No. _______

In the Supreme Court of the United States

LUCAS WALL,

APPLICANT,

v.

CENTERS FOR DISEASE CONTROL & PREVENTION,
DEPARTMENT OF HEALTH & HUMAN SERVICES,
TRANSPORTATION SECURITY ADMINISTRATION,
DEPARTMENT OF HOMELAND SECURITY,
DEPARTMENT OF TRANSPORTATION, and
JOSEPH BIDEN, in his official capacity of president
of the United States of America,

RESPONDENTS.

To the Honorable Clarence Thomas
Associate Justice of the U.S. Supreme Court
& Circuit Justice for the 11th Circuit

**EMERGENCY APPLICATION FOR WRIT OF INJUNCTION
RELIEF REQUESTED BY FRIDAY, JULY 16, 2021**

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I. INTRODUCTION

Applicant Lucas Wall, who is fully vaccinated against COVID-19, asks this Court to grant him a preliminary injunction to stop the Federal Defendants[1] from enforcing the Federal Transportation Mask Mandate ("FTMM")[2] nationwide (or, in the alternative, specifically against him) until the U.S. District Court for the Middle District of Florida can decide his case on the merits.

I respectfully ask for relief no later than Friday, July 16, because I have a flight booked to Germany on Saturday, July 17, to visit my brother and his wife. App. 8. I've already had to postpone this trip twice because I haven't been able to obtain preliminary injunctive relief from the District Court or the U.S. Court of Appeals for the 11th Circuit. If this Court does not grant me relief, I will have to cancel this and another upcoming trip to Seattle, Washington (App. 9), until at least September because the District Court has indicated it will not even consider providing any relief until then.

"Due to my Generalized Anxiety Disorder, I have never covered my face. I tried a mask a couple times for brief periods last year, but had to remove it after five or so

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[1] The Federal Defendants named in this case are: Centers for Disease Control & Prevention, Department of Health & Human Services, Transportation Security Administration, Department of Homeland Security, Department of Transportation, and President Joseph Biden.

[2] The Federal Transportation Mask Mandate consists of: 1) Executive Order 13998, 86 Fed. Reg. 7205 (Jan. 26, 2021); 2) Department of Homeland Security Determination 21-130 (Jan. 27, 2021); 3) Centers for Disease Control & Prevention Order "Requirement for Persons To Wear Masks While on Conveyances & at Transportation Hubs," 86 Fed. Reg. 8,025 (Feb. 3, 2021); 4) Transportation Security Administration Security Directives 1542-21-01A, 1544-21-02A, and 1582/84-21-01A (May 12, 2021); and 5) TSA Emergency Amendment 1546-21-01A (May 12, 2021).

minutes because it caused me to instigate a feeling of a panic attack, including hyperventilating and other breathing trouble. I have been illegally restricted from flying during the last year of the COVID-19 pandemic because of my inability to wear a mask, especially since the FTMM took effect Feb. 1, 2021." Wall Declaration, attached hereto as App. 7, at ¶¶ 5-6. I've been fully vaccinated against coronavirus since May 10, 2021. *Id*. at ¶ 8.

This Court has issued at least five emergency injunctive orders in the past seven months unequivocally holding that governments may not restrict First Amendment rights even in the name of fighting a pandemic. Today I ask the Court to also hold that other constitutional rights – including the freedom to travel, to due process, and states' rights under the 10th Amendment – also can't be suspended by the Federal Defendants because of COVID-19. Because of the Federal Government's unlawful issuance of orders without congressional, statutory, regulatory, or constitutional authority, this Court must immediately enjoin enforcement of the FTMM.

II. PARTIES

Applicant is Lucas Wall, Plaintiff in the U.S. District Court for the Middle District of Florida and Appellant in the U.S. Court of Appeals for the 11th Circuit. I reside in Washington, D.C., but am currently stranded at my mother's residence in The Villages, Florida, because the Federal Defendants banned me from boarding a flight out of Orlando International Airport on June 2, 2021, solely because I can't wear a face mask due to my Generalized Anxiety Disorder. Videos of the incident are posted to my YouTube channel at https://bit.ly/LucasMaskLawsuitPL.

Respondents are the Centers for Disease Control & Prevention ("CDC"); Department of Health & Human Services ("HHS"); Transportation Security Administration ("TSA); Department of Homeland Security ("DHS"); Department of Transportation ("DOT"); and Joseph Biden, in his official capacity as president of the United States of America (collectively "the Federal Defendants").

The other two Defendants in District Court – Greater Orlando Aviation Authority and Central Florida Regional Transportation Authority – are not a party to this application since I do not seek injunctive relief on my claims against them for violating Florida law by enforcing a mask mandate.

III. JURISDICTION

This Court has jurisdiction to grant this application for injunctive relief pursuant to 28 USC § 1651. I already exhausted my petition for permission to appeal to the U.S. Court of Appeals for the 11th Circuit pursuant to 28 USC §1292(b) and my interlocutory appeal pursuant to 28 USC § 1292(a).

IV. DECISIONS BELOW

All decisions in the lower courts in this case are styled *Wall v. Centers for Disease Control & Prevention*.

1. The June 15, 2021, order of the U.S. District Court for the Middle District of Florida denying my Emergency Motion for Temporary Restraining Order (Doc. 28)[3] is attached hereto at App. 1.

[3] Throughout this application, "Doc." refers to the Docket/Document number in the record of the U.S. District Court for the Middle District of Florida, Case No. 6:21-cv-975-PGB-DCI.

2. The June 22 order of the U.S. District Court for the Middle District of Florida striking my two Motions for Preliminary Injunction (Doc. 55) is attached hereto at App. 2.
3. The June 29 order of the U.S. District Court for the Middle District of Florida denying my Motion to Vacate the order striking my two Motions for Preliminary Injunction (Doc. 67) is attached hereto at App. 3.
4. The June 28 order of the U.S. Court of Appeals for the 11th Circuit denying my Emergency Petition for Permission to Appeal and Emergency Motion for Preliminary Injunction or, in the Alternative, for Temporary Restraining Order (Petition Docket 4)[4] is attached hereto at App. 4.
5. The June 30 order of the U.S. Court of Appeals for the 11th Circuit dismissing my interlocutory appeal and Motion for Preliminary Injunction or, in the Alternative, Temporary Restraining Order (Appeal Docket 7)[5] is attached hereto at App. 5.
6. The June 30 order of the U.S. Court of Appeals for the 11th Circuit denying my Emergency Motion to Reconsider the Court's Order Dismissing the Appeal for Lack of Jurisdiction (Appeal Docket 10) is attached hereto at App. 6.

[4] Throughout this application, "Petition Docket" refers to the docket number in the record of the U.S. Court of Appeals for the 11th Circuit, Case No. 21-90017.

[5] Throughout this application, "Appeal Docket" refers to the docket number in the record of the U.S. Court of Appeals for the 11th Circuit, Case No. 21-12179

V. QUESTIONS PRESENTED

1. Does Applicant Lucas Wall have a substantial likelihood of success on the merits of his claims that the FTMM must be vacated because the Federal Defendants issued it: 1) without notice and comment required by the Administrative Procedure Act ("APA") (5 USC § 551 *et seq.*); 2) in violation of the Regulatory Flexibility Act ("RFA") (5 USC § 601 *et seq.*); 3) in an arbitrary and capricious manner in violation of the APA; 4) in excess of Defendant CDC's statutory authority under the Public Health Service Act ("PHSA"); 5) in excess of Defendant TSA's statutory authority to ensure transportation security; 6) in violation of the Air Carrier Access Act ("ACAA") and its underlying regulations promulgated by Defendant DOT; 7) in violation of the Constitution's separation of powers; 8) in violation of the constitutional freedom to travel; 9) in violation of the Fifth Amendment right to due process; and 10) in violation of the 10th Amendment?
2. Is Applicant Lucas Wall, who is fully vaccinated from COVID-19, suffering irreparable harm of being banned from the nation's entire public-transportation system due to the Federal Defendants' enforcement of the FTMM because he medically can't wear a face mask?
3. Does the injury to Applicant Lucas Wall outweigh the harm a preliminary injunction would inflict on the Federal Defendants if the Court enjoins enforcement of the FTMM until a final decision on the merits in the District Court?
4. Would entry of a preliminary injunction stopping the Federal Defendants from enforcing the FTMM serve the public interest?

VI. STATEMENT OF THE CASE

I filed suit June 7, 2021, in the U.S. District Court in Orlando, Florida, seeking to permanently enjoin enforcement of the FTMM and the International Traveler Testing Requirement[6] put into place by orders of the Federal Defendants. I also want to enjoin any requirement to wear face coverings issued by Defendant Greater Orlando Aviation Authority, which administers Orlando International Airport, and Defendant Central Florida Regional Transportation Authority, the public-transportation operator for the Greater Orlando region, as these mandates are in direct violation of a Florida executive order prohibiting any subdivision of the state from requiring face coverings.[7] Surprisingly, my lawsuit appears to be the first in the nation to challenge all aspects of the FTMM, so this is no doubt a case of first impression before the Court.

The Federal Defendants' goal of easing the impact of COVID-19 is laudable but grossly misguided. By mandating masks for all American travelers (regardless of coronavirus vaccination and/or natural immunity status), the Executive Branch acted without statutory authorization or following the rulemaking process required by the APA. The FTMM also raises serious constitutional concerns. Because of the FTMM, perhaps tens of millions of Americans such as myself who medically can't tolerate wearing a face mask are banned from using any mode of public transportation anywhere in the country, violating our constitutional right to freedom of movement and

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[6] The International Traveler Testing Requirement is not discussed further because I do not seek emergency injunctive relief from this Court to block its enforcement. This application focuses solely on the Federal Transportation Mask Mandate.

[7] As with the ITTR, I do not discuss further my claims against the Local Defendants because I do not seek emergency injunctive relief from this Court against them.

our Fifth Amendment right to due process. Also, numerous state, local, and regional transportation agencies are required to enforce a federal policy (forcing the fully vaccinated to wear masks) that is in direct conflict with the laws of 49 states, violating the 10th Amendment.

The Court should immediately enjoin the FTMM because it is an improper, illegal, and unconstitutional exercise of executive authority never authorized by Congress. The mask mandate is procedurally defective because the Federal Defendants adopted rules without following the APA's notice-and-comment requirements, failing to consider the impact on tens of millions of travelers with medical conditions and/or disabilities such as myself who can't cover our faces. They also ignored countless scientific and medical data showing that face masks are totally ineffective in reducing coronavirus spread (and are actually harmful to human health) as well as Defendant CDC's own updated guidance on masks for Americans who are fully vaccinated against COVID-19. Doc. 1 at Pl. Exs. 40, 114-166, & 184.

The FTMM exceeds Defendant CDC's statutory authority because § 361 of the PHSA (42 USC § 264) contains no authority to adopt a nationwide mask mandate for the transportation (or any other) sector. Congress never intended for the Executive Branch to have the authority to promulgate this policy – and even if it did, the mask mandate is unconstitutional.

This Court just spoke late last month concerning Defendant CDC's illegal use of the PHSA to prohibit evictions nationwide, a policy at least four district courts have vacated. *Alabama Association of Realtors v. HHS*, No. 20A169, 594 U. S. __ (June 29, 2021). Likewise, the Court must find here that CDC lacks authorization under 42

USC § 264)to require all passengers and employees on all transportation conveyances and in all transportation hubs nationwide wear masks – especially considering that most of these passengers and workers never cross state lines. But for the FTMM, they would be under no legal obligation to wear a mask because 49 of the 50 states do not currently require fully vaccinated people cover their faces. App. 11. Also, there is no state mask mandate for any person (vaccinated or not) in 40 states (10 states never imposed such a requirement; 30 states have repealed their mask mandates). *Id*.

Congress has enacted at least 20 laws directly concerning the coronavirus pandemic, yet none of these have authorized a mask mandate. The Federal Defendants may not exercise their authority in a manner that is inconsistent with the administrative structure that Congress has created.

The FTMM is arbitrary and capricious because the Federal Defendants failed to reasonably explain why other measures are insufficient to tackle the rapidly declining COVID-19 infection and death rates.

Finally, the FTMM raises serious constitutional questions including separation of powers, right to due process, the freedom to travel, and states' rights, among others. If the PHSA (42 USC § 264) confers such broad authority upon Defendant CDC to adopt these types of sweeping nationwide policies, the statute would violate the nondelegation doctrine because it contains no intelligible principle guiding CDC's exercise of its authority. The FTMM is also unconstitutional because it effectuates a taking of private property (transportation services paid for) without just compensation,

infringes on the freedom to travel, delegates enforcement and exemption decisionmaking to nonfederal entities, applies to wholly intrastate travel, and compels state employees to enforce federal orders.

VII. THE FEDERAL TRANSPORTATION MASK MANDATE

A. Presidential Action

The day after taking office, Defendant Biden issued Jan. 21, 2021, "Executive Order Promoting COVID-19 Safety in Domestic & International Travel." E.O. 13998, 86 Fed. Reg. 7205 (Jan. 26, 2021). This executive order set in motion the FTMM issued by Defendants CDC, HHS, TSA, DHS, and DOT.

> It "is the policy of my Administration to implement these public health measures consistent with CDC guidelines on public modes of transportation and at ports of entry to the United States." Heads of agencies "shall immediately take action, to the extent appropriate and consistent with applicable law, to require masks to be worn in compliance with CDC guidelines in or on: (i) airports; (ii) commercial aircraft; (iii) trains; (iv) public maritime vessels, including ferries; (v) intercity bus services; and (vi) all forms of public transportation as defined in section 5302 of title 49, United States Code." *Id*.

"To the extent permitted by applicable law, the heads of agencies shall ensure that any action taken to implement this section does not preempt State, local, Tribal, and territorial laws or rules…" *Id*. But, as noted above, the FTMM does pre-empt the current mask laws of 49 states.

Defendant Biden's action marked an abrupt change of policy from the former administration. Defendant DOT "in October [2020] rejected a petition to require masks on airplanes, subways, and other forms of transportation, with Secretary Elaine

Chao's general counsel saying the department 'embraces the notion that there should be no more regulations than necessary.'" Doc. 1 at Pl. Ex. 91.

"The nation's aviation regulator has deferred to airlines on masks, with Federal Aviation Administration chief Stephen Dickson telling senators at a June [2020] hearing 'we do not plan to provide an enforcement specifically on that issue.' Such matters are more appropriately left to federal health authorities, Dickson argued. 'As [then-DOT] Secretary Chao has said, we believe that our space is in aviation safety, and their space is in public health,' Dickson said, referring to the CDC and other health officials." *Id.*

B. Department of Homeland Security Action

To carry out E.O. 13998, Defendant DHS issued Determination 21-130 on Jan. 27, 2021, signed by David Pekoske, acting secretary of homeland security: "Determination of a National Emergency Requiring Actions to Protect the Safety of Americans Using & Employed by the Transportation System." Doc. 1 at Pl. Ex. 10.

Defendant DHS claims it possesses authority under 49 USC § 114(g) to determine that a national emergency exists. Pekoske directed Defendant TSA "to take actions consistent with the authorities in ATSA as codified at 49 USC sections 106(m) and 114(f), (g), (l), and (m) to implement the Executive Order to promote safety in and secure the transportation system." *Id*.

> "This includes supporting the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system, including passengers and employees, from COVID-19 and to mitigate the spread of COVID-19 through the transportation system, to the extent appropriate and consistent with applicable law. I specifically direct

> the Transportation Security Administration to use its authority to accept the services of, provide services to, or otherwise cooperate with other federal agencies, including through the implementation of countermeasures with appropriate departments, agencies, and instrumentalities of the United States in order to address a threat to transportation, recognizing that such threat may involve passenger and employee safety." *Id*.

