IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ELIZABETH VAN DUYNE, and THE STATE OF TEXAS, *Plaintiffs,*	§	
v.	§	CIVIL ACTION NO. 4:22-cv-00122-O
CENTERS FOR DISEASE CONTROL AND PREVENTION, ROCHELLE P. WALENSKY, in her official capacity as Director of the CDC, SHERRI A. BERGER, in her official capacity as Chief of Staff of the CDC, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as Secretary of HHS, and UNITED STATES OF AMERICA. *Defendants*.	§	

PLAINTIFF ELIZABETH VAN DUYNE'S BRIEF
IN RESPONSE TO THE COURT'S ORDER (DOC. 15)

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On March 17, 2022, the Court directed the parties to brief "whether the Court should consolidate the preliminary injunction hearing with a trial on the merits." (Doc. 15.) For the reasons below, Plaintiff Elizabeth Van Duyne (hereafter, "Plaintiff") supports a quick resolution on the merits of her claim. However, rather than holding a trial on the merits, the Court should grant summary judgment to Plaintiff pursuant to Federal Rule of Civil Procedure 56(f) and enter final judgment declaring the Mask Mandate unlawful, set aside the Mandate pursuant to 5 U.S.C. § 706, and permanently enjoin Defendants and their agents from enforcing the Mandate. No evidentiary development is necessary, leaving purely legal questions for the Court to resolve, and not holding a trial on the merits will preserve judicial resources.

MEMORANDUM AND POINTS OF AUTHORITY

The only question before the Court is a legal one. Did Congress authorize the CDC to issue the *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8026 (Feb. 3, 2021) (the "Mask Mandate")? Defendants claim that their power to require masks over every commercial airplane passenger derives from Section 361 of the Public Health Service Act (the "PSHA"), codified as 42 U.S.C. § 264, and 42 C.F.R §§ 70.2, 71.31(b), and 71.32(b).[1] But once traditional methods of statutory interpretation are applied to the CDC's claimed authority, 42 U.S.C. § 264 and 42 C.F.R. § 70.2 (its implementing regulation), it is clear Congress did not authorize Defendants to issue such a sweeping public health measure. Further, if the Court disagrees with Plaintiff's interpretation of the statute, the Defendants' interpretation would violate the nondelegation doctrine. These issues should be resolved on summary judgment, rather than at trial because they are pure questions of law.

[1] Sections 71.31 and 71.32 govern entry into the United States from "foreign countries" and are not relevant to this challenge. *See* 42 C.F.R. § 71.1.

I. Plaintiff Van Duyne supports a quick resolution on the merits via summary judgment, rather than trial.

To the extent that the Court's March 17 order invites the parties to offer solutions to expedite the resolution of the case, Plaintiff Van Duyne believes that construing her motion for a preliminary injunction as a motion for summary judgment would be a more orderly and expeditious route for resolving the issues presented than would a trial. District courts enjoy "wide-ranging control over management of their dockets." *United States v. Colomb*, 419 F.3d 292, 300 (5th Cir. 2005) (quoting *United States v. Janati*, 374 F. 3d 263, 273 (4th Cir. 2004)). They are "vested with the inherent [authority] 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1417 (5th Cir 1996). Federal Rule of Civil Procedure 56(f) allows for the Court to consider summary judgment after giving notice and a reasonable time to respond when the material facts may not be genuinely in dispute. *See generally*, *Spring St. Partners v. Lam*, 730 F.3d 427, 435-36 (5th Cir. 2013). Additionally, as the harm of having to comply with the Mask Mandate remains ongoing[2] (Docs. 3, 14), Plaintiff supports a final judgment on the merits as soon as possible.

