No. _____

In the Supreme Court of the United States

LUCAS WALL,

APPLICANT,

v.

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

RESPONDENTS.

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

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

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I. INTRODUCTION

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

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

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

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

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

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

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

II. PARTIES

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

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

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

III. JURISDICTION

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

IV. DECISIONS BELOW

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

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

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

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

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

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

V. QUESTIONS PRESENTED

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

VI. STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. THE FEDERAL TRANSPORTATION MASK MANDATE

A. Presidential Action

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

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

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

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

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

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

B. Department of Homeland Security Action

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

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

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

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

C. Centers for Disease Control & Prevention Action

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

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

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

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

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

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

Defendant CDC's FTMM Order requires that:

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

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

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

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

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

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

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

D. Transportation Security Administration Actions

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

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

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

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

1. Airports

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

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

Airport operators must adopt the following measures:

> "A. The airport operator must make best efforts to provide individuals with prominent and adequate notice of the mask requirements to facilitate awareness and compliance. This notice must also inform individuals of the following: 1. Federal law requires wearing a mask at all times in and on the airport and failure to comply may result in removal and denial of re-entry. 2. Refusing to wear a mask in or on the airport is a violation of federal law; individuals may be subject to penalties under federal law. B. The airport operator must require that individuals in or on the airport wear a mask ... If individuals are not wearing masks, ask them to put a mask on. 2. If individuals refuse to wear a mask in or on the airport, escort them from the airport. C. The airport operator must ensure direct employees, authorized representatives, tenants, and vendors wear a mask at all times in or on the airport..." *Id.*
>
> "If an individual refuses to comply with mask requirements, follow incident reporting procedures in accordance with the Airport Security Program and provide the following information, if available: 1. Date and airport code; 2. Individual's full name and contact information; 3. Name

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

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

2. Aircraft Operators

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

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

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

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

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

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

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

3. Owners & Operators of Vehicles Used for Public Transportation

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

> "The requirements in this SD must be applied to all persons in or on one of the conveyances or a transportation facility used by one of the modes identified above, ***including those already vaccinated***. TSA developed these requirements in consultation with the Department of Transportation (including the Federal Railroad Administration, the Federal Transit Administration, and the Federal Motor Carrier Safety Administration) and the CDC." *Id.* (emphasis added).
>
> "For the purpose of this SD, the following definitions apply: Conveyance has the same definition as under 42 CFR 70.1, meaning "an aircraft, train, road vehicle, vessel .. or other means of transport, including military. ... Transportation hub/facility means any airport, bus terminal, marina, seaport or other port, subway stations, terminal (including any fixed facility at which passengers are picked-up or discharged), train

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

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

E. Department of Transportation Actions

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

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

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

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

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

VIII. PROCEDURAL HISTORY

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

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

A. Complaint

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

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

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

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

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

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

6) committed an improper delegation of legislative power;

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

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

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

B. District Court Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IX. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Let's start with the failure of Defendants CDC, HHS, DHS, TSA, and DOT to obey the notice-and-comment requirements of the APA. The FTMM is an "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 USC § 704. It represents the consummation of the Federal Defendants' decision-making process with respect to requiring masks in the entire U.S. transportation sector. And it affects my legal rights and obligations because it prevents me from flying and using any other mode of public transportation because I can't wear a mask.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Federal Defendants issued a contradictory statement reminding

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

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

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

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

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

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

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