

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FAMILY RESEARCH COUNCIL
ACTION, INC., *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States,
et al.,

Defendants.

Civil Action No. 4:22-cv-00209-O

**DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFFS'
MOTION FOR A TEMPORARY RESTRAINING ORDER AND
MOTION FOR A PRELIMINARY INJUNCTION**

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

CHAD E. MEACHAM
Acting United States Attorney

ERIC B. BECKENHAUER
Assistant Branch Director

STEPHEN M. PEZZI
MICHAEL J. GERARDI
ANDREW F. FREIDAH
JOHNNY H. WALKER
Trial Attorneys
United States Department of Justice
Civil Division
Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Telephone: 202-305-8576
Email: stephen.pezzi@usdoj.gov

Counsel for Defendants

TABLE OF CONTENTS

INTRODUCTION.....1

BACKGROUND..... 2

I. The CDC’s Transportation Mask Order 2

 a. Statutory Background2

 b. The COVID-19 Pandemic2

 c. The Challenged Orders4

II. This Lawsuit 6

LEGAL STANDARD..... 6

ARGUMENT..... 7

I. The Court lacks subject-matter jurisdiction over all claims except for Plaintiffs’ claims against the CDC. 7

 a. The Courts of Appeals have exclusive jurisdiction over all of Plaintiffs’ claims against TSA, DHS, DOT, and FAA.7

 b. Plaintiffs lack standing to challenge Executive Order 13998, and injunctive relief against the President is unavailable in any event.9

II. Plaintiffs have not carried their burden to show that they would suffer irreparable harm in the absence of a preliminary injunction......10

 a. Plaintiffs’ 14-month delay fatally undermines any claim of irreparable harm.10

 b. Plaintiffs’ (inaccurate) assertions about financial costs do not support a finding of irreparable harm, particularly given the widespread availability of free masks.12

 c. Every court to consider the question has rejected substantially similar requests for injunctive relief, including the Supreme Court of the United States.14

III. The equities and the public interest weigh sharply against a preliminary injunction......15

III. Plaintiffs are unlikely to succeed on the merits......16

IV. Plaintiffs’ requested relief is overbroad.23

 a. Any relief should be narrowly tailored.23

 b. The Court should stay the effective date of any TRO or injunction for 14 days.25

CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

ADT, LLC v. Cap. Connect, Inc.,
145 F. Supp. 3d 671 (N.D. Tex. 2015)11

Am. Wildlands v. Kemptborne,
530 F.3d 991 (D.C. Cir. 2008).....17

Amerijet Int’l v. DHS,
43 F. Supp. 3d 4 (D.D.C. 2014).....8

BCCA Appeal Grp. v. EPA,
355 F.3d 817 (5th Cir. 2003)17

Benisek v. Lamone,
138 S. Ct. 1942 (2018).....10

Biden v. Missouri,
142 S. Ct. 647 (2022)16, 20

Boire v. Pilot Freight Carriers, Inc.,
515 F.2d 1185 (5th Cir. 1975).....11

Califano v. Yamasaki,
442 U.S. 682 (1979)24

Camp v. Pitts,
411 U.S. 138 (1973)17

City of Austin v. Kinder Morgan Texas Pipeline, LLC,
447 F. Supp. 3d 558 (W.D. Tex. 2020).....13

City of Los Angeles v. Lyons,
461 U.S. 95 (1983).....13

Clark v. Prichard,
812 F.2d 991 (5th Cir. 1987)7

Competitive Enter. Inst. v. Dep’t of Transp.,
863 F.3d 911 (D.C. Cir. 2017).....16

Consol. Canal Co. v. Mesa Canal Co.,
177 U.S. 296 (1900)12

Corbett v. TSA,
19 F.4th 478 (D.C. Cir. 2021).....1, 8, 9

Corbett v. United States,
458 F. App'x 866 (11th Cir. 2012)8

Dep't of Homeland Sec. v. New York,
140 S. Ct. 599 (2020)24

DHS v. Regents of the Univ. of Cal.,
140 S. Ct. 1891 (2020).....16, 18, 22

Durso v. Napolitano,
795 F. Supp. 2d 63 (D.D.C. 2011).....8

Embarcadero Techs., Inc. v. Redgate Software, Inc.,
No. 1:17-cv-444, 2017 WL 5588190 (W.D. Tex. Nov. 20, 2017).....11

Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.,
968 F.3d 357 (5th Cir. 2020)9, 10