This Court and other courts have used Rule 56(f) in similar circumstances. In *Texas v. United States*, for example, this Court resolved issues raised by an application for preliminary injunction on summary judgment. 352 F. Supp. 3d 665, 669 (N.D. Tex. Dec. 30, 2018), *reversed on other grounds in California v. Texas*, 141 S. Ct. 2104 (2021). In *Terkel v. Centers for Disease Control*, the Eastern District of Texas also converted a motion for preliminary injunction to

[2] The CDC recently extended the Mask Mandate through April 18. CDC Newsroom Releases, *Mask Use on Public Transportation*, available at https://www.cdc.gov/media/releases/2022/s0310-TSA-masks.html (March 10, 2022) ("At CDC's recommendation, TSA will extend the security directive for mask use on public transportation and transportation hubs for one month, through April 18.").

summary judgment after giving notice and allowing for supplement briefing. 521 F. Supp. 3d 662, 669 (E.D. Tex. 2021). The procedural posture in *Terkel* is remarkably similar to this case. There, the plaintiffs challenged a CDC order prohibiting evictions in some circumstances. *Id.* at 668. The challenged order in *Terkel* even used the same claimed authority as the order in this case: 42 U.S.C. § 264(a). *Id.* at 673-74. The plaintiffs asked the court to proceed to considering summary judgment "given the purely legal nature of the merits question and the likely efficacy of declaratory relief" and the court agreed it was appropriate. *Id.* at 669. The same is true in this instance, for three reasons.

First, construing Plaintiff's motion for preliminary injunction as a motion for summary judgment under Rule 56(f) would be appropriate because there is no substantial evidentiary development necessary, a trial on the merits would be a waste of judicial resources, and Plaintiff Van Duyne's complaint raises purely legal questions that are appropriate for summary judgment. There is no evidentiary development required. (The only facts conceivably at issue are whether Plaintiff Van Duyne travels and whether she would not wear a mask if it was not required. Plaintiff has already submitted a declaration to that effect. (Doc. 3 at 27). These facts are not genuinely in dispute, and the parties will likely be able to stipulate to them. If the parties are unable to come to an agreement about whether Plaintiff travels by plane and whether she would voluntarily wear a mask, those questions can be resolved with a quick evidentiary hearing.)

Second, a trial on the merits would be a waste of judicial resources. As explained above, there are no substantial facts in dispute (and there may ultimately be no facts in dispute). Taking up the Court's time with a trial would be less conducive to resolving the issues of the case. A more efficient use of time would be to hold oral argument on the legal issues Plaintiff argued in her motion for a preliminary injunction.

Third, Plaintiff raises purely legal issues: whether 42 U.S.C § 264(a) authorized Defendants to issue the Mask mandate, and, if it does authorize it, whether that delegation of authority violates the nondelegation doctrine. These issues are appropriate for summary judgment. As explained below, Plaintiff's claims are meritorious.

II. The legal issues in this case are appropriate for summary judgment.

This is not a case about facts. It is not a case about whether masks work to stop the spread of disease or whether wearing a mask on a plane is a good idea. Instead, this case is solely about the delegation of legal authority. Namely, has Congress authorized Defendants to require masking on planes under the authority asserted by Defendants in their rulemaking? As shown in subsection A, the answer to that question is "no." Defendants contend that the answer is "yes," but that presents a separate problem under the non-delegation doctrine, which is addressed in subsection B. Ultimately, the Mask Mandate is illegal and the Court should issue a permanent injunction against its enforcement.

The Mask Mandate requires almost all people using commercial or public transportation to wear masks. Travelers "must wear a mask while boarding, disembarking, and traveling on any conveyance into or within the United States" and "must also wear a mask at any transportation hub that provides transportation within the United States." 86 Fed. Reg. at 8029. It defines masks as "a material covering the nose and mouth of the wearer, excluding face shields." *Id.* at 8027. The Mask Mandate uses the definition of "conveyance" found in 42 C.F.R. § 70.1: "Conveyance means an aircraft, train, road vehicle, vessel (as defined in this section) or other means of transport, including military." *Id.* It defines a "transportation hub" as "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.*

The Mask Mandate has very few exemptions. *Id.* (listing children under two years, people with disabilities who cannot safely wear a mask, and people who for wearing a mask would create a workplace hazard as exempt). It also has very few exceptions, such as while eating or while unconscious. *Id.* In June 2021, the CDC stated that it will not enforce the Mask Mandate when travelers are in outdoor areas. Centers for Disease Control and Prevention, *Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs*, https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html (last accessed Feb. 14, 2022). The order directs other Federal agencies to "implement additional measures enforcing the provisions of this Order." 86 Fed. Reg. at 8028, 8030. The Mask Mandate is enforceable through financial penalties, and the CDC reserves the right to enforce the Mask Mandate through criminal penalties. *Id.* at 8030.