C. Centers for Disease Control & Prevention Action

Without providing public notice or soliciting comment in violation of the APA, Defendant CDC (an agency within Defendant HHS) issued an order "Requirement for Persons To Wear Masks While on Conveyances & at Transportation Hubs" on Feb. 1, 2021, effective immediately. 86 Fed. Reg. 8,025 (Feb. 3, 2021); Doc. 1 at Pl. Ex. 11.

> Defendant CDC "announces an Agency Order requiring persons to wear masks over the mouth and nose when traveling on any conveyance (e.g., airplanes, trains, subways, buses, taxis, ride-shares, ferries, ships, trolleys, and cable cars) into or within the United States. A person must also wear a mask on any conveyance departing from the United States until the conveyance reaches its foreign destination. Additionally, a person must wear a mask while at any transportation hub within the United States (e.g., airport, bus terminal, marina, train station, seaport or other port, subway station, or any other area that provides transportation within the United States). Furthermore, operators of conveyances and transportation hubs must use best efforts to ensure that persons wear masks as required by this Order." *Id*.

Defendant CDC falsely asserts the FTMM is required to "mitigate the further introduction, transmission, and spread of COVID–19 into the United States and from one state or territory into any other state or territory…" *Id*.

"This Order will remain in effect unless modified or rescinded based on specific public health or other considerations, or until the Secretary of Health and Human Services rescinds the determination under section 319 of the Public Health Service Act (42 USC 247d) that a public health emergency exists." *Id*.

The current Public Health Emergency Declaration by Defendant HHS' secretary expires July 20, 2021 (however it appears Defendant HHS can extend it indefinitely so long as it believes COVID-19 presents a public-health emergency). Doc. 1 at Pl. Ex. 12.

As authority for the FTMM, Defendant CDC invoked § 361 of the PHSA (42 USC § 264) and CDC regulations implementing that statute (42 CFR §§ 70.2, 71.31(b), and 71.32(b)), but CDC provided no analysis of this authority in the FTMM Order. 86 Fed. Reg. 8,025 (Feb. 3, 2021); Doc. 1 at Pl. Ex. 11.

Defendant CDC's FTMM Order requires that:

> "(1) Persons must wear masks over the mouth and nose when traveling on conveyances into and within the United States. Persons must also wear masks at transportation hubs as defined in this Order. (2) A conveyance operator transporting persons into and within the United States must require all persons onboard to wear masks for the duration of travel. … (4) Conveyance operators must use best efforts to ensure that any person on the conveyance wears a mask when boarding, disembarking, and for the duration of travel. Best efforts include: • Boarding only those persons who wear masks; • instructing persons that Federal law requires wearing a mask on the conveyance and failure to comply constitutes a violation of Federal law; • monitoring persons onboard the conveyance for anyone who is not wearing a mask and seeking compliance from such persons; • at the earliest opportunity, disembarking any person who refuses to comply … (5) Operators of transportation hubs must use best efforts to ensure that any person entering or on the premises of the transportation hub wears a mask." *Id.*

Defendant CDC's FTMM Order defines "interstate traffic" as having "the same definition as under 42 CFR 70.1, meaning "(1): (i) The movement of any conveyance or the transportation of persons or property, including any portion of such movement or transportation that is entirely within a state or possession— (ii) From a point of

origin in any state or possession to a point of destination in any other state or possession …" *Id*. However, Defendant CDC's FTMM Order also applies to wholly intrastate transportation, including taking a rideshare, city bus, subway, or other mode of transit less than one mile – or even just sitting alone at a city bus stop or train station reading a newspaper or talking on a cellphone without any intent to travel. *Id*.

> "This Order applies to persons on conveyances and at transportation hubs directly operated by U.S. state, local, territorial, or tribal government authorities, as well as the operators themselves. U.S. state, local, territorial, or tribal government authorities directly operating conveyances and transportation hubs may be subject to additional federal authorities or actions, and are encouraged to implement additional measures enforcing the provisions of this Order regarding persons traveling onboard conveyances and at transportation hubs operated by these government entities." *Id*.

"Transportation hub means any airport, bus terminal, marina, seaport or other port, subway station, terminal (including any fixed facility at which passengers are picked-up or discharged), train station, U.S. port of entry, or any other location that provides transportation subject to the jurisdiction of the United States." *Id*. Thus stationery buildings that can't possibly move among the states are subject to the FTMM, in clear violation of the 10th Amendment and E.O. 13998's specific guidance that "To the extent permitted by applicable law, the heads of agencies shall ensure that any action taken to implement this section does not preempt State, local, Tribal, and territorial laws or rules…" 86 Fed. Reg. 7205 (Jan. 26, 2021).

Defendant CDC then delegated enforcement of the FTMM to Defendant TSA: "To address the COVID-19 public health threat to transportation security, this Order shall be enforced by the Transportation Security Administration under appropriate statutory and regulatory authorities including the provisions of 49 USC 106, 114,

44902, 44903, and 46301; and 49 CFR part 1503, 1540.105, 1542.303, 1544.305, and 1546.105." 86 Fed. Reg. 8,025 (Feb. 3, 2021); Doc. 1 at Pl. Ex. 11. However, Defendant CDC's FTMM Order does not cite any authority whereby it may delegate its supposed statutory authority to another governmental agency.

D. Transportation Security Administration Actions

Based on Defendant CDC's questionable delegation of its authority, Defendant TSA issued three security directives and one emergency amendment Feb. 1, 2021, to transportation operators requiring them to vigorously enforce the FTMM. These four orders were effective until May 11, 2021:

- SD 1542-21-01 "Security Measures – Mask Requirements" was issued to airport operators. Doc. 1 at Pl. Ex. 15.
- SD 1544-21-02 "Security Measures – Mask Requirements" was issued to aircraft operators. Doc. 1 at Pl. Ex. 16.
- EA 1546-21-01 "Security Measures – Mask Requirements" was issued to foreign air carriers for all flights to, from, or within the United States. Doc. 1 at Pl. Ex. 17.
- SD 1582/84-21-01 "Security Measures – Mask Requirements" was issued to operators of passenger railroads, intercity bus services, and public transportation. Doc. 1 at Pl. Ex. 18.

When Defendant TSA's FTMM security directives and emergency amendment expired May 11, the administration extended their effective date from May 12 to Sept.

13, 2021. These are the SD's and EA currently in effect. Under the Federal Defendants' erroneous reading of the law, they could continue extending these directives forever if not enjoined by this Court.

1. Airports

SD 1542-21-01A "Security Measures – Mask Requirements" was issued to airport operators. Doc. 1 at Pl. Ex. 19. Defendant TSA claims its statutory authority comes from 49 USC §§ 114 & 44903 as well as 49 CFR § 1542.303.

"TSA is issuing this SD requiring masks to be worn to mitigate the spread of COVID-19 during air travel. TSA developed these requirements in consultation with [Defendant DOT's] Federal Aviation Administration and CDC. The requirements in this directive apply to all individuals, ***including those already vaccinated***." Doc. 1 at Pl. Ex. 19. (emphasis added).

Airport operators must adopt the following measures:

> "A. The airport operator must make best efforts to provide individuals with prominent and adequate notice of the mask requirements to facilitate awareness and compliance. This notice must also inform individuals of the following: 1. Federal law requires wearing a mask at all times in and on the airport and failure to comply may result in removal and denial of re-entry. 2. Refusing to wear a mask in or on the airport is a violation of federal law; individuals may be subject to penalties under federal law. B. The airport operator must require that individuals in or on the airport wear a mask … If individuals are not wearing masks, ask them to put a mask on. 2. If individuals refuse to wear a mask in or on the airport, escort them from the airport. C. The airport operator must ensure direct employees, authorized representatives, tenants, and vendors wear a mask at all times in or on the airport…" *Id*.

> "If an individual refuses to comply with mask requirements, follow incident reporting procedures in accordance with the Airport Security Program and provide the following information, if available: 1. Date and airport code; 2. Individual's full name and contact information; 3. Name

> and contact information for any direct airport employees or authorized representatives involved in the incident; and 4. The circumstances related to the refusal to comply." *Id*.

Defendant TSA sent signs to airport operators and demanded they display them throughout every airport across America, overturning the no-mask policies in place in 49 states. Doc. 1 at Pl. Ex. 23.

2. Aircraft Operators

Defendant TSA issued SD 1544-21-02A "Security Measures – Mask Requirements" to aircraft operators requiring them to apply this SD to "all persons onboard a commercial aircraft operated by a U.S. aircraft operator, including passengers and crewmembers, ***including those already vaccinated***." Doc. 1 at Pl. Ex. 20 (emphasis added).

> "ACTIONS REQUIRED: A. The aircraft operator must provide passengers with prominent and adequate notice of the mask requirements to facilitate awareness and compliance. At a minimum, this notice must inform passengers, at or before check-in and as a pre-flight announcement, of the following: 1. Federal law requires each person to wear a mask at all times throughout the flight, including during boarding and deplaning. 2. Refusing to wear a mask is a violation of federal law and may result in denial of boarding, removal from the aircraft, and/or penalties under federal law. … B. The aircraft operator must not board any person who is not wearing a mask … C. The aircraft operator must ensure that direct employees and authorized representatives wear a mask at all times while on an aircraft or in an airport location under the control of the aircraft operator …" *Id*.

"Prolonged periods of mask removal are not permitted for eating or drinking; the mask must be worn between bites and sips." *Id*.

"Passengers who refuse to wear a mask will not be permitted to enter the secure area of the airport, which includes the terminal and gate area. Depending on the

circumstance, those who refuse to wear a mask may be subject to a civil penalty for attempting to circumvent screening requirements, interfering with screening personnel, or a combination of those offenses." Doc 1 at Pl. Ex. 24.

EA 1546-21-01A "Security Measures – Mask Requirements" was issued to foreign air carriers for all flights to, from, or within the United States. It requires foreign airlines to apply the EA to "to all persons onboard a commercial aircraft operated by a foreign air carrier, including passengers and crewmembers, and ***those already vaccinated***." Doc. 1 at Pl. Ex. 21 (emphasis added).

The actions required of foreign airlines are similar to those required of U.S. airlines. *Id*.

3. Owners & Operators of Vehicles Used for Public Transportation

SD 1582/84-21-01A "Security Measures – Mask Requirements" was issued to owners and operators of public-transportation vehicles "identified in 49 CFR 1582.1(a); each owner/operator identified in 49 CFR 1584.1 that provides fixed-route service as defined in 49 CFR 1500.3." Doc. 1 at Pl. Ex. 22.

> "The requirements in this SD must be applied to all persons in or on one of the conveyances or a transportation facility used by one of the modes identified above, ***including those already vaccinated***. TSA developed these requirements in consultation with the Department of Transportation (including the Federal Railroad Administration, the Federal Transit Administration, and the Federal Motor Carrier Safety Administration) and the CDC." *Id*. (emphasis added).

> "For the purpose of this SD, the following definitions apply: Conveyance has the same definition as under 42 CFR 70.1, meaning "an aircraft, train, road vehicle, vessel .. or other means of transport, including military. … Transportation hub/facility means any airport, bus terminal, marina, seaport or other port, subway stations, terminal (including any fixed facility at which passengers are picked-up or discharged), train

> station, U.S. port of entry, or any other location that provides transportation subject to the jurisdiction of the United States." *Id*.

The actions required of public-transportation operators are similar to those required of airports and airlines. *Id*. "If an individual's refusal to comply with the mask requirement constitutes a significant security concern, the owner/operator must report the incident to the Transportation Security Operations Center (TSOC) at 1-866-615-5150 or 1-703-563-3240 …" *Id*.

E. Department of Transportation Actions

Defendant DOT, with no statutory authority to implement a CDC public-health order, has also acted illegally and unconstitutionally to enforce the FTMM.

> The department "launched a 'Mask Up' campaign to educate travelers and transportation providers, including transit agencies, on their responsibility to comply with the Federal mask requirement on public transportation. The national requirement to wear a mask while traveling follows the Centers for Disease Control and Prevention (CDC) Order and Transportation Security Administration Security Directive, and failure to comply with the requirement can result in civil penalties." Doc. 1 at Pl. Ex. 26.

"The centerpiece of the campaign is a digital toolkit that includes background materials, talking points, digital assets and print-ready resources, in English and Spanish, to support your outreach efforts. Each item is downloadable and shareable." *Id*. Defendant DOT has created several e-mail addresses for travelers, employees, and transportation operators to contact it with questions about the FTMM including TransitMaskUp@dot.gov. *Id*.

DOT falsely claims that "U.S. federal law requires the wearing of face masks on planes, buses, trains, and other forms of public transportation." Doc. 1 at Pl. Ex. 27.

As discussed above, Congress has never enacted a single law requiring anyone in the United States to wear a face mask in any situation. "To get the message out to passengers about this new federal law, the U.S. Department of Transportation started the Mask Up initiative. We developed a helpful FAQ page. We've also created materials to help industry and safety partners effectively communicate the mandate to the traveling public." *Id*.

VIII. PROCEDURAL HISTORY

This case of first impression nationwide began June 2, 2021, when I was denied boarding my Southwest Airlines flight from Orlando (MCO) to Fort Lauderdale (FLL) by the Federal Defendants because Southwest refused to grant me a mask exemption even though I submitted the required form stating my Generalized Anxiety Disorder makes it impossible for me to tolerate wearing a face covering (advance notice of a disability request is actually illegal per 14 CFR § 382.25) when I booked my ticket May 31.

Defendant TSA deferred to the decision of a private company, Southwest, in refusing to honor my medical exemption to the FTMM, prohibiting me from passing through its security checkpoint. Videos at https://bit.ly/LucasMaskLawsuitPL. TSA declined to accept my medical exemption form (Doc. 1 at Pl. Ex. 204) and/or my CDC COVID-19 Vaccination Record Card (Doc. 1 at Pl. Ex. 53). And TSA did not give me any opportunity to appeal or otherwise challenge this refusal, violating my Fifth Amendment right to due process by relying solely on the opinion of a private corporation.

A. Complaint

The Complaint (Doc. 1), filed June 7, asserts 21 causes of action against CDC, TSA, and the four other federal defendants to immediately halt enforcement of the FTMM. The Complaint alleges that the Federal Defendants:

1) failed to observe the notice-and-comment procedure required by the APA and did not comply with the RFA;

2) committed arbitrary and capricious agency action in violation of the APA;

3) exceeded their statutory authority under the PHSA (42 USC § 264);

4) exceeded their statutory authority under TSA's enabling act (49 USC § 114) because TSA doesn't have congressional authority to enforce public-health or other general "safety" policies, only transportation security measures such as ensuring planes don't get blown up;

5) violate the ACAA (49 USC § 41705) by failing to comply with Defendant DOT's regulations (14 CFR Part 382) concerning how to treat passengers with a known communicable disease and those with disabilities;

6) committed an improper delegation of legislative power;

7) deprive Americans of their constitutional freedom of travel without intrusive government obstructions by blocking all people who can't or won't wear a face mask from using any form of public transportation throughout the entire nation regardless of whether they have a disability, and whether they are fully vaccinated and/or naturally immune from COVID-19;

8) deprive travelers of due process under the Fifth Amendment by assigning FTMM enforcement and exemption powers to private companies as well as state, regional, and local agencies with no ability to appeal to a federal decisionmaker;

9) violate the 10th Amendment by applying the mask mandate to intrastate transportation in direct conflict with the mask policies of 46 (now 49) states (App. 11) and commandeer state officials to enforce federal orders.