FCC v. Prometheus Radio Project,
141 S. Ct. 1150 (2021).....16, 18, 21

FW/PBS, Inc. v. Dallas,
493 U.S. 215 (1990)13

Gbedi v. Mayorikas,
16 F.4th 456 (5th Cir. 2021).....8

Gill v. Whitford,
138 S. Ct. 1916 (2018).....23

Gilmore v. Gonzales,
435 F.3d 1125 (9th Cir. 2006).....8

Gonannies, Inc. v. Goupair.Com, Inc.,
464 F. Supp. 2d 603 (N.D. Tex. 2006)12

Green v. Brantley,
981 F.2d 514 (11th Cir. 1993).....8

H.D. Vest, Inc. v. H.D. Vest Mgmt. & Servs., LLC,
No. 3:09-cv-390, 2009 WL 1766095 (N.D. Tex. June 23, 2009).....10

Jones v. United States,
625 F.3d 827 (5th Cir. 2010)8

Jordan v. Fisher,
823 F.3d 805 (5th Cir. 2016) 6, 7

Leaf Trading Cards, LLC v. Upper Deck Co.,
 No. 3:17-cv-3200, 2019 WL 7882552 (N.D. Tex. Sept. 18, 2019).....11

Leal v. Szoeke,
 917 F.2d 206 (5th Cir. 1990)8

Lewis v. Casey,
 518 U.S. 343 (1996)21

Ligon v. LaHood,
 614 F.3d 150 (5th Cir. 2010)8

Little Sisters of the Poor v. Pennsylvania,
 140 S. Ct. 2367 (2020).....17

Louisiana v. Becerra,
 20 F.4th 260 (5th Cir. 2021).....24, 25

Louisiana v. Biden,
 No. 22-cv-30087, 2022 WL 866282 (5th Cir. Mar. 16, 2022).....11

Madsen v. Women’s Health Ctr.,
 512 U.S. 753 (1994)24

Mahwikizi v. CDC,
 No. 21-cv-3467, 2022 WL 602452 (N.D. Ill. Mar. 1, 2022).....24

Merritt v. Shuttle, Inc.,
 245 F.3d 182 (2d Cir. 2001)8

Mississippi v. Johnson,
 71 U.S. 475 (1866).....10

Mobil Oil Exploration & Producing Se. Inc. v. United Distribution Cos.,
 498 U.S. 211 (1991)23

Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.,
 463 U.S. 29 (1983).....1, 17

Nat’l Shooting Sports Found., Inc. v. Jones,
 716 F.3d 200 (D.C. Cir. 2013).....17, 21

Opulent Life Church v. City of Holly Springs,
 697 F.3d 279 (5th Cir. 2012)10

Quince Orchard Valley Citizens Ass’n v. Hodel,
 872 F.2d 75 (4th Cir. 1989)11

Ronaldo Designer Jewelry, Inc. v. Cox,
1:17-cv-2, 2017 WL 3879095 (N.D. Miss. Sept. 5, 2017)11

Sepulvado v. Jindal,
729 F.3d 413 (5th Cir. 2013) 6, 7

Texas v. Biden,
10 F.4th 538 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1098 (2022)13

Texas v. EPA,
983 F.3d 826 (5th Cir. 2020)17

Texas v. United States,
328 F. Supp. 3d 662 (S.D. Tex. 2018).....12

Texas v. United States,
809 F.3d 134 (5th Cir. 2015)24

TIGI Linea Corp. v. Pro. Prods. Grp., LLC,
No. 4:19-cv-00840, 2020 WL 3154857 (E.D. Tex. May 20, 2020),
report & recommendation adopted, 2020 WL 3130139 (E.D. Tex. June 12, 2020)11

Town of Chester v. Laroe Ests., Inc.,
137 S. Ct. 1645 (2017).....25

Trump v. Hawaiï,
138 S. Ct. 2392 (2018).....24

U.S. Navy SEALs 1–26 v. Biden,
No. 4:21-cv-01236-O, --- F. Supp. 3d ---, 2022 WL 34443 (N.D. Tex. Jan. 3, 2022)10

Va. Soc’y for Hum. Life, Inc. v. FEC,
263 F.3d 379 (4th Cir. 2001), *overruled in part on other grounds by The Real Truth About
Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012)25