A. Congress has not authorized Defendants to issue the Mask Mandate.

Federal agencies "are creatures of statute" and "possess only the authority that Congress has provided." *NFIB v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022) (per curiam). Congress never gave Defendants the authority to issue the Mask Mandate and Defendants are acting beyond their statutory authority. A reviewing court must hold unlawful and set aside agency action that is in excess of statutory authority. 5 U.S.C. § 706(2)(c). This Court should do just that.

The CDC relies on 42 U.S.C. § 264(a) for authority to make and enforce the Mask Mandate 86 Fed. Reg. at 8029.[3] That subsection reads in full:

[3] "Until further notice, under 42 U.S.C. 264(a) and 42 CFR 70.2, 71.31(b), and 71.32(b), unless excluded or exempted as set forth in this Order, a person must wear a mask while boarding, disembarking, and traveling on any conveyance into or within the United States. A person must

> **(a) Promulgation and enforcement by Surgeon General.**[4] The Surgeon General, with the approval of the Administrator [Secretary], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

42 U.S.C. § 264(a). The Fifth Circuit reviews an agency's interpretation of a statute using the two-step *Chevron* framework. *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (2020). Step one asks, "whether Congress has directly spoken to the precise question at issue." *Id.* During this step, the court will use all the "traditional tools of construction, including text, structure, history, and purpose." *Id.* (internal quotation marks omitted). The interpretation "must account for both the specific context in which language is used and the broader context of the statute." *Id.* Only if the statute is "truly ambiguous" will the court proceed to step two, "asking whether the agency's construction is permissible." *Id.* (internal quotation marks omitted). Here, once the Court uses all the traditional interpretive methods, there is no ambiguity as to whether the statute authorizes the CDC to issue the Mask Mandate Order. It does not.

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also wear a mask at any transportation hub that provides transportation within the United States." 42 C.F.R. § 70.2 allows substantially the same measures as the statute, though it also requires a finding that "the measures taken by health authorities of any State or possession . . . are insufficient to prevent the [interstate] spread" of communicable diseases. The latter two regulations, as explained in footnote one, only apply to entry from foreign countries.

[4] The Statute refers to the Surgeon General, but statutory powers granted to the Surgeon General were transferred to the Secretary of the Department of Health and Human Services. 20 U.S.C. § 3508; 31 Fed. Reg. 8855 (June 25, 1966).

1. Traditional methods of statutory construction can only lead to the conclusion that § 264(a) does not authorize the Mask Mandate.

Thanks to the CDC's repeated attempts to stretch the boundaries of this statute, there is substantial recent guidance for interpreting its provisions. Subsection (a) is only two sentences. The first sentence, on its face, "gives the CDC broad authority to take whatever measures it deems necessary to control the spread" of communicable diseases. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021). The second sentence, however, cabins the CDC's discretion by "illustrating the kinds of measures that could be necessary." *Id.*; *see also Tiger Lily, LLC v. United States HUD*, 5 F.4th 666, 671 (6th Cir. 2021) ("Therefore, we conclude that the first sentence of § 264(a) authorizes the Secretary to take action and the second dictates what actions he may take."); *Florida v. Becerra*, 544 F. Supp. 3d 1241, 1270 (M.D. Fla. June 18, 2021) ("In short, several canons of statutory interpretation—such as *ejusdem generis*, *noscitur a sociis*, the canon against surplusage, the constitutional avoidance canon, and the major questions doctrine—gravitate against CDC's broad interpretation [of § 264(a)].") Appropriate measures include inspection, fumigation, disinfection, sanitation, pest extermination, destruction of contaminated animals or articles. 42 U.S.C. § 264(a). Additionally, § 264(a) includes a catchall provision allowing the CDC to take "other measures, as in his judgment may be necessary."

Traditional methods of statutory interpretation counsel that the catchall provision is quite limited. The interpretive canons of *ejusdem generis*[5] and *noscitur a sociis*,[6] for example, limit the power conferred by the catchall phrase to measures that are similar to the ones listed. *See United*

[5] *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 199-213 (2012) (summarizing the *ejusdem generis* canon as "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned").

[6] *See* Scalia and Garner, Reading Law, 195-98 (summarizing the *noscitur a sociis* canon as "associated words bear on one another's meaning").

