> 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

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[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 SARCoV-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

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[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.