B. District Court Action

Because I was banned from flying June 2 and had numerous upcoming flights booked, I moved June 10 for a temporary restraining order (Doc. 8) to stop nationwide enforcement of the FTMM until the District Court had time to hold a preliminary injunction hearing. The district judge, considering only one of the four TRO factors, denied my motion June 15 (Doc. 28; App. 1), erroneously concluding that I didn't demonstrate any irreparable harm.

The Federal Defendants appeared June 12, filing a motion for an extension of time (Doc. 11) from seven days (per Middle District of Florida Local Rule 6.02(c)) to 14 days to respond to an upcoming Motion for Preliminary Injunction. The government's request was denied June 17 (Doc. 32).

Also June 17, without the consent of either party, the district judge signed an order (Doc. 31) referring the entire case to the magistrate judge for disposition of all matters. I filed an objection to the referral and a Motion for Reconsideration June 20 (Doc. 46), which the district judge then failed to rule upon. He instead ordered June

21 my Motion for Reconsideration stricken from the docket because "The administration of the court is not Plaintiff's concern." (Doc. 47). However, the delaying tactics involving referring of my entire case without my consent to a magistrate are of tantamount concern to me, as argued in Doc. 46.

I filed June 17 a Motion for Preliminary Injunction Against All Federal Defendants on Counts 1–12 & 14–15 of the Complaint (Doc. 33) asking nationwide enforcement of the FTMM be enjoined. The deadline for defendants to file an opposition was June 24 per Local Rule 6.02(c): "A party opposing the motion must respond to the motion within seven days after notice of the motion…"

I then filed June 18 a Motion for Preliminary Injunction Against All Federal Defendants on Counts 19-23 of the Complaint (Doc. 36) asking worldwide enforcement of the International Traveler Testing Requirement be enjoined. The deadline for defendants to file an opposition was June 25 per Local Rule 6.02(c).

The Federal Defendants moved June 21 (Doc. 48) to strike my two PI motions and be given an extension of time from seven days per Local Rule 6.02(c) to 30 days to respond after my filing a new combined Motion for PI regarding why both the FTMM and ITTR should be enjoined. I filed an opposition (Doc. 54) at 10:26 a.m. June 22 (Doc. 56-1). Only 16 minutes later, without possibly having had time to consider my 14-page opposition brief, the magistrate judge issued an illegal *ex parte* order (Doc. 55; App. 2) granting the Federal Defendants both of their requests that my two PI motions (Docs. 33 & 36) be struck from the docket and that they be allowed more than four times the days permitted under Local Rule 6.02(c) to file an opposition to a new

combined PI motion. The magistrate's order (Doc. 55; App. 2) was entered at 10:42 a.m. (Doc. 56-2) and makes no mention of having considered my opposition (Doc. 54).

Shellshocked by this inexplicable *ex parte* order, I quickly wrote an Objection to Magistrate Judge's Order & Emergency Motion to Vacate & Reconsider (Doc. 56), which I filed at 12:31 p.m. June 22 (Doc. 57) pursuant to Fed.R.Civ.P. 72(a). The district judge failed to rule on my emergency motion (Doc. 57) within a day as requested, so I then sought relief from the 11th Circuit.

Later, on June 29, the district judge denied my Objection to Magistrate Judge's Order & Emergency Motion to Vacate & Reconsider. Doc. 67; App. 3.

C. Court of Appeals Action: Case No. 21-90017

I filed June 24 with the U.S. Court of Appeals for the 11th Circuit an Emergency Petition for Permission to Appeal, which was assigned Case No. 21-90017. Petition Docket 1. I asked the 11th Circuit "to correct the lower court's erroneous decisions on several motions that, as of now, will allow the Federal Defendants to stop me from flying on Delta Air Lines to Germany on July 1 for a weeklong visit to my brother and his wife and flying home to the United States on July 8 even though I am fully vaccinated from COVID-19." *Id*. I told the 11th Circuit my "emergency appeal should be taken because review of a denial of a temporary restraining order falls clearly within this Court's discretion as it is equivalent to denial of a preliminary injunction," citing 11th Circuit precedent and 28 USC § 1651. *Id*.

Also June 24, immediately after filing my Emergency Petition for Permission to Appeal, I submitted to the 11th Circuit an Emergency Motion for Preliminary Injunction or, in the Alternative, for Temporary Restraining Order on Counts 1-12, 14-15, & 19-23 of the Complaint. Petition Docket 3.

The 11th Circuit denied June 28 my Emergency Petition for Permission to Appeal, and also denied as moot my Emergency Motion for Preliminary Injunction or, in the Alternative, for Temporary Restraining Order on Counts 1-12, 14-15, & 19-23 of the Complaint. "To the extent that Wall seeks permission to appeal pursuant to 28 USC § 1292(b), the district court has not certified any order for immediate appeal under that provision. Accordingly, Wall's petition is DENIED. … All pending motions are DENIED as moot." Petition Docket 4; App. 4.

D. Court of Appeals Action: Case No. 21-12179

The same day (June 24) I submitted the emergency petition with the 11th Circuit, I filed it with the District Court so it would be served on all defendants' counsel. Doc. 58. The district clerk interpreted my emergency petition as a Notice of Interlocutory Appeal and submitted that document to the 11th Circuit on June 25, which was then assigned Case No. 21-12179 when the U.S. Court of Appeals clerk docketed the Notice on June 28. Appeal Docket 1.

A bit confused, I filed June 28 an Amended Notice of Appeal "to restate the issues in light of [the 11th Circuit's] decision from this morning and to make clear the Court should consider this an appeal of right pursuant to 28 USC § 1292(a): '[T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district

courts of the United States … or of the judges thereof, granting, continuing, modifying, ***refusing***, or dissolving injunctions, or refusing to dissolve or modify injunctions…'" Appeal Docket 4 (emphasis added).

Early the next day (June 29), I filed Time-Sensitive Motion for Preliminary Injunction or, in the Alternative, for Temporary Restraining Order, on counts 1-12, 14-15, & 19-23 of the Complaint. Appeal Docket 5. I asked the 11th Circuit:

> "for an order granting me a preliminary injunction for at least 45 days to stop the Federal Defendants' worldwide enforcement of the [FTMM] … until the District Court can hold a hearing and issue rulings on my two Motions for Preliminary Injunction (Docs. 33 & 36). In the alternative, if the Court does not grant my request for a preliminary injunction, I ask it to issue a temporary restraining order for at least 14 days to stop worldwide enforcement of the FTMM and ITTR and direct the District Court to hold a hearing on the pending Motions for Preliminary Injunction (Docs. 33 & 36) and issue decisions before the TRO expires." *Id.*

I noted the "motion is designated time sensitive because I have a flight from Orlando (MCO) to Frankfurt, Germany (FRA), via Atlanta (ATL) on Thursday, July 1, that I won't be able to take if the requested relief is not provided by Wednesday, June 30." *Id.*

The 11th Circuit issued an order June 30 dismissing my appeal *sua sponte* for lack of jurisdiction. The panel cited circuit caselaw that it may review an order granting or denying a TRO if it might have serious, perhaps irreparable consequences and it can only be effectively challenged via an immediate appeal. But the panel did not explain why it failed to consider being deprived of my constitutional right of freedom to travel and due process as not having serious, irreparable consequences. Appeal

Docket 7; App. 5. The panel dismissed my Time-Sensitive Motion for Preliminary Injunction or, in the Alternative, for Temporary Restraining Order, on Counts 1-12, 14-15, & 19-23 of the Complaint as moot. *Id*.

Later June 30, I submitted to the panel an Emergency Motion to Reconsider the Court's Order Dismissing the Appeal for Lack of Jurisdiction. Appeal Docket 9. I argued the 11th Circuit

> "has jurisdiction to hear this appeal as the district judge below denied my Motion for Temporary Restraining Order as well as my Motion to Vacate the magistrate judge's Order striking my two Motions for Preliminary Injunction filed June 17 and 18. These two Orders are both 'final' and I have no means available in the lower court to seek the emergency injunctive relief I need to be able to board my flight to Germany tomorrow. This Court must exercise its jurisdiction to determine this appeal. Dismissal is not warranted." *Id*.

However, the panel disagreed, denying later June 30 my Emergency Motion to Reconsider the Court's Order Dismissing the Appeal for Lack of Jurisdiction in a two-sentence order. Appeal Docket 10; App. 6. I thus was banned by the Federal Defendants – even though I am fully vaccinated from COVID-19 – from taking my July 1 flight from Florida to Germany to visit my brother and his wife solely because I medically am unable to wear a face mask.

E. No Prospect of Immediate Injunctive Relief from the District Court

As I explained to the 11th Circuit, it erroneous claimed "[W]e note that Wall's refusal to refile his preliminary injunction motion in the district court in compliance with the court's local rules, as noted in the magistrate judge's order, is an insufficient basis for us to exercise our appellate jurisdiction in this case." Appeal Docket 7; App. 5.

First, I have not refused to refile a combined PI motion in the District Court. I just received the district judge's order (Doc. 67; App. 3) June 29 declining to vacate the magistrate judge's *ex parte* order (Doc. 55; App. 2) striking the two PI motions I filed June 17 and 18 in compliance with the page limit established by Local Rule 3.01(a). Since receiving that order (Doc. 67; App. 3), I have been considering whether to consolidate my two PI motions (Docs. 33 & 36) into one as suggested by the District Court or to pursue another legal strategy such as moving for summary judgment on some of the causes of action stated in the Complaint because it appears hopeless the District Court will grant me any preliminary injunctive relief.

Second, I point out to the Court that my original two PI motions (Docs. 33 & 36) were filed in compliance with the Local Rules, despite what the District Court magistrate determined (Doc. 55; App. 2) in striking them *ex parte*. The District Court concluded that my two motions (one attacking the FTMM and the other attacking the International Traveler Testing Requirement) should be presented collectively, thus refusing to consider them as filed, but I did not violate Local Rule 3.01(a) because both PI motions (Doc. 33 & 36) were 25 pages.

Third, the fact that I might soon refile my two Motions for PI below as one combined motion does not absolve this Court of the basis for it to exercise its emergency jurisdiction to grant me immediate preliminary injunctive relief. Let's say I refile my two inappropriately stricken PI motions today (July 6). The District Court has abused its discretion and given the Federal Defendants 30 days to respond, instead of the seven days established by Local Rule 6.02(c).

The government gave the District Court a laundry list of excuses why it can't comply with the Local Rules requiring it to respond to a Motion for Preliminary Injunction within seven days. The Federal Defendants' motivation is clear: They know they are going to lose this case, just as they have lost in four district courts plus a preliminary merits ruling by the Sixth Circuit and an unfavorable order from this Court on June 29 regarding Defendant CDC's Eviction Moratorium as well as in district court just recently regarding CDC's Conditional Sailing Order for cruiseships (Docs. 42 & 44-45).

Because of the improper 23-day deadline extension, this means the Federal Defendants would have until Aug. 5 to submit an opposition brief if I file July 6 a combine Motion for PI. Being optimistic (even though I have no reason to be given how the lower court has handled my case to date), let's just assume the magistrate judge, to whom the entire case has been referred to without either parties' consent, holds oral argument the week of Aug. 9-13 and issues a recommended decision on my combined Motion for PI the week of Aug. 16-20. Each party then has two weeks to file objections with the district judge, so let's say that takes us to Sept. 3. Then the district judge has to consider any objections *de novo* and issue a final decision on the Motion for PI. Let's guess that takes another two weeks. We are thus looking at an estimated final District Court preliminary-injunction decision day of Sept. 17 – four days after Defendant TSA's enforcement order for the FTMM is currently scheduled to expire Sept. 13.

In other words, the process set up by the District Court will effectively moot this case (unless the Federal Defendants extend their FTMM enforcement directives beyond Sept. 13). It should be clear to the Court that's exactly what the Federal Defendants and District Court are doing – kicking the can down the road until it's no longer a can at all. In the meantime, I would suffer another 2½ months of irreparable injury of being deprived of my constitutional right to travel even though I did what the government asked of me (got fully vaccinated) and I don't pose a threat to anyone. I can't wear a mask because of my medical condition, not just because I don't want to.

If I obtained a preliminary or permanent injunction against the FTMM after Sept. 13, it would allow the Federal Defendants to have run out the clock on unlawful action and render my favorable judgment a hollow victory. And if the Federal Defendants are considering extending the mask mandate yet again, an injunction from this Court now is all the more necessary to prevent them from doing so.

"[A]pplicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another [extension]." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 66 (2020).

This Court shall not let these delaying tactics stand. It must invoke its jurisdiction and issue the emergency relief I have sought. Waiting for the District Court to act on a Motion for PI is futile. This is exactly why Congress authorized this Court by statute to consider emergency applications and grant injunctive relief pending a final disposition of the case on the merits by the trial court.

IX. ARGUMENT

A. This Court has the power to grant me a preliminary injunction.

The All Writs Act, 28 USC § 1651(a), authorizes an individual justice or the full Court to issue an injunction when: 1) the circumstances presented are "critical and exigent"; 2) the legal rights at issue are "indisputably clear"; and 3) injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). The Court also has discretion to issue an injunction "based on all the circumstances of the case," without its order being "construed as an expression of the Court's views on the merits" of the underlying claim. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014).

This Court has previously granted emergency injunctive relief from overbearing governmental COVID-19 restrictions when applicants "have shown that their [constitutional] claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Catholic Diocese*; *see also Robinson v. Murphy*, 141 S.Ct. 972 (2020); *High Plains Harvest Church v. Polis*, 141 S.Ct. 527 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021); *Gateway City Church v. Newsom*, 141 S.Ct. 1460 (2021); and *Tandon v. Newsom*, 141 S.Ct. 1294 (2021).

A circuit justice or the full Court may also grant injunctive relief if there is a "significant possibility" that the Court would grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking*

Ass'ns v. Gray, 483 U.S. 1306, 1308 (1987) (Blackmun, J.); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (considering whether there is a "fair prospect" of reversal).

Because the District Court granted (Doc. 55; App. 2) the Federal Defendants' motion to strike and extend briefing deadline (Doc. 48) *ex parte*, this Court should consider that action a denial of my two Motions for PI (Docs. 33 & 36). The government, per Local Rule, was supposed to respond to my first motion (Doc. 33) June 24 and the second PI motion (Doc. 36) June 25. I asked the District Court for oral argument early in the week June 28 so it could have made a decision on the PI requests no later than June 30, so I'd know if I would be able to take my flight to Germany on July 1. The District Court refused to even consider my two PI motions, let alone schedule a hearing. Doc. 55; App. 2.

Under 28 USC § 1292, I would have a statutory right to appeal a refusal of an injunction, so the Court should treat the striking of my two PI motions and granting the government an excessive opposition deadline extension as a refusal. This Court should then grant this application and issue me a preliminary injunction halting nationwide enforcement of the FTMM until the District Court disposes of my case on the merits.

B. I meet all four prongs of the legal standard to obtain a preliminary injunction.

I meet the four factors used to determine whether initial injunctive relief should be granted, which are whether the movant has established: 1) a substantial likelihood of success on the merits; 2) that irreparable injury will be suffered if the relief is not

granted; 3) that the threatened injury outweighs the harm the relief would inflict on the nonmovant; and 4) that entry of the relief would serve the public interest. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

Reversal of the lower courts' decisions refusing injunctive relief is appropriate if they applied an incorrect legal standard, applied improper procedures, relied on clearly erroneous fact-finding, or if they reached a conclusion that is clearly unreasonable or incorrect. *Klay v. United Healthgroup*, 376 F.3d 1092, 1096 (11th Cir. 2004); *Chicago Tribune v. Bridgestone/Firestone*, 263 F.3d 1304, 1309 (11th Cir. 2001). In this case, the District Court in its ruling (Doc. 28; App. 1) on my Motion for TRO (Doc. 8) applied an incorrect legal standing in evaluating my claim of irreparable harm, failing to consider appropriate caselaw – including this Court's decisions – concerning the constitutional right of freedom to travel. It then (after failing to review the other three prongs) reached a conclusion (denying the TRO) that was clearly unreasonable and incorrect.