States v. Koutsostamatis, 956 F.3d 301, 306-07 (5th Cir. 2020) ("Our reading of the text is supported by tried-and-true tools of statutory interpretation—*noscitur a sociis* and *ejusdem generis*. Both canons have deep roots in our legal tradition."); *Reed v. Taylor*, 923 F.3d 411, 413 (5th Cir. 2019) ("And 'other legal process' is not a limitless catchall. The time-honored *ejusdem generis* canon confines the phrase to processes like those specifically enumerated."). The Supreme Court, without mentioning the canons explicitly, applied them in *Alabama Association of Realtors* when it said that the second sentence of § 264(a) illustrates the "kinds of measures that could be necessary." 141 S. Ct. at 2488. Importantly, it noted that all the listed measures—inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated articles or animals—shared an important feature: they are targeted at "identifying, isolating, and destroying the disease itself." *Id.*

The Mask Mandate is not like the measures that precede the catchall provision. It is not targeted at identifying, isolation, and destroying a disease. In fact, it is not targeted at all. It is a blanket rule that sweeps up the healthy and infected alike, without regard to whether a person is even capable of spreading a disease. Applying these limiting canons to § 264(a)'s catchall provision, the Court should recognize that the Mask Mandate goes far beyond the authority conferred by Congress to the CDC and set it aside.

Further, a preventative measure such as the Mask Mandate ignores § 264(a)'s requirement that allows for regulations on "animals or articles … *found* to be so infected or contaminated as to be sources of dangerous infection to human beings" (emphasis added). It does not empower Defendants to combat "amorphous disease spread." *Skyworks, Ltd. v. CDC,* 524 F. Supp. 3d 745, 758 (N.D. Ohio Mar. 10, 2021). That is, "found" is past tense. Defendants must first find an animal or article to be infected or contaminated before regulating it. *See Ala Ass'n of Realtors v. United*

States HHS, 2021 U.S. Dist. LEXIS 85568, at *16 (D.D.C. May 5, 2021). Instead, the Mask Mandate regulates travelers who have *not* been found to be infected or contaminated.

A couple other canons of interpretation also bear mentioning. First, the canon against surplusage advises that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (5th Cir. 2009) (alteration in original). If the "other measures" clause in § 264(a) was truly so expansive as to encompass the Mask Mandate, the preceding measures listed would carry no meaning and be mere "surplusage." Second, as explained below, the constitutional avoidance canon counsels courts to avoid an interpretation of a statute "that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). If the court reads the statute as granting the Defendants the authority to make regulations where the only limiting principle is what is in his own judgment is "necessary," his discretion is not meaningfully constrained and the statute runs afoul of the nondelegation doctrine. *Touby v. United States*, 500 U.S. 160, 166 (1991).

In sum, the Mask Mandate is not authorized by § 264(a). The catchall provision does not allow the CDC to make and enforce a rule that is not similar in kind to the ones listed in the statute. Requiring every traveler to wear a mask is not a targeted measure to stop the spread of a communicable disease similar to fumigation, inspection, or sanitation. The Court, like other previous courts to consider this statute, should construe § 264(a) narrowly and reject the CDC's seemingly limitless understanding of its authority.

2. The context and structure of § 264 show that the Mask Mandate is beyond the CDC's statutory authority.

When interpreting a statute, "the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *In re Application of the United*

States for Historical Cell Site Data, 724 F.3d 600, 618 (5th Cir. 2013). "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). The context of § 264 reveals that it was never meant to empower the CDC to issue broad public regulations.

First, it is located within "Part G—Quarantine and Inspection" of the PSHA, 78 P.L. 410, 58 Stat. 682 (Enacted July 1, 1944). "[S]tatutory titles and section headings are 'tools available for the resolution of a doubt about the meaning of a statute.'" *See Fla. Dept. of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (quoting *Porter v. Nussle*, 534 U.S. 516, 528 (2002)). While statutory titles are not dispositive, the sections within Part G—§§ 264-272—reveal that in passing this section, Congress was focused on empowering the executive to find and target particular threats from communicable disease,[7] not institute population-wide preventative health measures.

