experimentation." ICCPR Art. 7.

Congress has not passed a law requiring airline passengers be refused transportation unless they present a negative COVID-19 test. However, "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." ICCPR Art. 9.

"2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those

which are provided by law… 4. No one shall be arbitrarily deprived of the right to enter his own country." ICCPR Art. 12.

The ITTR restricts our liberty of movement including the freedom to enter and re-enter our country(ies) of citizenship. Just like Mr. Wall, who travels abroad often to visit his brother who lives in Germany, we fly frequently between the United States and Israel and Greece.

In carrying out all federal aviation laws, the Executive Branch "shall act consistently with obligations of the United States Government under an international agreement." 49 USC § 40105(b)(1)(A). This should make the ICCPR binding law in the United States when it concerns the aviation sector, even if courts have determined the treaty is not ordinarily "self-executing" in other circumstances.

The Court should hold unlawful and enjoin the ITTR because it violates the ICCPR treaty.

G. The International Traveler Testing Requirement violates the Food, Drug, & Cosmetic Act.

As the airline worker *amici* point out, the Food, Drug, & Cosmetic Act ("FDCA") protects all Americans' right to refuse administration of a Food & Drug Administration ("FDA") unauthorized or Emergency Use Authorization ("EUA") medical device. All rapid COVID-19 tests used by travelers to

comply with the ITTR are authorized by FDA only for emergency use, or have no authorization whatsoever since they are obtained by passengers in foreign countries, where FDA has no control over the quality of the tests.

The ITTR acknowledges that many COVID-19 tests are only approved for emergency use. "Viral Test means a viral detection test for current infection (i.e., a nucleic acid amplification test or a viral antigen test) cleared, approved, or issued an emergency use authorization (EUA) by the U.S. Food and Drug Administration…"

Since the ITTR only applies in foreign countries, there is no way for an airline passenger to determine if the FDA, which lacks jurisdiction outside the United States, authorizes a testing procedure. CDC and HHS have no way to verify the authenticity and reliability of COVID-19 tests manufactured abroad without FDA authorization.

The ITTR violates the FDCA by not giving passengers our legal option to refuse administration of an FDA unauthorized or EUA medical device. 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).

"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).

The Court should enjoin the FTMM because it violates the FDCA, making it "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 USC § 706(2)(C).

H. Mr. Wall will continue suffering irreparable harm if the Court doesn't enjoin the International Traveler Testing Requirement. Doing so is also in the public interest.

Mr. Wall has been denied the ability to visit his brother in Germany since January 2021 because of the ITTR (as well as the FTMM, which thankfully was vacated April 18 in *Health Freedom Defense Fund*). Like us, he is concerned about the high cost of virus testing and being stranded, detained, and quarantined by CDC in a foreign country if he can't find a rapid test or obtains a false positive from tests that are not FDA regulated and are, at best, approved only for emergency use – for which federal law guarantees anyone the right to refuse use of such a product. In and of itself, the cost of testing to comply with the *ultra vires* ITTR is a substantial irreparable injury since CDC and HHS don't reimburse testing costs and Mr. Wall can't obtain a monetary judgment against them under the Administrative Procedure Act.

Whereas Mr. Wall has been deprived of his constitutional right to freedom of travel and his procedural right to give comments on proposed CDC orders that directly impact him, *inter alia*, the government would suffer no harm if

the Court grants a PI. And as the Supreme Court has made clear many times during this pandemic, it's in the public interest to enjoin agency mandates that Congress has never authorized to ensure our constitutional system of government survives a crisis.

It's in the public interest to enforce congressional intent. There is no law requiring any traveler get tested for COVID-19. "[I]t is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could." *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021) (Gorsuch, J.).

Airlines, hotels, chambers of commerce, and many others have been urging the Biden Administration for months to do away with the ITTR: "Pre-departure testing is no longer an effective measure in protecting the United States from COVID-19. This requirement provides little health benefit, yet discourages travel by imposing an additional cost, as well as a fear of being stranded overseas." Appendix at Doc. 272.

IV. CONCLUSION

This Court should not allow such a broad reading of 42 USC § 264(a) that would permit CDC to force all air travelers to endure virus testing in a foreign nation or be detained and quarantined. We join Mr. Wall and the other 309 Friends of the Court in urging the Court to enjoin the ITTR pending appeal.

The only proper decision here is a worldwide preliminary injunction. *Health Freedom Defense Fund*.

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

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.).

Universal injunctions against federal agency action are appropriate when "the public interest would be ill-served … by requiring simultaneous litigation of this narrow question of law in countless jurisdictions." *Chicago v. Sessions*, 888 F.3d 272, 292 (7th Cir. 2018). "The nature of the injury is a valid consideration in determining the proper scope of injunctive relief. … [T]he executive's usurpation of the legislature's power … implicates an interest that is fundamental to our government and essential to the protection against tyranny." *Chicago v. Barr*, 961 F.3d 882, 919 (7th Cir. 2020).

Respectfully submitted this 9th day of May 2022.

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V. CERTIFICATE OF INTERESTED PERSONS

We certify that we concur with the CIP filed May 7 by Mr. Wall.

VI. CERTIFICATE OF COMPLIANCE

We certify that this *amicus curiae* support of a motion complies with the requirements of FRAP 27(d) because it has been prepared in 14-point Georgia, a proportionally spaced font, and it conforms with the limit of 5,200 words because this document contains 5,196 words, according to Microsoft Word (excluding sections not counted pursuant to FRAP 32(f)).

Also, in compliance with FRAP 29(a)(2), we received consent from Appellant Lucas Wall and appellee's counsel Alisa Klein to file this *amicus* brief.