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,
454 U.S. 464 (1982)16

Villareal v. Saenz,
No. 5:20-cv-571, 2021 WL 1940620 (W.D. Tex. May 14, 2021),
report & recommendation adopted, 2021 WL 4057570 (W.D. Tex. Aug. 4, 2021)11

Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,
435 U.S. 519 (1978)17

Wall v. CDC,
543 F. Supp. 3d. 1290 (M.D. Fla. 2021)14

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982)12, 15

White v. Carlucci,
862 F.2d 1209 (5th Cir. 1989).....10, 16

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 1, 6

Wreal, LLC v. Amazon.com, Inc.,
840 F.3d 1244 (11th Cir. 2016)11

Statutes

42 U.S.C. § 264..... 1, 2

42 U.S.C. § 265.....22

49 U.S.C. § 46110.....1, 7, 8, 9

Rules

Fed. R. Civ. P. 12.....7

Administrative and Executive Materials

Declaring a Nat’l Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak,
85 Fed. Reg. 15,337 (Mar. 13, 2020)..... 2, 3

Determination of Nat’l Emergency,
86 Fed. Reg. 8217 (Feb. 4, 2021).....5

Exec. Order No. 13,998, *Promoting COVID-19 Safety in Domestic and Int’l Travel*,
86 Fed. Reg. 7205 (Jan. 21, 2021)..... 4, 9

*Order Under Section 361 of the Public Health Service Act, Requirement for Persons to Wear Masks While
on Conveyances and at Transportation Hubs*,
86 Fed. Reg. 8025 (Feb. 3, 2021).....*passim*

*Requirements for Negative Pre-Departure Covid-19 Test Result or Documentation of Recovery From Covid-19 for
All Airline or Other Aircraft Passengers Arriving Into the United States From Any Foreign Country*,
86 Fed. Reg. 69,256 (Dec. 7, 2021).....2

Other Authorities

Adam Taylor & Ben Guarino, *Massive randomized study is proof that surgical masks limit coronavirus
spread, authors say*, WASH. POST (Sept. 1, 2021),
<https://perma.cc/M2E4-7E3Q>18

CDC, *COVID Data Tracker*,
<https://covid.cdc.gov/covid-data-tracker>.....3

CDC, *COVID Data Tracker*,
https://covid.cdc.gov/covid-data-tracker/#trends_dailycases 3

CDC, *Covid Data Tracker*,
<https://covid.cdc.gov/covid-data-tracker/#vaccinations>4

CDC, *COVID Data Tracker*,
<https://perma.cc/MY3B-72T6>.....16

CDC, *COVID-19 Community Levels* (updated Feb. 25, 2022),
<https://perma.cc/2WTC-KLLG>.....3

CDC, *Find Free Masks (N95 Respirators)* (updated Mar. 16, 2022),
<https://perma.cc/Q4Q9-QBMK>.....12

CDC, *How COVID 19 Spreads* (updated July 14, 2021),
<https://perma.cc/R38B-WAPL>.....2

CDC, *Omicron Variant: What You Need to Know* (updated Dec. 20, 2021),
<https://perma.cc/UH3B-FESV>.....3

CDC, *Reinfections and COVID-19* (updated Jan. 20, 2022),
<https://perma.cc/CCM6-N875>20

CDC, *The Possibility of COVID-19 After Vaccination: Breakthrough Infections* (updated Dec. 17, 2021),
<https://perma.cc/3G8E-3MCL>.....20

CDC, *When You’ve Been Fully Vaccinated* (updated July 27, 2021),
<https://perma.cc/C3LC-HMLF>.....3

Charles Alan Wright & Arthur R. Miller, 11A Fed. Prac. & Proc. Civ. (2d ed. 1995).....10

Charles Alan Wright & Arthur R. Miller, 11A Fed. Prac. & Proc. Civ. (3d ed.)7, 13

D. Silcott et al., *TRANSCOM/AMC Commercial Aircraft Cabin Aerosol Dispersion Tests* 29
 (Oct. 14, 2020).....19

Gholamhossein Bagheri et al., *An upper bound on one-to-one exposure to infectious human respiratory particles*, *PROCEEDINGS OF THE NAT’L ACADEMY OF SCIENCES* (2021),
<https://perma.cc/3R3Q-838Y>.....18

Henning Bundgaard et al., *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers: A Randomized Control Trial*, *ANNALS OF INTERNAL MEDICINE* (2020),
<https://perma.cc/K8XM-TAJG>.....18

HHS, *Determination that a Public Health Emergency Exists* (Jan. 31, 2020),
<https://perma.cc/VZ5X-CT5R>.....2