Second, looking at § 264 specifically, all of the powers listed in subsection (a) concern what regulations can be made and enforced on property. *See Tiger Lily*, 992 F.3d at 522. Multiple district courts also recognized this distinction in the statute. "In other words, Section 264(a) allows the regulation of only an infected or infecting *item*." *Florida v. Becerra*, 544 F. Supp. 3d 1241,

[7] *See* § 264(d) (allowing apprehension and examination of "any individual reasonably believe to be infected with a communicable disease"); § 265 (allowing suspension of the "introduction of persons and property from such countries or places" where there is serious danger of introduction of a communicable disease); § 266 (allowing "apprehension and examination, in time of war, of any individual reasonably believed (1) to be infected with such disease and (2) to be a probable source of infection to members of the armed forces of the United States or to individuals engaged in the production or transportation of arms, munitions, ships, food, clothing, or other supplies for the armed forces."). Other sections allowed for the creation of quarantine sites, § 267, assigned quarantine duties, § 268, and defined penalties for violating quarantine laws, § 271.

1270 (emphasis added). That is, "any regulations enacted pursuant to § 264(a) must be directed toward 'specific targets 'found' to be sources of infection." *Ala Ass'n of Realtors v. United States HHS*, 2021 U.S. Dist. LEXIS 85568, at *16 (D.D.C. May 5, 2021) (quoting *Skyworks*, 524 F. supp. 3d at 758).

Section 264's grant of authority over people's actions, meanwhile, are addressed in subsection (d). *Id.* Section 264(d) allows for the apprehension and examination of persons, but only when they are "reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State." By relying on § 264(a), Defendants claim authority from a statute that governs property interests. But the decision of travelers concerning whether to wear a mask is a liberty interest, which is governed by § 264(d) and only allows for restrictions of people who are "reasonably believed to be infected with a communicable disease."

Read as a whole, § 264 does not authorize the CDC to issue population-wide preventive measures. Its reach is much more limited by its context. The Court should look to the context of § 264 and recognize that Defendants have overstepped their congressionally delegated authority.

3. The history of federal quarantine and disease control shows the PSHA's limited role for the federal government.

The PSHA did not grant the federal government new public health powers. It merely codified its existing role of inspection, quarantine, and assisting state authorities. In *Florida v. Becerra*, the CDC conceded that the PSHA "consolidates and codifies the federal quarantine practices applied during the previous century." 544 F. Supp. 3d at 1264. Here, the CDC claims the authority to institute a Mask Mandate for interstate travel for the first time in history. This claim

of newly discovered power in a "long-extant statute" should be viewed "with a measure of skepticism." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

Defendants' explanation of the federal government's history of combatting communicable disease shows that its role has traditionally been limited to "help[ing] states enforce quarantine laws" and "inspections." (Doc. 13 at 12-14). When an item was suspected of being infected, "the item was subjected to a process of disinfection, typically either steaming or fumigation." *Florida*, 544 F. Supp. 3d at 1264 (internal quotation marks omitted). The federal government did not have widespread authority to institute population wide public health measures. *Id.* at 43-44. This limited role is consistent with the general understanding that states are vested with quarantine authority as a part of their police powers. *Id.* at n.23 (listing cases); *cf. NFIB v. Dep't of Labor*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) ("There is no question that state and local authorities possess considerable power to regulate public health.").

Defendants also overstate what the PSHA authorized the federal government to do. In their telling, the PSHA provided "federal health authorities flexibility to respond to new types of contagion and 'expressly sanction[ed] the use of conventional public-health enforcement methods' by the government in disease-control efforts." (Doc. 13 at 13) (quoting *Consolidation & Revision of Laws Relating to the Public Health Service*, H.R. Rep. No. 1364 78th Cong. 2d Sess., at 24-25). Not so. That same report acknowledged *not* that it was expanding the federal government's role in combatting disease, but merely codifying "heretofore practiced" methods that were previously done by the federal government "under authority of regulations based upon implication rather than explicit authority." *Consolidation*, at 24. The Mask Mandate is not a "discrete action, such as inspection and sanitation at a port of entry," *Florida*, 544 F. Supp. 3d at 1264, but an entirely

different kind of *preventative* public health regulation aimed at all individuals at airports and on airplanes.