The first of the four prerequisites to temporary injunctive relief (likely success on the merits) is generally the most important. *Gonzalez v. Reno*, No. 00-11424-D, 2000 WL 381901 at *1 (11th Cir. 2000). The necessary level or degree of possibility of success on the merits will vary according to the court's assessment of the other factors. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). But an extremely high likelihood of prevailing on the merits, as I have shown here, is not required. "A substantial likelihood of success requires a showing of only ***likely*** or probable, rather than certain, success." *Home Oil Company v. Sam's East*, 199 F.Supp.2d 1236, 1249 (M.D. Ala. 2002) (emphasis original); *see also Ruiz*, 650 F.2d at 565. "Where the 'balance of the

equities weighs heavily in favor of granting the [injunction],' the movant need only show a 'substantial case on the merits.'" *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

A movant must demonstrate a "substantial likelihood," not a substantial certainty. To require more undermines the purpose of even considering the other three prerequisites. Instead, "the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the injunction." *Ruiz*, 650 F.2d at 565. The review "require[s] a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief." *Siegel*, 234 F.3d at 1178.

When combined with my extremely high odds of winning on the merits, review of the other three factors reveals it is obvious that the equities weigh heavily in favor of granting the preliminary injunction. First, there is no doubt I have already suffered, and will continue to suffer, irreparable harm as a direct result of the Federal Defendants' enforcement of the FTMM. Second, the relief would inflict no injury on the Federal Defendants because they can't suffer any damages from adopting a policy that violates the Constitution, laws, and regulations. Third, the injunction is in the public interest as explained below.

C. I have a substantial likelihood of success on the merits of my claim that the FTMM must be vacated because the Federal Defendants issued it without notice and comment required by the APA and in violation of the RFA.

I have a substantial likelihood of success on the merits for nine reasons, which I will run through now starting with the procedural deficiencies of the FTMM as promulgated by the Federal Defendants.

Let's start with the failure of Defendants CDC, HHS, DHS, TSA, and DOT to obey the notice-and-comment requirements of the APA. The FTMM 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 the Federal Defendants' decision-making process with respect to requiring masks in the entire U.S. transportation sector. And it affects my legal rights and obligations because it prevents me from flying and using any other mode of public transportation because I can't wear a mask.

A court must "hold unlawful and set aside agency action … found to be … without observance of procedure required by law." 5 USC § 706(2)(D). The APA requires agencies to issue rules through a notice-and-comment process. 5 USC § 553.

The FTMM 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). The Federal Defendants issued the FTMM 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 procedures. 5 USC § 553(b)(3)(B).

The District Court should hold unlawful and set aside the FTMM because it violates the APA's notice-and-comment requirement. 5 USC § 706(2)(D). The Federal Defendants issued the FTMM with zero input from the public as required by law. The

policies were rushed into effect only 12 days after Defendant Biden took office as president. But the World Health Organization declared COVID-19 a pandemic March 11, 2020 – meaning the Federal Defendants had nearly 11 months to put the FTMM through the required notice-and-comment procedures before adopting them as final rules. But they failed to do so.

"Violation of the conditional sailing order triggers a serious consequence... The conditional sailing order is a rule … The APA therefore obligates CDC to … provide notice and comment. … CDC lacked 'good cause' to evade the statutory duty of notice and comment." *State of Florida v. Becerra*, No. 8:21-cv-839-SDM-AAS (M.D. Fla. June 18, 2021). In this case, Defendant TSA has threatened to fine anyone not wearing a mask anywhere in the American transportation network. That triggers a serious consequence, and the APA therefore required the Federal Defendants to go through a notice-and-comment proposed rulemaking before trying to adopt the FTMM. They did not.

Likewise, the Federal Defendants did not comply with the Regulatory Flexibility Act. The RFA requires agencies, in promulgating rules subject to the APA's notice-and-comment requirement, to "prepare a final regulatory flexibility analysis." 5 USC § 604(a). The FTMM is a "rule" for purposes of the RFA. 5 USC § 601(2). The Federal Defendants did not prepare a regulatory flexibility analysis as required.

The District Court therefore must hold unlawful and set aside the FTMM because it violates the RFA. 5 USC § 706(2)(D).

D. I have a substantial likelihood of success on the merits of my claim that the FTMM must be vacated because it is arbitrary and capricious in violation of the APA.

As a fully vaccinated American, I pose zero risk to other travelers. The federal requirement forcing me to wear a mask (even though my Generalized Anxiety Disorder prohibits it) is the perfect example of arbitrary and capricious executive policies that the law demands be stopped. A court must "hold unlawful and set aside agency action … found to be … arbitrary, capricious, [or] an abuse of discretion." 5 USC § 706(2)(A).

Defendant CDC's "conditional sailing order likely is by definition capricious. … An agency decision issued without adherence to its own regulations must be overturned as arbitrary and capricious…" *State of Florida*. Likewise, the FTMM is by definition capricious for failing to consider vaccination and disability status, among other factors.

Defendant CDC's FTMM Order applies to foreign-flagged ships traveling in international waters beyond the jurisdiction of the United States:

> "Yes, the mask order applies to all persons traveling on commercial maritime conveyances into, within, or out of the United States and to all persons at U.S. seaports. The term commercial maritime conveyance means all forms of commercial maritime vessels, including but not limited to cargo ships, fishing vessels, research vessels, self-propelled barges, and all forms of passenger carrying vessels including ferries, river cruise ships, and those chartered for fishing trips, unless otherwise exempted." Doc. 1 at Pl. Ex. 14.

The broad and enveloping requirement for every American traveler to cover their face indiscriminately excludes plainly relevant considerations such as the individual's vaccination, immunity, and disability status. The FTMM "therefore is patently

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

The FTMM impermissibly establishes an irrebuttable presumption that every single person traveling anywhere in the United States is infected with COVID-19 and therefore must wear a mask to supposedly prevent transmission of the virus. (Scientific research actually shows that masks do nothing to reduce coronavirus spread and are actually harmful to humans. *See* the extensive discussion at ¶¶ 513-855 of the Complaint.) The Federal Defendants claim that every single traveler – even those who are fully vaccinated and/or have natural immunity – are deemed to be a direct threat to transportation security. This conclusion is beyond absurd and is scientifically impossible.

Public health can be adequately protected by means which, when compared with the FTMM, are more discriminately tailored to the constitutional liberties of individuals. For instance, the Federal Defendants could utilize the "Do Not Board" and "Lookout" systems to stop those who test positive for COVID-19 from flying for two weeks while they are ill. Doc. 1 at Pl. Ex. 66. This would specifically target those travelers who are a genuine threat to public health without infringing on the freedom to travel for everyone else.

Defendant CDC's FTMM Order makes numerous false claims about the effectiveness of face coverings including that

> "Masks help prevent people who have COVID–19, including those who are presymptomatic or asymptomatic, from spreading the virus to others. … Masks also provide personal protection to the wearer by reducing inhalation of these droplets, i.e., they reduce wearers' exposure through filtration. … Appropriately worn masks reduce the spread of COVID–19

> – particularly given the evidence of pre-symptomatic and asymptomatic transmission of COVID-19. … Requiring a properly worn mask is a reasonable and necessary measure to prevent the introduction, transmission, and spread of COVID–19 into the United States and among the states and territories under 42 USC 264(a) and 42 CFR 71.32(b).” 86 Fed. Reg. 8,025 (Feb. 3, 2021); Doc. 1 at Pl. Ex. 11.

Defendant CDC’s FTMM Order makes false claims about vaccines against COVID-19 available in the United States and ignores the science showing that people who have recovered from coronavirus have long-lasting natural immunity:

> “While vaccines are highly effective at preventing severe or symptomatic COVID–19, at this time there is limited information on how much the available COVID–19 vaccines may reduce transmission in the general population and how long protection lasts. Therefore, this mask requirement, as well as CDC recommendations to prevent spread of COVID–19, additionally apply to vaccinated persons. Similarly, CDC recommends that people who have recovered from COVID–19 continue to take precautions to protect themselves and others, including wearing masks; therefore, this mask requirement also applies to people who have recovered from COVID–19.” *Id.*

On its website, Defendant CDC falsely claims that “Most people, including those with disabilities, can tolerate and safely wear a mask...” Doc. 1 at Pl. Ex. 13.

“Due to my Generalized Anxiety Disorder, I have never covered my face. I tried a mask a couple times for brief periods last year, but had to remove it after five or so minutes because it caused me to instigate a feeling of a panic attack, including hyperventilating and other breathing trouble.” Wall Decl. at ¶ 5; App. 7.

Defendant CDC’s FTMM Order is so broad it appears to require passengers on ferries, cruiseships, and long-distance trains to wear masks even within their own private cabins, completely segregated from other people. *Id.*

Defendant TSA’s security directives are so onerous they apply to people who are not traveling interstate, employees working at facilities and on conveyances that only

serve intrastate travelers, people at a transportation hubs for purposes other than traveling interstate (i.e. buying tickets for future travel, waiting on a train platform for a family member to arrive, etc.), and so on. Doc. 1 at Pl. Exs. 15-22.

In an update to a press release posted on its website, Defendant TSA announced:

> "Regarding the civil penalty fine structure for individuals who violate the Security Directive, TSA will recommend a fine ranging from $250 for the first offense up to $1,500 for repeat offenders. Based on substantial aggravating or mitigating factors, TSA may seek a sanction amount that falls outside these ranges. TSA has provided transportation system operators specific guidance on how to report violations so that TSA may issue penalties to those who refuse to wear a face mask." Doc. 1 at Pl. Ex. 24.

Promulgating a fine structure by press release is hardly the type of notice-and-comment rulemaking Congress had in mind when it adopted the APA. This further shows how arbitrary and capricious the FTMM is.

Despite Defendant CDC amending its guidance May 13, 2021, to advise that no American who is vaccinated needs to wear a face covering (Doc. 1 at Pl. Ex. 40), Defendants CDC, TSA, and DOT issued a joint statement May 14, 2021, titled "Mask Mandate On Public Transportation Remains in Effect." Doc. 1 at Pl. Ex. 25.

The Federal Defendants issued a contradictory statement reminding

> "the traveling public that at this time if you travel, you are still required to wear a mask on planes, buses, trains, and other forms of public transportation traveling into, within, or out of the United States, and in U.S. transportation hubs such as airports and stations. CDC guidance is clear that fully vaccinated people are safe to travel and can resume travel." *Id*.

Yet despite this guidance from Defendant CDC, the announcement did not mention repealing the FTMM for vaccinated travelers and transportation industry employees.

Defendant DOT's FTMM FAQ's are extreme in their enforcement guidelines, further showing how arbitrary and capricious the mask mandate is. For instance: "A transit employee is required to wear a mask unless covered under an exemption, even if the employee is separated from passengers or other employees by plexiglass or another protective barrier." Doc. 1 at Pl. Ex. 28. This is only one example of hundreds, perhaps thousands, of scenarios where the FTMM applies in direct contradiction to Defendant CDC's guidance that face coverings are not required for any American – vaccinated or not – when physical distancing (3-6 feet) from other people.

"Transit employees must wear masks while on public transportation conveyances and at transportation hubs. The starting point is that everyone should be wearing a mask and employees are broadly required to wear masks by the CDC Order." *Id*. So, for example, a fully vaccinated train-station worker eating lunch in his/her office with not another human anywhere around is required by the federal government to wear a mask between bites and sips.

Another absurdity that goes against Defendant CDC's guidelines: "Are transit operators required to wear masks when there are no passengers on the vehicle? Yes … the operator must wear a mask when there are no passengers on the vehicle." *Id*.

Defendant DOT's FAQ's informs transit agencies that the Federal Transit Administration (an agency of DOT) has gone way beyond its legal authority by amending its "Master Agreement" to incorporate the requirements of the CDC FTMM Order:

> "Pursuant to the terms and conditions of FTA Master Agreement FTA MA(28), FTA may take enforcement action against a recipient or subrecipient that fails to comply with this Order, including, but not limited to, actions authorized by 49 USC § 5329(g) and 2 CFR §§ 200.339-.340

> when a recipient does not comply with Federal law with respect to the safety of its public transportation system." *Id*.

Therefore if a transit system in a state such as Florida decides to obey its own state law prohibiting face coverings, Defendant DOT will strip the agency of some of its federal funding.

Defendant DOT's FTMM FAQ's is way overbroad in defining what a "transportation hub" is, to include a bus stop on a city street with nothing more than a sign indicating the route served. "The CDC Order defines a transportation hub as any location where people gather to await, board, or disembark public transportation. This includes bus stops with or without shelters or benches." *Id*.

Disabled Americans seeking an exemption from the FTMM face high hurdles under Defendant DOT's illegal policy:

> "May a transit agency require requests for exemptions from mask requirements to be made in advance of travel? Yes. … Consistent with the CDC Order and TSA Security Directive, fixed-route transit providers may require individuals to request an exemption in advance of being allowed to travel and could issue riders a card or other document noting the exemption to present to transit personnel on future trips." *Id*.

Numerous transit agencies across the nation are requiring disabled passengers to seek a mask exemption in advance and carry a card with them. For one example, Kitsap Transit, a public agency serving Kitsap County, Washington, part of the Seattle metropolitan area, mandates disabled customers obtain a mask-exemption card. Doc. 1 at Pl. Ex. 29. This creates an immense burden on any disabled American traveling around the nation as they could potentially need to acquire dozens or even hundreds of exemption cards from various transit agencies.

The FTMM is exactly the kind of policy Congress has told the courts to vacate as arbitrary and capricious. 5 USC § 706(2)(A).

E. I have a substantial likelihood of success on the merits of my claim that the FTMM must be vacated because it exceeds CDC's statutory authority under the Public Health Service Act.

Congress never gave Defendant CDC the staggering amount of power it now claims. This Court just spoke June 29 about the merits of CDC orders issued during the COVID-19 pandemic without congressional authorization. Just like the Eviction Moratorium at issue in the recent decision, the FTMM was issued by CDC claiming nonexistent authority under the PHSA, 42 USC § 264. Unlike the Eviction Moratorium, which Congress did authorize for two short periods of time, Congress has ***never*** enacted into law a mandate that travelers wear masks.

Justice Kavanaugh's concurring opinion is critical in that it shows there are at least five votes on this Court to strike down any pandemic mitigation measure issued by Defendant CDC (such as the FTMM) that goes beyond the agency's authority under 42 USC § 264: "I agree with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium. *See Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)." *Alabama Association of Realtors v. HHS*, No. 20A169, 594 U.S. __ (June 29, 2021) (Kavanaugh, J., concurring).

Justice Kavanaugh explained he only voted to deny the emergency application by a group of landlords because "CDC plans to end the moratorium in only a few weeks,

on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds…" *Id*.

However, it is significant to note that on the merits, Justice Kavanaugh agreed with his four dissenting colleagues that "clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31." *Id*.

> "The CDC's orders, which form[] the basis for the TSA's transportation mask mandate, suffer[] from the same legal defect as the eviction moratorium. Specifically, the mask mandate, like the eviction moratorium, is a power not mentioned in any statute nor substantially similar to a power mentioned in statute. And even if Congress meant to give the CDC broader powers than mentioned in law, that would be an unconstitutional delegation of its power. … Either the CDC's authority is limited and it hasn't been granted the power to require masks on planes, or its power isn't limited and the grant of power is unconstitutional. Either way the law doesn't support the CDC's action. And the Supreme Court agreed with this exact take in reviewing the CDC eviction ban." App. 12.