HHS, *Strategic National Stockpile Makes High-quality Masks Available to Americans*,
<https://perma.cc/KL66-R4F2>.....12

Michael Marks et al., *Transmission of COVID-19 in 282 clusters in Catalonia, Spain: a cohort study*,
 21 THE LANCET 629 (May 2021),
<https://perma.cc/7Z5Z-KERM>.....19

Premium Single Use Disposable Face Mask, Soft on Skin, Pack of 3-Ply Masks Facial Cover with Elastic Earloops (50 Masks),
<https://perma.cc/N8ZE-CALE>.....12

S. Bushwick et al., *Evaluating COVID Risk on Planes, Trains and Automobiles*, SCIENTIFIC AMERICAN
 (Nov. 19, 2020),
<https://perma.cc/5K6F-EU7E>.....19

Silke Schwarz et al., *Corona child studies “Co-Ki”: first results of a Germany-wide register on mouth and nose covering (mask) in children*, 4 Monatsschrift Kinderheilkunde 353 (Feb. 22, 2021),
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7898258/>.....21

State of Texas, Exec. Order GA-29, *Relating to the use of face coverings during the COVID-19 disaster*
 (July 2, 2020), <https://perma.cc/KB4T-4CY4>, rescinded by State of Texas, Exec. Order GA-34
 (March 2, 2021), <https://perma.cc/KTR5-AGY4>.....13

Transportation Security Administration (TSA), *Checkpoint Travel Numbers*,
<https://perma.cc/UG2V-3TCA>.....3

TSA, *Coronavirus (COVID-19) FAQ* (accessed Mar. 30, 2022),
<https://perma.cc/2U5N-JR68>.....13

TSA, *Security Directives & Emergency Amendments*,
<https://www.tsa.gov/sd-and-ea>.....6

TSA, *Statement Regarding Face Mask Use on Public Transportation* (Mar. 10, 2022),
<https://perma.cc/8D4Q-EU7F>.....6

Wall v. TSA, No. 21A198,
<https://perma.cc/E7UD-HMBM>.....15

Wei Lyu & George L. Wehby, *Community Use Of Face Masks and COVID-19: Evidence From A Natural Experiment Of State Mandates in the US*, 39 Health Affairs 1419 (2020),
<https://perma.cc/U9ZM-5Z1X>.....18

INTRODUCTION

“The COVID-19 global pandemic poses one of the greatest threats to the operational viability of the transportation system and the lives of those on it seen in decades.” *Corbett v. TSA*, 19 F.4th 478, 480 (D.C. Cir. 2021). In response to that threat, the Centers for Disease Control and Prevention (CDC) determined that temporarily requiring masks on public transportation—subject to exceptions, including for young children, and those who cannot safely wear a mask for medical reasons—is “necessary to prevent the introduction, transmission, or spread of communicable diseases.” 42 U.S.C. § 264(a). Plaintiffs—two adults, a 14-year-old, and an organization—offer no basis for this Court to accept their invitation “to substitute its judgment for that of the agency,” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), least of all based on unfounded assertions that “[m]asks are ineffective” or even “harm[ful].” Pls.’ TRO Br., ECF No. 15, at 8, 22. And these Plaintiffs—unlike others before this Court, *see Van Dyne v. CDC*, No. 22-cv-122 (N.D. Tex.)—do not deny that the CDC has the statutory and constitutional authority to issue the challenged order.

But even though the merits of this case are straightforward, the Court need not reach them at this stage. As a threshold matter, the courts of appeals have exclusive jurisdiction over all claims against the agency defendants other than CDC, under the plain text of 49 U.S.C. § 46110. And even on the claims against CDC, the only question currently before the Court is whether Plaintiffs have carried their burden to justify the “extraordinary remedy” of a temporary restraining order or a preliminary injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). They have not.

Most obviously, Plaintiffs have not carried their burden to show irreparable harm. Plaintiffs assert that they “will continue having to purchase and clean masks, at some monetary expense, to comply with the Mask Mandate,” TRO Br. at 21—but that is incorrect, as free masks are widely available. Furthermore, the relief Plaintiffs seek—14 months after the order was issued, and as the CDC is actively deliberating about its future—would come at the direct expense of other travelers who remain at risk of contracting COVID-19. The public interest in leaving the Order in place at this time therefore dwarfs Plaintiffs’ individual interests in exercising their personal preferences not to wear masks on airplanes. Accordingly, Plaintiffs’ motions should be denied.