Additionally, an expansive interpretation of Section 264(a) here runs headlong into the interpretive principle that when an "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," there must be "a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001). Certainly, and traditionally, inspection and disinfection of arriving vessels was delegated to the federal government. *Florida*, 544 F. Supp. 3d at 1241. But a federal mandate requiring persons on vessels, as a measure to control disease, to wear a mask whenever he or she is on a commercial flight or in an airport has never been required before. The Court should recognize this limitless understanding of statutory authority as inconsistent with the modest scope of § 264(a) and hold that the Mask Mandate exceeds the CDC's statutory authority.

B. Defendants' interpretation of 42 U.S.C § 264(a) violates the nondelegation doctrine.

If the Court agrees with Defendants' interpretation of the statute, such an interpretation violates the nondelegation doctrine. To comply with the nondelegation doctrine, a statute must have an "intelligible principle" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). An intelligible principle requires Congress to "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *Am. Power and Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). These boundaries must "meaningfully constrain[]" the Executive's discretion. *Touby v. United States*, 500 U.S. 160, 166 (1991). It is meant to prevent Congress from assigning its constitutionally-conferred legislative powers to another branch of government. *Gundy*, 139 S. Ct.

at 2121; *see* U.S. Const. Art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States."). Congress cannot "merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). Defendants' interpretation of 42 U.S.C § 264(a) contains no meaningful constraints on their discretion.

This separation of powers concern is particularly sharp here, where the Mask Mandate both creates a new crime and affects the entire commercial and public transportation industry. If Congress meant to give Defendants such unfettered power, they needed to "provide substantial guidance." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001). Unlike "narrow, interstitial delegations of authority," *United States v. Melgar-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021), a statute that confers the authority to "affect the entire national economy" must direct the Executive how to use it, *Whitman*, 531 U.S. at 475. Defendants' interpretation gives them the ability to vastly expand their authority through the use of broad definitions, and the Court should hold their interpretation of the statute violates the nondelegation doctrine.

The only boundaries on Defendants' authority found in the statute are what regulations Defendants determine in their "judgment" to be "necessary." 42 U.S.C. § 264(a). Though recent case law requires these regulations to be like "the kinds of measures" listed in the statute: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles., *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021), this constraint means nothing if Defendants can still merely pick one of the listed measures and assign it the broadest possible meaning. Such an understanding of the statute is directly adverse to *Whitman*'s rule that requires more guidance when more power is conferred, not less.

It is hard to imagine that Congress gave the power to criminalize the actions of millions of travelers every day as long as Defendants make the determination that it is necessary. Here, a comparison is helpful. In *Touby*, 500 U.S. at 166, Congress gave the Attorney General authority to temporarily schedule a drug if doing so was "necessary." To make that determination, he was required to consider six factors such as the drug's history and current pattern of abuse, the scope of its abuse, and its risk the public health. *Touby*, 500 U.S. at 166. The Attorney General was also required to comply with the section identifying the criteria for each of the five schedules of drugs, and the statute required a 30-day notice. *Id.* Comparatively, Section 264(a)'s guidance is not only paltry; it is not existent.

Defendants' understanding of § 264(a) confers great power with minimal guidance. It allows them to criminalize the behavior of millions of everyday travelers and commuters without any guidance from Congress as to how to make such a determination. It allows Defendants to adopt capacious definitions of their authority without being informed by the statute's context, structure, and history. In short, it does not meaningfully constrain their discretion, and the Court should hold that such an interpretation violates the nondelegation doctrine.

CONCLUSION

As shown above, a trial is not necessary in this case. The motion for preliminary injunction should instead be converted to a motion for summary judgment. Following a hearing, summary judgment should be granted for Plaintiff Van Duyne. In granting summary judgment, Plaintiff asks the Court to grant declaratory relief and hold that the Mask Mandate is invalid under the Administrative Procedure Act, 5 U.S.C. § 706. Because it is beyond the CDC's statutory authority under § 264(a), the Court should set it aside. Plaintiff also asks the Court to order Defendants, as

well as all agents, administrators, employees, and other persons acting on behalf of the Defendants to cease enforcing the Mask Mandate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2022, I electronically filed the foregoing with the Clerk of the Court for the Northern District of Texas by using the CM/ECF system, which will serve a copy of same on all counsel of record.

/s/Matthew Miller
MATTHEW MILLER