At least four federal district courts have vacated Defendant CDC's Eviction Moratorium as illegal and/or unconstitutional – and the U.S. Court of Appeals for the Sixth Circuit denied the government's motion for a stay pending appeal, ruling in no uncertain terms that it could not prevail on the merits.[8] Because the FTMM I challenge in the instant matter was issued under the same section of federal law as the Eviction Moratorium, recent caselaw supports the arguments I make that the FTMM was issued beyond the statutory and constitutional authority of the Federal Defendants. Because § 361 of the PHSA (42 USC § 264) contains no authority to adopt a

[8] *Tiger Lily v. HUD*, No. 2:20-cv-2692, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021); *Tiger Lily v. HUD*, 992 F.3d 518, 520 (6th Cir. 2021) (denying emergency motion for stay pending appeal); *Alabama Association 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).

nationwide mask mandate for the transportation (or any other) sector, the District Court must set the FTMM aside.

As part of its response to the COVID-19 pandemic, Defendants CDC and HHS issued a nationwide Eviction Moratorium under 42 USC § 264. Likewise, as authority for the FTMM, Defendants CDC and HHS invoked 42 USC § 264 and CDC regulations implementing that statute (42 CFR §§ 70.2, 71.31(b), and 71.32(b)), but CDC provided no analysis of this authority in the FTMM Order. Doc. 1 at Pl. Ex. 11.

The PHSA authorizes Defendant CDC to promulgate regulations to "prevent the introduction, transmission, or spread of communicable diseases" into the United States or among the states. 42 USC § 264(a). The next sentence permits CDC to "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 [its] judgment may be necessary." *Id.*

Defendant CDC's regulation implementing PHSA § 361 permits the agency's director, upon "determin[ation] that the measures taken by health authorities of any State or possession … are insufficient to prevent the spread of any of the communicable diseases," to "take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection." 42 CFR. § 70.2.

Defendant CDC's FTMM Order did not contain the required determination that the measures taken by health authorities of any specific state or territory are insufficient to prevent the spread of any communicable diseases. It only issued a broad generalized claim – without supporting evidence – that "Any state or territory without sufficient mask-wearing requirements for transportation systems within its jurisdiction has not taken adequate measures to prevent the spread of COVID–19 from such state or territory to any other state or territory." Doc. 11 at Pl. Ex. 11. There are 49 states that disagree with that assertion. App. 11.

The Sixth Circuit denied a motion to stay a District Court judgment that held the Eviction Moratorium exceeded CDC's authority under 42 USC § 264. *Tiger Lily v. HUD*, No. 2:20-cv-2692, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021), appeal filed No. 21-5256 (6th Cir. 2021); *Tiger Lily v. HUD*, 992 F.3d 518, 520 (6th Cir. 2021) (denying emergency motion for stay pending appeal).

"Whether the government is likely to succeed on the merits boils down to a simple question: Did Congress grant the CDC the power it claims? … CDC points to 42 USC § 264 as the sole statutory basis for the [Eviction Moratorium] order's extension. But the terms of that statute cannot support the broad power that the CDC seeks to exert," the Sixth Circuit wrote. *Id*.

The Federal Defendants are not entitled to *Chevron* deference when considering the FTMM. When reviewing an agency's construction of a statute it administers, courts generally apply the two-step *Chevron* framework. Where the statute is unambiguous, then that is the end of the matter; a court applies it as written.

In the motion-for-stay briefing before the Sixth Circuit, "neither party has argued that *Chevron* applies. Whether or not it applies, we find that the statute is unambiguous; therefore, we need not proceed beyond step one in any event." *Tiger Lily*.

Several courts have held that no portion of PHSA § 361 authorized Defendants CDC and HHS to prohibit landlords from evicting tenants during a pandemic, interfering with state eviction laws. Likewise, no portion of § 361 authorizes those same defendants to make every American using any form of public transportation wear a face mask. Courts have not concurred with the Federal Defendants' incredibly broad and erroneous interpretation of PHSA § 361.

> "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 USC § 264(a). Plainly, government intrusion on property to sanitize and dispose of infected matter is different in nature from a moratorium on evictions. *See Terkel v. CDC*, No. 6:20-cv-564, 2021 WL 742877, at *6 (E.D. Tex. Feb. 25, 2021) …" *Id.*

The FTMM must be vacated because it falls outside the scope of the PHSA. "[W]e cannot read the Public Health Service Act to grant the CDC the power to insert itself into the landlord-tenant relationship without some clear, unequivocal textual evidence of Congress's intent to do so. Regulation of the landlord-tenant relationship is historically the province of the states." *Id.*

Likewise, regulation of public health and intrastate transportation is historically the province of the states. And unlike the Eviction Moratorium, where Congress did authorize such a measure for a short period of time, Congress has ***never*** enacted a federal mask mandate. Congress has approved at least 20 laws directly concerning the coronavirus pandemic, yet none of these have authorized a mask mandate. *See* discussion in the Complaint at ¶¶ 339-353.

"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)." *Tiger Lily*.

There is no "unmistakably clear" language in the PHSA indicating Congress' intent to invade the traditionally state-operated arena of public health and intrastate transportation by forcing all people to wear a mask while traveling. The various provisions indicate that the PHSA (42 USC § 264) is limited to disease-control measures involving the inspection and regulation of infected property or the quarantine of contagious individuals, not any conceivable action the government deems necessary to fight infectious disease. This Court requires "a clear indication" from Congress that it meant to "override[] the usual constitutional balance of federal and state powers" before interpreting a statute "in a way that intrudes on the police power of the States." *Bond v. United States*, 572 U.S. 844, 858, 860 (2014) (internal citation and quotation marks omitted).

The major-questions doctrine points in the same direction. This Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) – a category that indisputably includes the choice of whether to risk one's health by covering our nose and mouth, only our ways to breathe. Doc. 1 at ¶¶ 513-855.

"As the district court noted, the broad construction of [42 USC] § 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*.

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.

> "Though the Public Health Service Act 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 USC § 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 Association of Realtors v. HHS*, No. 20-cv-3377 (D.D.C. May 5, 2021).

The Federal Defendants clearly lack statutory authority to impose a nationwide mask mandate. The FTMM is different in nature than "'inspect[ing], fumigat[ing], disinfect[ing], sanit[izing], … exterminat[ing] [or] destr[oying],' 42 USC § 264(a), a

potential source of infection. … *See Tiger Lily*, 992 F.3d at 524." *Id*. Moreover, interpreting the term "animals" and/or "articles" to include human beings would stretch the term beyond its plain meaning.

> "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." *Id*.

Beyond the mask mandate itself, Defendant CDC's sweeping view of its own domain would, if left unchecked, allow it to adopt future regulations governing nearly all aspects of national life in the name of public health – whether it be vaccine mandates, worship limits, school and business closures, or stay-at-home orders.

Like its Eviction Moratorium, Defendant CDC's Conditional Sailing Order directed at cruiseships was enjoined because it exceeds CDC's statutory authority and CDC failed to follow the APA, *inter alia*. *State of Florida*. Many of the same legal conclusions from the district judge's 124-page decision should be applied to a determination in this case since the Conditional Sailing Order and FTMM are all emergency pandemic orders of Defendant CDC that have no legal or constitutional basis.

"[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 ex-

termination, [or the] destruction of infected animals or articles.'" *Id*. Just like regulating what cruiseships must do before sailing again, forcing humans to wear masks is not allowed under the PHSA. 42 USC § 264.

One might view the FTMM and masks in general as good or bad public policy. Americans disagree passionately about this. But this case turns on whether Congress has authorized Defendant CDC to adopt a nationwide mask mandate. Congress has not – despite ample opportunity during the 16-month-long pandemic.

"[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).

> "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, or at least those likely to be..." *Skyworks v. CDC*, No. 5:20-cv-2407 (N.D. Ohio March 10, 2021).

The PHSA authorizes Defendants HHS and CDC to combat the spread of disease through a range of measures, but these measures plainly do not encompass a nationwide mask mandate on all forms of public transportation effecting tens of millions of Americans every day – including those fully vaccinated and/or with natural immunity to COVID-19.

> "Accepting [Defendant HHS'] expansive interpretation of the Act would mean that Congress delegated to the Secretary the authority to resolve not only this important question, but endless others that are also subject to 'earnest and profound debate across the country.' … Under its reading, so long as the Secretary can make a determination that a given

> measure is 'necessary' to combat the interstate or international spread of disease, there is no limit to the reach of his authority." *Alabama Association of Realtors v. HHS* (D.D.C. May 5, 2021).

F. I have a substantial likelihood of success on the merits of my claim that the FTMM must be vacated because it exceeds Defendant TSA's statutory authority to ensure transportation security.

Defendants TSA and DHS have well exceeded their authority under the act creating the Transportation Security Administration. For the first time, TSA and DHS claim authority to regulate nonsecurity matters, to wit: directives mandating face masks be worn by passengers throughout the nation's transportation system, most of whom are traveling intrastate.

TSA was created by statute in 2002, the Aviation & Transportation Security Act ("ATSA"), to address "security in all modes of transportation." 49 USC § 114(d). TSA's function is limited by that law to address ***security threats***. General health and safety measures are outside the scope of the enabling act. Further, the relevant federal regulations under which the TSA Security Directives and Emergency Amendment were issued clearly state that they are to be used for ***security threats***, not public health. *See*, for example, 49 CFR § 1542.303(a): "When TSA determines that additional security measures are necessary to respond to a ***threat assessment or to a specific threat*** against civil aviation, TSA issues a Security Directive setting forth mandatory measures." (emphasis added). And to the extent that these orders were issued under any "emergency" authority, TSA's failure to act during the first 11 months of the COVID-19 pandemic precludes such use and counsels the necessity of ordinary notice-and-comment rulemaking under the APA. These directives are thus *ultra vires*.

TSA has no congressional authority to expand its domain from transportation security to enforcing public-health orders.

Defendant TSA has invented authority to force passengers and employees in the nation's entire transportation system wear face masks everywhere – from the check-in counter, to security checkpoints, bathrooms, food courts, airline lounges, boarding areas, and on conveyances themselves, without any regard to physical distancing, whether the area is indoors or outdoors, and whether a passenger or employee is vaccinated and/or possesses natural immunity to coronavirus.

"I have a substantial interest in the FTMM at issue in this suit. I am a frequent flyer, subject to Defendant TSA's enforcement policies dozens of times a year. I was denied the ability to fly June 2, 16, 18, 20, 22, and 24-25 as well as July 1 because of the FTMM. My denied flights include intrastate, interstate, and international travel." Wall Decl. at ¶ 22; App. 7.

TSA's mask enforcement directives go far above and beyond the few state rules for face coverings still in effect. As noted above, the FTMM is in direct contradiction to the mask polices of 49 states and the District of Columbia, and violate Defendant CDC's own May 13 guidance that "vaccinated people don't need masks … ***people who are fully vaccinated can stop wearing masks*** or maintaining social distance…" Doc. 1 at Pl. Ex. 63 (emphasis added).

Defendant CDC finally admitted May 13: "The science is clear***: If you are fully vaccinated, you are protected, and you can start doing the things that you stopped doing because of the pandemic***…" *Id.* (emphasis added).

On June 10, Defendant Biden told federal agencies that they no longer have to limit the number of employees allowed in the workplace, lifting yet another COVID-19 restriction. Doc. 8 at Pl. Ex. 2. Recently his administration lifted the executive order that required fully vaccinated people to wear masks in/on all federal buildings and lands. *Id*. Yet somehow the FTMM remains in effect.

TSA's directives are so far-reaching they explicitly require those who are eating and drinking at any transportation facility in the nation to wear masks "between bites and sips" – a policy found nowhere else in the country, even during the peak of the pandemic. This is hardly a matter of transportation "security" enforcement Congress envisioned when it passed ATSA 19 years ago after the terrorist attacks of Sept. 11, 2001.

"Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

A review of 49 USC Chapter 449 makes clear Congress' mandate to Defendant TSA is with regard to passenger and cargo screening, managing intelligence relating to threats to civil aviation, technology to detect weapons and explosives, federal air marshals, and similar matters. Nowhere in the law did Congress imagine a transportation ***security*** agency focused on ensuring planes aren't blown up would get involved in ***public-health*** enforcement. Nowhere in any statute has TSA ever been assigned responsibility for aviation safety or health matters.

Before the FTMM directives took effect Feb. 1 of this year, Defendant TSA had never attempted to extend its jurisdiction from security matters into general safety or health concerns. Thus, TSA greatly disturbs the status quo with its new foray into nonsecurity matters.

If Defendant TSA is permitted to regulate what a person wears on his/her face, there would be no end to its powers. There is no distinction between the authority it claims to stop a virus (even among travelers such as myself who are fully vaccinated and pose zero risk of transmitting coronavirus to others) and the authority that would be required to set crew sleep requirements, maintenance standards for the escalators between arrivals and departures levels of an airport, or the speed limit on the roads entering a parking garage at any transportation hub.

Defendant TSA's FTMM includes harsh enforcement methods not authorized by law:

> "If a passenger refuses to comply with an instruction given by a crew member with respect to wearing a mask, the aircraft operator must: 1. Make best efforts to disembark the person who refuses to comply as soon as practicable; and 2. Follow incident reporting procedures in accordance with its TSA-approved standard security program and provide the following information, if available: a. Date and flight number; b. Passenger's full name and contact information; c. Passenger's seat number on the flight; d. Name and contact information for any crew members involved in the incident; and e. The circumstances related to the refusal to comply." Doc. 1 at Pl. Ex. 20.

In conclusion, not only does Defendant TSA lack authority to enforce the FTMM, the mask mandate actually negatively impacts transportation security because it has created chaos in the sky and on the ground. *See* discussion of the numerous incidents

of unruly passenger and crew behavior as a direct result of the mask mandate at ¶¶ 424-479 of the Complaint. Doc. 1.

G. I have a substantial likelihood of success on the merits of my claim that the FTMM must be vacated because it violates the ACAA and its underlying regulations.

The FTMM blatantly discriminates against Americans such as myself with medical conditions who can't wear face masks in violation of the Air Carrier Access Act (49 USC § 41705). The District Court's statement in its order denying a TRO (Doc. 8; App. 1) that "Plaintiff can still fly to Utah in compliance with the FTMM" is sadly ignorant of the fact that I ***cannot*** safely wear a face mask because of my medical condition. Wall Decl. at ¶ 5, App. 7; *see also* my medical records at Docs. 12-1 to 12-6. The District Court's statement that I could simply obey the FTMM would be akin to a tribunal telling a person with two broken legs that he could still board his flight by walking from the airport curb to the gate because the airline illegally stopped offering wheelchair service. Or telling a blind passenger whose walking stick was improperly seized by TSA that he could still find his way to the airplane anyway.

The District Court ignored that even Defendant CDC says numerous Americans with a variety of medical conditions can't safely wear a mask. CDC

> "states that a person who has ***trouble breathing*** or is unconscious, incapacitated, or otherwise unable to remove the face mask without assistance should not wear a face mask or cloth face covering. … Additionally, people with post-traumatic stress disorder, ***severe anxiety***, claustrophobia, autism, or cerebral palsy may have difficulty wearing a face mask." Doc. 1 at Pl. Ex. 117 (emphasis added).

Declarations from 13 airline passengers and one former flight attendant describe their terrible discriminatory experiences with the FTMM, illustrating how it negatively affects tens of millions of Americans each and every day. App. 10.

Defendant CDC's FTMM Order violates the ACAA, and Defendant DOT has allowed airlines to prohibit all passengers with disabilities who can't wear face masks from flying and/or impose numerous onerous requirements to obtain an exemption that violate the ACAA and its accompanying regulations.

