

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 re-surface 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 COVID-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.

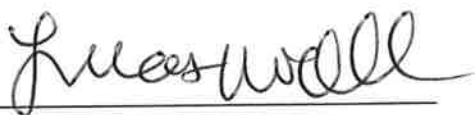
Pursuant to 28 USC § 1651, for the numerous reasons set forth above, I ask the Court to grant my application for emergency injunctive relief to order the Federal Defendants to stop enforcing the FTMM nationwide. I request an injunction be issued

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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No. _____

WALL v. CENTERS FOR DISEASE CONTROL & PREVENTION ET AL.

DECLARATION OF SERVICE

Pursuant to Sup. Ct. R. 29, I certify that a copy of my Emergency Application for Writ of Injunction and the Appendix was served June 6, 2021, by Priority Mail to the following:

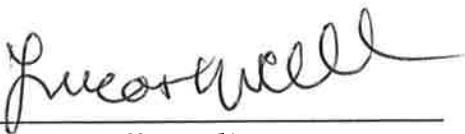
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Respondent Officer of the United States:
President Joseph Biden
Attn: Legal Counsel
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Washington, DC 20500

An electronic version was also served the same day by e-mail to Stephen Pezzi, counsel for respondents, at Stephen.Pezzi@usdoj.gov.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 6, 2021.



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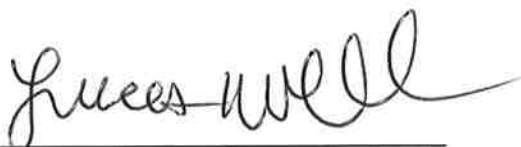
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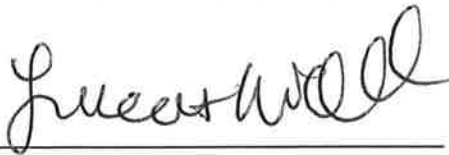
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