> "This Order exempts the following categories of persons: • A child under the age of 2 years; • A person with a disability who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act … This is a narrow exception that includes a person with a disability who cannot wear a mask for reasons related to the disability." 86 Fed. Reg. 8,025 (Feb. 3, 2021); Doc. 1 at Pl. Ex. 11.
>
> "Persons who are experiencing difficulty breathing or shortness of breath or are feeling winded may remove the mask temporarily until able to resume normal breathing with the mask. Persons who are vomiting should remove the mask until vomiting ceases. Persons with acute illness may remove the mask if it interferes with necessary medical care such as supplemental oxygen administered via an oxygen mask." *Id*.
>
> "Operators of conveyances or transportation hubs may impose requirements, or conditions for carriage, on persons requesting an exemption from the requirement to wear a mask, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the operator, as well as require evidence that the person does not have COVID–19 such as a negative result from a SARS–CoV–2 viral test or documentation of recovery from COVID–19. … Operators may further require that persons seeking exemption from the requirement to wear a mask request an accommodation in advance." *Id*.

Defendant CDC's FTMM Order is in direct conflict with the ACAA (49 USC § 41705) and the regulations promulgated thereunder. For example, "As a carrier, you must not require a passenger with a disability to provide advance notice of the fact

that he or she is traveling on a flight." 14 CFR § 382.25. CDC's FTMM Order goes against numerous other regulations promulgated by Defendant DOT, who has thus far neglected its duty to enforce the ACAA. *See* 14 CFR Part 382 for an extensive list of ACAA requirements for airlines to accommodate passengers with disabilities.

Likewise, Defendant TSA has issued several unlawful directives that violate the ACAA:

> "Aircraft operators may impose requirements, or conditions of carriage, on persons requesting an exemption from the requirement to wear a mask, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the aircraft operator, as well as require evidence that the person does not have COVID-19 such as a negative result from a SAR-CoV-2 viral test or documentation of recovery from COVID-19. … Aircraft operators may also impose additional protective measures that improve the ability of a person eligible for exemption to maintain social distance (separation from others by 6 feet), such as scheduling travel at less crowded times or on less crowded conveyances, or seating or otherwise situating the individual in a less crowded section of the conveyance or airport. Aircraft operators may further require that persons seeking exemption from the requirement to wear a mask request an accommodation in advance." Doc. 1 at Pl. Ex. 20.

Defendant TSA's FTMM is in direct conflict with the ACAA (49 USC § 41705) and the regulations promulgated thereunder. It's especially troubling that Defendant DOT, the agency assigned by Congress to protect the rights of disabled flyers by enforcing the ACAA, has totally abdicated its responsibility. DOT issued a lengthy "Frequently Asked Questions" bulletin about the FTMM. Doc. 1 at Pl. Ex. 28.

> "Additional requirements or conditions may be imposed that provide greater public health protection and are more restrictive than the requirements of the CDC Order, including requirements for persons requesting an exemption from the mask requirement, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the operator." *Id*.

Defendant DOT's FTMM FAQ's are in direct conflict with the ACAA (49 USC § 41705) and the regulations promulgated thereunder. DOT has thus far neglected its own statutory duty to enforce the ACAA. The Office of Aviation Consumer Protection ("OACP"), a unit within DOT's Office of the General Counsel, issued a Notice of Enforcement Policy "Accommodation by Carriers of Persons with Disabilities Who Are Unable to Wear or Safely Wear Masks While on Commercial Aircraft" on Feb. 5, 2021, "to remind U.S. and foreign air carriers of their legal obligation to accommodate the needs of passengers with disabilities when developing procedures to implement the Federal mandate on the use of masks to mitigate the public health risks associated with the Coronavirus Disease 2019 (COVID-19)." Doc. 1 at Pl. Ex. 208.

> "OACP will exercise its prosecutorial discretion and provide airlines 45 days from the date of this notice to be in compliance with their obligation under the Air Carrier Access Act ("ACAA") and the Department's implementing regulation in 14 CFR Part 382 ("Part 382") to provide reasonable accommodations to persons with disabilities who are unable to wear or safely wear masks, so long as the airlines demonstrate that they began the process of compliance as soon as this notice was issued." *Id*.

The 45-day deadline was March 22, 2021, but it appears every commercial airline in the nation continues to violate the ACAA because the Federal Defendants have told them it's okay. "[T]he ACAA and Part 382, which are enforced by OACP, require airlines to make reasonable accommodations, based on individualized assessments, for passengers with disabilities who are unable to wear or safely wear a mask due to their disability." *Id*. However:

> "I have been illegally restricted from flying during the last year of the COVID-19 pandemic because of my inability to wear a mask, especially since the FTMM took effect Feb. 1, 2021. … I was denied the ability to fly by the Federal Defendants and Southwest Airlines from Orlando

> (MCO) to Fort Lauderdale (FLL) on June 2, 2021, solely because I can't wear a face covering – despite the fact I submitted the airline's mask exemption form immediately after booking my ticket May 31, 2021. … Defendant Transportation Security Administration ("TSA") refused to let me pass through its checkpoint at MCO solely because I can't wear a mask, refusing to accept my exemption form and/or CDC COVID-19 Vaccination Record Card." Wall Decl. at ¶¶ 6 & 9-10.

See also the 14 declarations from airline passengers and a former flight attendant at App. 10 describing the horrible discrimination they have faced because they medically can't wear a face covering. The Federal Defendants have been complicit to this discrimination that is forbidden by the ACAA:

> "To ensure that only qualified persons under the exemptions would be able to travel without a mask, the CDC Order permits operators of transportation conveyances, such as airlines, to impose requirements, or conditions for carriage, on persons requesting an exemption, including requiring a person seeking an exemption to request an accommodation in advance, submit to medical consultation by a third party, provide medical documentation by a licensed medical provider, and/or provide other information as determined by the operator. The CDC Order also permits operators to require protective measures, such as a negative result from a SARS-CoV-2 viral test or documentation of recovery from COVID-19 or seating or otherwise." Doc. 1 at Pl. Ex. 208. (emphasis added).

OACP's Notice of Enforcement Policy did not advise airlines that the CDC's Order allowing carriers to impose additional requirements (such as requesting a mask exemption in advance, submitting to a third-party medical consultation, submitting a medical certificate, and requiring a negative COVID-19 test) is illegal. *Id*.

"As a carrier, you must not refuse to provide transportation to a passenger with a disability on the basis of his or her disability, except as specifically permitted by this part." 14 CFR § 382.19(a).

"Except as provided in this section, you must not require a passenger with a disability to have a medical certificate as a condition for being provided transportation." 14 CFR § 382.23(a).

"You may also require a medical certificate for a passenger if he or she ***has*** a communicable disease or condition that could pose a direct threat to the health or safety of others on the flight." 14 CFR § 382.23(c)(1) (emphasis added). This requirement does not include speculation or presumption that a person ***might*** have a communicable disease such as COVID-19; evidence is required that the passenger ***has*** a communicable disease, i.e. has tested positive for coronavirus.

Since airlines may not require a medical certificate for a passenger unless he/she has a communicable disease, they may also not require a third-party medical consultation. "As a carrier, you may require that a passenger ***with a medical certificate*** undergo additional medical review by you if there is a legitimate medical reason for believing that there has been a significant adverse change in the passenger's condition since the issuance of the medical certificate…" 14 CFR § 382.23(d) (emphasis added).

No provision of the ACAA or its accompanying regulations permits airlines to require that passengers submit a negative test for any communicable disease. To require a test from a disabled person but not all passengers violates the express terms of the ACAA:

> "In providing air transportation, an air carrier …may not discriminate against an otherwise qualified individual on the following grounds: (1) the individual has a physical or mental impairment that substantially limits one or more major life activities. (2) the individual has a record of

> such an impairment. (3) the individual is regarded as having such an impairment." 49 USC § 41705(a).

In its Feb. 5 Notice of Enforcement Policy, OACP admitted it had failed to enforce the ACAA and its regulations in 2020 when many airlines banned all passengers with disabilities who could not wear a face covering:

> "Some carriers have adopted policies that expressly allow 'no exceptions' to the mask requirement other than for children under the age of two. OACP has received complaints from persons who assert they have a disability that precludes their wearing a mask, and who contend that they were denied transport by an airline under a 'no exceptions allowed' mask policy." Doc. 1 at Pl. Ex. 208.
>
> "The CDC and other medical authorities recognize that individuals with certain medical conditions may have trouble breathing or other difficulties such as being unable to remove the mask without assistance if required to wear a mask that fits closely over the nose and mouth. … It would be a violation of the ACAA to have an exemption for children under 2 on the basis that children that age cannot wear or safely wear a mask and not to have an exemption for … individuals with disabilities who similarly cannot wear or safely wear a mask when there is no evidence that these individuals with disabilities would pose a greater health risk to others." *Id*.
>
> "The ACAA prohibits U.S. and foreign air carriers from denying air transportation to or otherwise discriminating in the provision of air transportation against a person with a disability by reason of the disability. When a policy or practice adopted by a carrier has the effect of denying service to or otherwise discriminating against passengers because of their disabilities, the Department's disability regulations in Part 382 require the airline to modify the policy or practice as necessary to provide nondiscriminatory service to the passengers with disabilities …" *Id*.

"Part 382 allows an airline to refuse to provide air transportation to an individual whom the airline determines presents a disability-related safety risk, provided that the airline can demonstrate that the individual would pose a 'direct threat' to the

health or safety of others onboard the aircraft, and that a less restrictive option is not feasible." *Id*.

OACP illegally told airlines that "In accordance with the CDC Order, as conveyance operators, airlines are required to implement face mask policies that treat passengers presumptively as potential carriers of the SARS-CoV-2 virus and, therefore, as presenting a potential threat to the health and safety of other passengers and the crew." *Id*. This guidance violates 14 CFR § 382.23(c)(1), which provides that an airline must have evidence that the passenger "has" a communicable disease, i.e. has tested positive for coronavirus. A "presumptive" determination that every single airline passenger – even those who are fully vaccinated and/or naturally immune – is infected with COVID-19 goes against the plain language of 14 CFR § 382.23(c)(1) and is simply ridiculous.

OACP illegally informed airlines Feb. 5 that "both the CDC Order and Part 382 permit airlines to require passengers to consult with the airline's medical expert and/or to provide medical evaluation documentation from the passenger's doctor sufficient to satisfy the airline that the passenger does, indeed, have a recognized medical condition precluding the wearing or safe wearing of a mask." Doc. 1 at Pl. Ex. 208. But *see* 14 CFR § 382.23(a).

OACP illegally informed airlines that "Part 382, like the CDC Order, permits airlines to require passengers with disabilities who are unable to wear masks to request an accommodation in advance." But *see* 14 CFR § 382.25.

OACP illegally informed airlines that they "may impose protective measures to reduce or prevent the risk to other passengers. For example, airlines may require

protective measures, such as a negative result from a SARS-CoV-2 test, taken at the passenger's own expense, during the days immediately prior to the scheduled flight." Doc. 1 at Pl. Ex. 208. As noted above, there is no provision of the ACAA or 14 CFR Part 382 that allows airlines to require a negative virus test to board a plane.

Information provided to passengers by Defendant DOT contradicts OACP's Feb. 5 Notice of Enforcement Policy. In a document "New Horizons: Information for the Air Traveler with a Disability," DOT informs flyers that "Airlines may not require passengers with disabilities to provide advance notice of their intent to travel or of their disability…" Doc. 1 at Pl. Ex. 209.

> "A medical certificate is a written statement from the passenger's physician saying that the passenger is capable of completing the flight safely without requiring extraordinary medical care. A disability is not sufficient grounds for a carrier to request a medical certificate. Carriers shall not require passengers to present a medical certificate unless the person: … Has a communicable disease or infection that has been determined by federal public health authorities to be generally transmittable during flight." *Id*.

> "If a person who seeks passage ***has*** an infection or disease that would be transmittable during the normal course of a flight, and that has been ***deemed so*** by a federal public health authority knowledgeable about the disease or infection, then the carrier may: … Impose on the person a condition or requirement not imposed on other passengers (e.g., wearing a mask)." *Id*. (emphasis added).

Defendant DOT publishes a 190-page handbook "What Airline Employees, Airline Contractors, & Air Travelers with Disabilities Need to Know About Access to Air Travel for Persons with Disabilities: A Guide to the Air Carrier Access Act (ACAA) and its implementing regulations…" Relevant excerpts of this handbook are attached to the Complaint. Doc. 1 at Pl. Ex. 210.

"May I ask an individual what his or her disability is? Only to determine if a passenger is entitled to a particular seating accommodation pursuant to section 382.38. Generally, you may not make inquiries about an individual's disability or the nature or severity of the disability." *Id.*

"You must not refuse transportation to a passenger solely on the basis of a disability. [Sec. 382.31(a)]." *Id.*

"You shall not require a passenger with a disability to travel with an attendant or to present a medical certificate, except in very limited circumstances. [Secs. 382.35(a) and 382.53(a)]" *Id.*

"You cannot require passengers with disabilities to provide advance notice of their intention to travel or of their disability except as provided below. [Sec. 382.33(a)]." *Id.*

> "If you are faced with particular circumstances where you are required to make a determination as to whether a passenger with a communicable disease or infection poses a direct threat to the health or safety of others, you must make an individualized assessment based on a reasonable judgment, relying on current medical knowledge or the best available objective evidence." No presumptive judgment that every single person has a communicable disease or infection is permitted. *Id.*

"If, in your estimation, a passenger ***with a communicable disease or infection*** poses a direct threat to the health or safety of other passengers, you may … (iii) impose on that passenger a special condition or restriction (e.g., wearing a mask)." … [Sec. 382.51(b)(4)]." *Id.* (emphasis added).

> "Except under the circumstances described below, you must not require medical certification of a passenger with a disability as a condition for providing transportation. You may require a medical certificate only if the passenger with a disability is an individual who is traveling on a stretcher or in an incubator (where such service is offered); needs medical oxygen during the flight (where such service is offered); or has a medical condition that causes the carrier to have reasonable doubt that the

> passenger can complete the flight safely without requiring extraordinary medical assistance during the flight. [Sec. 382.53 (a) and (b)]." *Id*.

"In addition, if you determine that a passenger ***with a communicable disease or infection*** poses a direct threat to the health or safety risk of others, you may require a medical certificate from the passenger. [Sec. 382.53(c)(1)]." *Id*. (emphasis added).

"Generally, you must not refuse travel to, require a medical certificate from, or impose special conditions on a passenger with a communicable disease or infection." *Id*.

"Some Examples of Mental or Psychological Impairments [Sec. 382.5(a)(2)]: Mental retardation; Depression; ***Anxiety disorders*** …" *Id*. (emphasis added).

"Discrimination is Prohibited: Management of carriers are required to ensure that the carrier (either directly or indirectly through its contractual, licensing, or other arrangements for provision of air transportation) does not discriminate against qualified individuals with a disability by reason of such disability. [Sec. 382.7(a)(1)]." *Id*.

"Carriers must not refuse to provide transportation to a passenger with a disability on the basis of his or her disability ***unless it is expressly permitted by the ACAA and part 382***. [Sec. 382.31(a)]." *Id*. (emphasis added).

It is shocking the degree to which the Federal Defendants are allowing airlines to illegally discriminate against passengers with disabilities by enforcing the FTMM and making it virtually impossible to get a mask exemption. The District Court must vacate the FTMM for violating the ACAA.

H. I have a substantial likelihood of success on the merits of my claim that the FTMM must be vacated because it violates of the Constitution's separation of powers.

"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." *State of Florida.* The same applies here: Never before has Defendant CDC tried to dictate what Americans must wear on their faces when taking any mode of public transportation nationwide. The FTMM is an authoritarian policy that has no basis in law.

"This practically unbounded interpretation causes separation-of-powers problems, discussed in greater depth below, and naturally stirs suspicion about the constitutionality of [42 USC] Section 264(a)." *Id*. The district judge's finding in the cruiseship case echoes here: the Federal Defendants have no statutory or constitutional basis for forcing travelers to cover their faces. The same applies to Defendant CDC's Eviction Moratorium.

> "The court declares that the challenged [moratorium] … 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 USC § 706(2)(B)." *Terkel v. CDC*, No. 6:20-cv-564 (E.D. Tex. Feb. 25, 2021).

If Defendant CDC's outrageous interpretation of the breadth of its authority under the PHSA were upheld, the statute would have to be invalidated as an unconstitutional delegation of legislative power to the Executive Branch.

I. I have a substantial likelihood of success on the merits of my claim that the FTMM must be vacated because it violates the constitutional guarantee of freedom to travel.

As early as the Articles of Confederation, Congress recognized freedom of movement (Article 4), though the right was thought to be so fundamental during the drafting of the Constitution as not needing explicit enumeration. "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).

This Court has repeatedly frowned upon restrictions of constitutional rights during the COVID-19 pandemic.[9] The FTMM violates the long-standing constitutional freedom to travel without undue governmental interference. When the government deprives a person of his/her freedom to travel without due process of law, it violates the Bill of Rights.

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

"It is a familiar and basic principle, recently reaffirmed in *NAACP v. Alabama*, 377 U.S. 288, 307 … that 'a governmental purpose to control or prevent activities

[9] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 66 (2020); *Robinson v. Murphy*, 141 S.Ct. 972 (2020); *High Plains Harvest Church v. Polis*, 141 S.Ct. 527 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021); and *Tandon v. Newsom*, 141 S.Ct. 1294 (2021).

constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" *Aptheker,* 378 U.S. 500. "This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful – knowing, studying, arguing, exploring, conversing, observing, and even thinking. Once the right to travel is curtailed, all other rights suffer..." *Id.* (Douglas, J., concurring).

"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." *Id.*

The Court more recently affirmed the constitutional right to travel:

> "The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence. … Indeed, as Justice Stewart reminded us in *Shapiro v. Thompson*, 394 U.S. 618 (1969), 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." *Id.*, at 643 (concurring opinion)." *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

"No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. 5. Travelers, including me, have a liberty interest in not being forced to wear something that we don't want to wear to block our breathing – a function essential for human life – or alternatively being barred from all modes of public transportation. Abridged liberty cannot be merely compensated with cash, especially in this case where it is highly unlikely that there is any avenue in which monetary damages could be pursued by myself or any of the other tens of millions of

individuals subject to Defendant TSA's *ultra vires* enforcement directives. This is unchanged even if the rule implicates only a modest or slight liberty interest. The question is whether the harm is irreparable, not whether it is severe.

This Court 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* at 629.

In this year's *Tandon* case, the constitutional problem was California's emergency pandemic orders permitting, for example, several hundred people to shop at a big-box store but a much smaller number to gather at places of worship. The Court found this offended the First Amendment. Likewise, the Fifth Amendment is offended here when the Federal Defendants don't enforce mask orders across the nation for uncountable number of activities that are not protected by the Constitution, but do enforce mask wearing on interstate and international travelers, an activity that IS protected by the Constitution. If going to a nonconstitutionally protected activities such as a rock concert with 20,000 other fans or the Indianapolis 500 car race with more than 100,000 other people unmasked is permitted by the Federal Defendants, then exercises of constitutionally protected rights such as flying from one state to another must likewise be permitted.

"The right of 'free ingress and regress to and from' neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" *Saenz* at 501.

My constitutional right to freedom of movement can't be restricted when there is no evidence that airplanes 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 a CDC/TSA/DHS system to alert airlines to not board any passengers who have been reported by public-health authorities as having tested positive for COVID-19 during the past two weeks. *See* discussion of the Federal Defendants' "Do Not Board" and "Lookout" systems at ¶¶ 354-365 of the Complaint. Doc. 1. But there's no evidence that the Federal Defendants have been using the Do Not Board and Lookout procedures to stop passengers who have tested positive for COVID-19 from boarding flights. Doc. 1 at Pl. Ex. 66.

The District Court erred in finding that "There is nothing stopping Plaintiff from traveling from state to state…" Yes, there is. It's called the FTMM, a series of orders from the Executive Branch that were quickly put into place after the Jan. 20 inauguration of Defendant Biden without any public review.

Public health can be adequately protected by means which, when compared with the FTMM, are more discriminately tailored to the constitutional liberties of individuals. Using the Do Not Board and Lookout databases would specifically target those travelers who are a genuine threat to public health without infringing on the freedom to travel for everyone else.

The District Court erred in finding that "flying may be Plaintiff's preferred mode of transportation, but it is by no means the only reasonable mode of transportation available to him." Doc. 28; App. 1 at 4. This ignores the facts and the law. First, I don't own a car. Second, the FTMM applies to all forms of public transportation, so

taking a bus or train isn't an option for me either. Third, the large distances covered rapidly by airplanes aren't feasible by ground transportation. To drive from my current location at my mom's house in The Villages, Florida, to Salt Lake City, Utah, would have taken about 34 hours, according to Google Maps – not counting stops to eat, get gas, go the bathroom, and sleep. My visit to Utah was only planned for two nights, so saying that I had other "reasonable" modes of transportation is patently untrue. Also, my next flight (July 16) is to Germany. App. 8. I ask the Court: How am I supposed to get across the Atlantic Ocean by any mode other than aircraft?

In addition to having a constitutional right to travel, I also have a statutory right to fly: "A citizen of the United States has a public right of transit through the navigable airspace." 49 USC § 40103(a)(2).

Freedom of travel includes the right to movement on common carriers. "A carrier becomes a common carrier when it 'holds itself out' to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it." That means any individual or corporation becomes a common carrier by promoting to the public the ability and willingness to provide transportation service, including air travel. Air transport providers operating in, to, or from the United States act under common-carrier rules. FAA Advisory Circular No. 120-12A (April 24, 1986), https://bit.ly/FAA120-12A (visited July 3, 2021).

J. I have a substantial likelihood of success on the merits of my claim that the FTMM must be vacated because it violates the Fifth Amendment right to due process.

The FTMM deprives travelers of due process by assigning determinations on mask-exemption requests due to medical conditions and/or disabilities to private companies (such as airlines and bus companies) with no opportunity to appeal a denial to a neutral federal decisionmaker.

The Court recently spoke forcefully to 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*.

K. I have a substantial likelihood of success on the merits of my claim that the FTMM must be vacated because it runs afoul of the 10th Amendment.

The FTMM is at odds with the mask policies of 49 states. App. 11. As it applies to wholly intrastate travel, including taking a rideshare car or transit bus just one mile from a person's residence to another location within the same city, it violates the 10th Amendment. There is no nexus to interstate commerce for a person using public transportation to travel within their own city, county, or state for leisure. The Federal Defendants have no authority to overrule the mask policies of every state but Hawaii by imposing a national mask mandate for all forms of public transportation except driving your own motor vehicle.

> "The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and

> indefinite.' … if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that [the Federal Government] is without power to regulate. … To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *United States v. Lopez*, 514 U.S. 549 (1995).

Although the Federal Government has some authority to regulate intrastate economic activity that has a substantial effect on interstate commerce, this Court has held the 10th Amendment prohibits the Federal Defendants from regulating noneconomic intrastate activity. If I use public transportation such as an airplane to travel from Orlando to Fort Lauderdale, Florida, to visit a friend (as I attempted to do June 2 and was blocked by Defendant TSA), this is a purely noneconomic intrastate activity not subject to federal regulation. Here in Florida, it's illegal for any governmental agency to require any person to wear a mask. Doc. 1 at Pl. Ex. 55. Therefore the Federal Government has no constitutional authority to override that state policy by telling me to wear a mask when I travel within the state.

"[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Printz v. United States*, 521 U.S. 898, 919-920 (1997).

Defendant CDC's FTMM Order is so broad it applies to "Commercial motor vehicles or trucks as these terms are defined in 49 CFR 390.5, unless the driver is the sole occupant of the vehicle or truck …" 86 Fed. Reg. 8,025 (Feb. 3, 2021); Doc. 1 at Pl. Ex. 11. Thus the order applies to a delivery truck transporting locally made goods within a city with two fully vaccinated employees having no nexus to interstate commerce.

"Individuals traveling into or departing from the United States, traveling interstate, or ***traveling entirely intrastate***, conveyance operators that transport such individuals, and transportation hub operators that facilitate such transportation, must comply with the mask-wearing requirements set forth in this Order." *Id*. (emphasis added).

More importantly for this 10th Amendment analysis, the FTMM requires states and their political subdivisions who operate transit systems and hubs such as airports and train stations to enforce federal orders mandating masks – even when those federal orders directly conflict with state law. The Constitution does not permit commandeering the states to enforce policies established by the Federal Government.

> "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States. … Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's … [T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs…" *Printz.*

Defendant CDC's FTMM Order applies to school buses in direct contradiction to the policies of numerous states that forbid school districts from requiring that students be muzzled: "passengers and drivers on school buses must wear a mask, including on buses operated by public and private school systems…" Doc. 1 at Pl. Ex. 14. Defendant DOT's Federal Motor Carrier Safety Administration notes that "school bus operators, including operations by public school districts, and their passengers are required to wear masks…" Doc. 1 at Pl. Ex. 28. But school buses rarely ever cross state lines since school districts are created by states to serve children residing in

that state only. The FTMM thus requires state officials (employees of school districts) to enforce a federal order in violation of the anti-commandeering doctrine.

"[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *FERC v. Mississippi*, 456 U.S. 742, 761-762 (1982). Many experts consider forcing kids to wear masks child abuse. Doc. 1 at ¶¶ 828-855. Hence why some states forbid school districts from mandating that their students cover their sources of oxygen.

Defendant CDC's FTMM Order regulates not only travelers, but all employees working in the transportation sector – most of whom never cross state lines and many of whom work for state governments and their subdivisions: "Employees must wear a mask while on the premises of a transportation hub unless they are only person in the work area, such as might occur in private offices, private hangars at airports, or in railroad yards." Doc. 1 at Pl. Ex. 14.

"The Federal Government … may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992).

Defendant DOT's Federal Railroad Administration ("FRA") says "both passenger and freight train operators and rail employees are subject to Executive Order 13998 and the CDC's Order requiring masks during rail transportation." Doc. 1 at Pl. Ex. 28. But most passenger trains are operated by states and transit authorities created by states.

"It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. … even when the States are not forced to absorb the costs of implementing a federal program, they

are still put in the position of taking the blame for its burdensomeness and for its defects." *Printz.*

FRA's rules apply mostly to train personnel who never cross state lines or even come into contact with passengers who do:

> "This applies to railroad terminals, yards, storage facilities, yard offices, crew rooms, maintenance shops, and other areas regularly occupied by railroad personnel. Masks are also required in vans hauling crews and occupied engines. The CDC Order broadly requires persons to wear masks in such settings and applies in both passenger and freight rail facilities. … Any violation of FRA's Emergency Order may subject the railroad carrier committing the violation to a civil penalty of up to $118,826 for each day the violation continues."

It offends the Constitution to imagine the Federal Government fining a state commuter-rail operator $118,826 per day for failing to ensure its train maintenance workers wear masks in violation of state law. The mandatory obligation imposed on all state-operated transit systems and transportation hubs to enforce the FTMM plainly runs afoul of the constitutional rule that the Federal Government may not compel the states to administer a federal mandate.

> "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz* at 935.

There is no question that the decision to impose a nationwide mask mandate on all forms of transportation is one of vast economic and political significance. Mask mandates have been the subject of "earnest and profound debate across the country."

Gonzales v. Oregon, 546 U.S. 243, 267 (2006). There have been statewide mask mandates put into place at some point during the pandemic by 40 states. App. 11. However, now that Defendant CDC updated its guidance May 13, 2021, to say mask wearing is no longer necessary among those who are fully vaccinated, there remains only one state that requires everyone (vaccinated and unvaccinated) cover their faces in public. Hawaii is the last holdout, mandating masks for all residents regardless of vaccination status (in indoor settings only). *Id*.

Going farther, eight states, including Florida, ***prohibit*** any governmental agency from requiring any person be muzzled. *Id.* Gov. Ron DeSantis made clear the public policy in Florida is that no person should ever be required to cover their face, acknowledging the health dangers masking creates: "Surgeon General Dr. Scott Rivkees issued a Public Health Advisory … stating that continuing COVID-19 restrictions on individuals, including long-term use of face coverings and withdrawal from social and recreational gatherings, pose a risk of adverse and unintended consequences …" Executive Order 21-102 (May 3, 2021). Doc. 1 at Pl. Ex. 55.

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

Unlike the Federal Defendants, the states are the appropriate authorities – as both a constitutional and practical matter – to determine whether reimposing mask mandates is necessary to mitigate COVID-19 should the pandemic flare up again.

L. The FTMM can't survive strict scrutiny.

"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 the law 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). The FTMM fails strict scrutiny because there are far less restrictive options available to advance the Federal Government's asserted interest in combatting the spread of COVID-19.

Strict scrutiny must apply in this case because the Federal Defendants, through enforcement of the unlawful FTMM, disparately impact the right to due process and the freedom of movement compared to analogous activities that are not constitutionally protected. If a person may go see a movie, eat in a restaurant, shop in a crowded mall, and so forth without a mask, then he must also be permitted to travel without covering his face – especially when the person (such as myself) is fully vaccinated from COVID-19 and/or has a medical condition that prevents him from safely wearing a mask. *See* my medical records at Docs. 12-1 to 12-6 and my CDC vaccination card at Doc. 1, Pl. Ex. 53.

> "In cases implicating this form of 'strict scrutiny,' courts nearly always face an individual's claim of 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. The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard. … Even in times of crisis – perhaps especially in times of crisis – we

> have a duty to hold governments to the Constitution." *South Bay*, 141 S.Ct. 716 (Gorsuch, Thomas, Alito, JJ., concurring).

The Federal Defendants have never rationally explained why they believe the science shows the fully vaccinated don't need to wear masks in virtually every situation except transportation. How is sitting next to someone for two hours in a movie theater unmasked any different than sitting next to someone on a plane, train, or bus for two hours? There is no way the Federal Defendants can satisfy narrow tailoring.

"I adhere to the view that the 'Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.' … But the Constitution also entrusts the protection of the people's rights to the Judiciary…" *South Bay* (Roberts, C.J., concurring).

In the instant matter, we have Defendant CDC, with the support of Defendant Biden, telling fully vaccinated Americans they may go about their lives without wearing a mask – except in the transportation sector. The Court doesn't care for those sorts of distinctions, especially when constitutional rights such as due process and the freedom to travel are denied when numerous other nonconstitutionally protected activities are permitted without mask wearing.

> "[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. Where the government permits other activities to proceed with precautions, it must show that the [constitutionally protected] exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for [constitutionally protected] exercise too." *Tandon*.

In this matter, the Federal Defendants have measures available to them that are far less restrictive than mandating masks be worn in the entire national transportation network, especially a system that's long been established to stop passengers with a communicable disease from traveling such as the "Do Not Board" and "Lookout" lists. *See* discussion in ¶¶ 354-365 of the Complaint. Dkt. 1.

The FTMM fails narrow tailoring because to the extent the Federal Defendants seek to reduce sickness, hospitalizations, and death, there are far less restrictive means available than a blanket mandate that everyone wear masks, whose effectiveness are greatly disputed by scientists. Doc. 1 at ¶¶ 513-855.

Caps on attendance at houses of worship in New York could not survive strict scrutiny because the State "offered no evidence that applicants … contributed to the spread of COVID-19," and there were "many other less restrictive rules that could be adopted to minimize the risk to those attending religious services." *Roman Catholic Diocese.*

Although the virus is still circulating at low levels in the United States – as it likely always will -- the public health system is not under any strain, and there are currently fewer people hospitalized with COVID-19 than at any point in the past year. An injunction here will not harm public health. Indeed, since this Court granted the injunctions in *South Bay*, *Gateway City Church*, and *Tandon*, the nation has continued to see a steady decline in the number of deaths, hospitalizations, and confirmed cases of COVID-19.

M. I'm suffering irreparable harm of being banned from the nation's entire public-transportation system due to the Federal Defendants' enforcement of the FTMM, even though I'm fully vaccinated from COVID-19, because I medically can't wear a face mask. The government's violation of my constitutional and statutory rights will continue to cause irreparable harm absent injunctive relief.

I will without a doubt suffer continual irreparable injury if the requested relief is not granted. The Federal Defendants by their actions June 2 (and continuing June 16, 18, 20, 22, and 24, and July 1) denying me the ability to board an airplane because I can't wear a mask have already caused me irreparable injury.

In its June 15 ruling (Doc. 28; App. 1) on my Emergency Motion for TRO (Doc. 8), the District Court failed to consider the seriousness of the irreparable injuries I am suffering. Put simply, a "violation of a constitutional right constitutes irreparable injury…" *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013).

"CDC fail[ure] to provide notice and comment … establishes irreparable injury. … the harm flowing from a procedural violation can be irreparable." *State of Florida*.

In addition to ignoring the irreparable injury from the Federal Defendants not obeying the APA, the District Court failed to consider legal precedent by claiming I have other "reasonable" ways to travel between states and abroad other than airplane. The right of free movement is not tied to any specific mode of transportation. Consequently, it encompasses all means of travel. If I want or need to travel by air – for example on a lengthy trip such as Florida to Utah that I was denied June 16 or Florida to Germany that I was denied June 24 and again July 1 – that is my right. I only planned to stay in Utah for two nights, making it impossible to travel there by means other than airplane. And of course it's impossible to drive a car from Florida to Germany.

> "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, 94 S. Ct. 316, 38 L. Ed. 2d 274 (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).

Justice Gorsuch wrote in a concurring opinion in *Roman Catholic Diocese* that government is not free to disregard the Constitution in times of crisis: "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."

The Court must revisit the trial court's erroneous holding and instead should conclude that the FTMM too broadly and indiscriminately restricts the right to travel – especially for the fully vaccinated and/or people with disabilities who can't wear a mask – and thereby abridges the liberty guaranteed by the Constitution.

The District Court erroneously found that "Defendant TSA and Southwest Airlines gave Plaintiff clear notice that he will not be allowed to fly without a mask, and Plaintiff has made no attempt to avoid financial harm by requesting a refund for his pending flights." Doc. 28; App. 1 at 4. However, I am not required to make any attempt to avoid financial harm when the Federal Defendants enforce an illegal and unconstitutional FTMM on me. It is rather the Court's duty to enjoin enforcement of the mandate that was issued beyond the Federal Defendants' statutory and constitutional authority.

The fact that "many of Plaintiff's upcoming flights are fully refundable" is irrelevant. Some of them are, but some of them are not. I have already had to cancel six

trips during the past month because of the FTMM and more are in grave danger of being scuttled as well since they occur in the next few weeks, before I could possibly get a merits decision from the District Court. This is irreparable harm and warrants a preliminary injunction.

My next trip (July 16) is to Germany to visit my brother and his wife. App. 7 at ¶ 17; App. 8. There exists no other "reasonable" way to get across the Atlantic Ocean than by airplane. My trip after that is from Washington, D.C., to Seattle, Washington (App. 9), again not a distance reasonably covered by any mode other than airplane.

In ruling on my Emergency Motion for TRO (Doc. 8) on June 15 (Doc. 28; App. 1), the District Court addressed only one of the four factors required for obtaining extraordinary relief at the start of a case: irreparable harm. Its conclusions concerning this factor are not supported by the facts or law – and I meet the other three standards as discussed supra and below.

The District Court failed to take into account that I am without a doubt suffering continual irreparable injury if the requested relief is not granted. The Federal Defendants, by their actions June 2 denying me the ability to board an airplane, have already caused me irreparable injury.

I have now suffered irreparable harm of 10 lost or delayed flights – depriving me of my constitutional freedom to travel without unnecessary government obstruction – costing me a total of $769.89 in ticket cancellation and change fees because of the FTMM. App. 7 at ¶ 23. Those dollars can't be recovered from the Federal Defendants because the APA doesn't permit monetary relief: "A person suffering legal wrong because of agency action … is entitled to judicial review thereof. An action in a court of

the United States seeking relief ***other than money damages*** and stating a claim that an agency … acted or failed to act in an official capacity or under color of legal authority shall not be dismissed…" 5 USC § 702 (emphasis added).

The sovereign immunity defense has been withdrawn only with respect to actions seeking specific relief ***other than money damages***, such as an injunction, a declaratory judgment, or a writ of mandamus. *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Therefore, I have suffered irreparable injury. The Court should grant me emergency injunctive relief until the District Court decides my case on the merits.

There can be no question that the challenged restrictions, if enforced, will cause irreparable harm because it is well-settled that the "loss of [constitutionally guaranteed] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

N. The equities weigh strongly in favor of injunctive relief. The injuries I am suffering by being excluded from all forms of public transportation across the entire country – despite being vaccinated from COVID-19 – outweigh the harm a preliminary injunction would inflict on the Federal Defendants.

The threatened injury to me outweighs the harm the relief would inflict on the Federal Defendants. Whereas I have been denied the ability to use airline tickets I have paid for and been deprived of my constitutional rights to due process and freedom to travel, the government would suffer no harm if the Court grants me a PI. The relief requested would actually match the federal mask policy in every realm of society except transportation – as well as the mask rules in 49 states. App. 11.

The balance of equities factor focuses on the "effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). The Federal Defendants cannot have an interest in taking actions that are outside of their statutory and/or constitutional authority. They therefore cannot claim to have any cognizable "injury" as a result of the issuance of a PI halting enforcement nationwide of the FTMM.

O. Entry of a preliminary injunction stopping the Federal Defendants from enforcing the FTMM would serve the public interest.

A preliminary injunction is warranted here because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Bev. Ass'n v. City and Cty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc). Protecting Americans' Fifth Amendment rights to due process and the liberty to travel – not to mention the states' 10th Amendment protection against being made to enforce federal orders contrary to their own laws – is in the public interest.

"The public interest inquiry primarily addresses impact on nonparties rather than parties." *League of Wilderness Defs/Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). When the government is the defendant, the analyses of these two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Much earlier in the pandemic, the Federal Defendants might have argued that an injunction against the FTMM is not in the public interest because it could cause the nation's hospital system to be overwhelmed with COVID-19 patients (even though

the efficacy of masks is extremely disputed in the scientific community – *see* discussion at ¶¶ 513-855 of the Complaint). But vaccines are now widely available to every American age 12 and older who wants one. According to Defendant CDC, 329,970,551 vaccinations have been administered in the United States – just about one for every single American. 181,887,598 people age 12 and older have received at least one vaccine dose (64.1% of the population in this age group). Of the adult population (age 18 and above), more than two-thirds (67%) have received at least one inoculation. Most importantly, 88.3% of senior citizens (age 65 and above) – the group most vulnerable to severe COVID-19 – have gotten a shot. https://bit.ly/CDCvactracker (visited July 3, 2021).

The number of COVID-19 infections and deaths thanks to vaccinations have plummeted since their summit in January 2021. Compared with the highest peak of 252,905 on Jan. 10, the current seven-day average of new daily coronavirus cases is down 95% to 12,514, according to Defendant CDC. https://bit.ly/CDCCOVIDtracker (visited July 3, 2021).

"[I]t is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could." *South Bay*, 141 S. Ct. at 720 (statement of Gorsuch, J.).

"COVID-19 no longer threatens the public's health to the same extent presented at the start of the pandemic or when CDC issued the conditional sailing order. … And Florida's high likelihood of success on the merits ensures that a preliminary injunction would serve the public interest." *State of Florida*.

"With enough vaccine in the U.S. for anyone 12 or older who wants one, reduced spread, and an indoor environment safer than bars where masks are no longer mandatory, in addition to likely being illegal the federal [mask] requirement no longer makes sense." App. 12.

The Federal Defendants have presented few arguments in the District Court to date, instead preferring a tactic of delay. In a procedural brief, they incorrectly argued my "adamant opposition to mask wearing [is] at odds with the widespread consensus of public-health experts…" Doc. 11 at 5. This statement couldn't be farther from the truth. There is no "widespread consensus of public-health experts" that face masks are effective in reducing COVID-19 spread, especially among those like me who are fully vaccinated. In fact, if there is any "widespread consensus" among scientists, it's that mask wearing has been totally ineffective in reducing COVID-19 infections and deaths. Doc. 1 at ¶¶ 513-855 and the numerous exhibits attached to the Complaint in support thereof. Furthermore, Defendant CDC itself recommends that fully vaccinated Americans not wear masks, so how can it possibly assert to this Court that there is a "widespread consensus" that masks are needed?

Several state legislatures have taken notice of the Federal Defendants' false assertions that masks are an effective COVID-19 mitigation tool. Oklahoma enacted a law that severely restricts state schools and colleges from adopting mandatory mask mandates because they pose a danger to human health. Lawmakers in Utah and Kansas repealed statewide mask mandates. Legislators in Arkansas and Iowa have banned any mask requirements. App. 11.

Governors have also refused to believe what the Federal Defendants claim about masks being helpful in combatting COVID-19. By executive orders, the public policy of Arizona, Florida, South Carolina, Tennessee, and Texas is that no counties, cities, state agencies, or regional authorities may require anyone to cover their face. *Id.* Finally, the Wisconsin Supreme Court and Michigan Supreme Court are among U.S. tribunals that have struck down mask mandates. *Id.*

It's also in the public interest to prevent discrimination against travelers such as myself with medical conditions that prevent them from wearing masks. The public policy of the United States is that passengers with disabilities shall not be discriminated against (or in this case, almost entirely banned from flying or using any other mode of public transportation nationwide). *See* discussion supra about the Air Carrier Access Act (49 USC § 41705) and its accompanying regulations (14 CFR Part 382).

Because of the FTMM, tens of millions of Americans who can't wear face coverings because of medical conditions – many of whom like me are fully vaccinated and/or have natural immunity from COVID-19 – are essentially being banned from using all modes of public transportation nationwide for no rational reason. *See* passenger declarations at App. 10.

There is "no public interest in the perpetuation of unlawful agency action." *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (brackets and citation omitted). Embracing the theory that a nationwide mask mandate is still necessary to prevent an imminent peril to public health would require this Court "to exhibit a naiveté from which ordinary citizens are free." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted).

To the extent that legitimate public-health concerns surrounding COVID-19 resurface locally, this Court enjoining enforcement of the FTMM would not stop the states from reinstating or extending their own mask mandates if they deemed it necessary and proper despite the scientific evidence to the contrary.

In weighing the public interest, the Court needs to take into account that airplanes are among the safest places you can be during the pandemic, especially now that a big chunk of Americans are vaccinated. *See* discussion at ¶¶ 942-960 of the Complaint. Doc. 1. Most importantly, there have not been any reported outbreaks of COVID-19 at airports or on board aircraft. The Court drew this similar distinction when granting injunctive relief to churches in New York who faced draconian limits on how many people could attend mass.

> "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*.

Also demonstrating the public interest is that regulation of public health is historically the province of the states, 49 of which do not require vaccinated people to cover their nose and mouth (Hawaii being the outlier). App. 11. And unlike with the Eviction Moratorium, where Congress did authorize such a measure for a short period of time, Congress has ***never*** enacted a federal mask mandate.

The Court has to consider that the federal mask mandate negatively impacts transportation security because it has created chaos in the sky and on the ground.

See discussion of the thousands of incidents of unruly passenger and crew behavior as a direct result of the mask mandate at ¶¶ 424-479 of the Complaint. Doc. 1. Even CEOs of two major airlines (Frontier and Spirit) have now come out opposed to continuing to mandate masks. Doc. 63.

"The US government can help reduce the incidence of unruly air passenger behavior by doing away with the requirement that travelers wear face coverings, says the chief executive of Spirit Airlines," Flight Global reported June 23. https://bit.ly/FG062321. "'That's got to be the next step – when facial [covering requirements] are relaxed on airplanes,' CEO Ted Christie says during the Routes Americas conference ... 'That is going to take a lot of steam out of things. … The masks make everyone uncomfortable, and it does drive a lot of friction.'"

The CEO of Frontier Airlines also spoke out against the FTMM because of the safety risks it creates: "Barry Biffle agrees: face coverings are a prime contributor to a string of recent in-flight disruptions. 'The reality is, a lot of people don't want to wear masks,' says Biffle, who also spoke at the event. 'You don't have to wear a mask here, you don't have to wear [masks] at Walmart, but yet you've got to do it on a plane.' 'People are agitated,' he adds." *Id*.

It is in the public interest to enjoin the mask mandate from being enforced nationwide until the District Court can reach a final decision on the merits. Right now tens of millions of Americans are subjected every single day to Defendant TSA's unlawful "security" directives that have nothing to do with ensuring transportation security. This Court has the power to put a stop to it, especially considering that scientific

research shows that masks do nothing to reduce coronavirus spread and are actually harmful to humans. *See* discussion at ¶¶ 513-855 of the Complaint. Doc. 1.

California engaged in fearmongering in *South Bay*, claiming that "the relief plaintiffs seek from this Court would imperil public health." It's anticipated the Federal Defendants would attempt to make a similar outlandish claim not supported by science; Defendant CDC's own May 13 no-mask guidance; and COVD-19 vaccine, infection, hospitalization, and death data. The Court must reject these erroneous claims that an injunction against the FTMM would harm public health.

As members of this Court have recognized, 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*, 141 S. Ct. at 720 (Statement of Gorsuch, J.). It is time for the FTMM to end.

X. CONCLUSION

The lower courts erred in refusing to grant me a temporary restraining order and/or preliminary injunction to halt enforcement of the FTMM until the a final judgment in my case is entered. The task of protecting travelers from overzealous government mandates that are issued in excess of statutory and regulatory authority as well as violate our constitutional rights from government officials is once again in the hands of this Court.

Pursuant to 28 USC § 1651, for the numerous reasons set forth above, I ask the Court to grant my application for emergency injunctive relief to order the Federal Defendants to stop enforcing the FTMM nationwide. I request an injunction be issued

no later than Friday, July 16, so I may take my July 17 flight to Germany to see my family.

WHEREFORE, I request this Court issue an order granting me the following relief:

1. All Federal Defendants and their officers, agents, servants, employees, contractors, and attorneys are hereby ENJOINED from enforcing the Federal Transportation Mask Mandate nationwide until the U.S. District Court for the Middle District of Florida enters a final judgment in this case.
2. Because all airlines and other transportation providers nationwide who are subject to the Federal Transportation Mask Mandate's enforcement provisions are in active concert or participation with the enjoined Federal Defendants in enforcing the mandate, all airlines and other transportation providers nationwide are also hereby ENJOINED from requiring that any passenger wear a face covering unless such a such a restriction is imposed by valid state or local law.

Respectfully submitted this 6th day of July 2021.

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