BACKGROUND

I. The CDC's Transportation Mask Order

a. Statutory Background¹

The Public Health Service Act, 42 U.S.C. § 264, authorizes the CDC “to make and enforce such regulations as in [its] 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.” *Id.* § 264(a). “For purposes of carrying out and enforcing such regulations,” the agency “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.” *Id.*

b. The COVID-19 Pandemic

In December 2019, the novel coronavirus later named SARS-CoV-2 was first detected in Wuhan, Hubei Province, in the People's Republic of China. *See Declaring a Nat'l Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 13, 2020). The virus causes a respiratory disease known as COVID-19. *Id.* COVID-19 poses a risk of “severe” respiratory illness, meaning that infected persons may require hospitalization, intensive care, or a ventilator. 86 Fed. Reg. at 69,259. Severe cases may be fatal. *Id.* SARS-CoV-2 transmits “very easily and sustainably,” 85 Fed. Reg. at 55,293, including when an individual “[b]reath[es] in air when close to an infected person,” CDC, *How COVID-19 Spreads* (updated July 14, 2021), <https://perma.cc/R38B-WAPL>. Persons not displaying symptoms can transmit the virus. 86 Fed. Reg. at 69,258.

On January 31, 2020, the Secretary of Health and Human Services (HHS) declared a public-health emergency. HHS, *Determination that a Public Health Emergency Exists* (Jan. 31, 2020), <https://perma.cc/VZ5X-CT5R>. On March 11, 2020, the World Health Organization (WHO)

¹ Because Plaintiffs do not bring any claims relating to the government's statutory or constitutional authority to issue the Order, Defendants provide only a brief discussion of the statutory and regulatory background here. *Cf. Van Dyne v. CDC*, No. 22-cv-00122-O, Defs.' PI Opp'n at 2-5, ECF No. 13 (N.D. Tex. Mar. 4, 2022) (O'Connor, J.) (discussing this history in detail).

classified COVID-19 as a pandemic. 85 Fed. Reg. at 15,337. And on March 13, 2020, then-President Trump declared the outbreak a national emergency. *Id.* By late August 2020, the virus had spread to all 50 states. 85 Fed. Reg. at 55,292. As of the date of this filing, it has infected more than 80 million and killed more than 982,000 people in the United States alone, and many more around the world. *See* CDC, *COVID Data Tracker*, <https://covid.cdc.gov/covid-data-tracker> (last visited Apr. 12, 2022).

Mask wearing “is one of the most effective strategies available for reducing COVID-19 transmission.” *See* Ex. 1, CDC, *Order Under Section 361 of the Public Health Service Act, Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025, 8026 (Feb. 3, 2021). By spring of 2021, significant progress had been made with vaccinations and falling case counts in the United States, which led the CDC to relax its mask-wearing guidance for fully vaccinated individuals, in some settings. But shortly thereafter, a more transmissible and more severe variant of the original virus (the Delta variant) began circulating, leading the CDC to recommend that, “[t]o maximize protection from the Delta variant and prevent possibly spreading it to others,” even fully vaccinated individuals should “wear a mask indoors in public” when “in an area of substantial or high transmission.” CDC, *When You’ve Been Fully Vaccinated* (updated July 27, 2021), <https://perma.cc/C3LC-HMLF>. More recently, the new, even more transmissible Omicron variant circulated rapidly, leading to another nationwide surge in cases. *See* CDC, *Omicron Variant: What You Need to Know* (updated Dec. 20, 2021), <https://perma.cc/UH3B-FESV>; CDC, *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#trends_dailycases (last visited Apr. 12, 2022). The CDC continues to update its mask-wearing recommendations and guidelines based on the latest available data and sound public-health policy. *See, e.g.*, CDC, *COVID-19 Community Levels* (updated Feb. 25, 2022), <https://perma.cc/2WIC-KLLG> (relaxing county-by-county mask recommendations).

Meanwhile, for the first time in approximately two years, passenger volume in commercial air travel has been approaching (and occasionally, even surpassing) pre-pandemic levels, *see* Transportation Security Administration (TSA), *Checkpoint Travel Numbers*, <https://perma.cc/UG2V-3TCA> (last visited Apr. 12, 2022), which necessarily increases the risk of viral transmission among passengers, crew, and staff. As of this filing, about 66% of the country is fully vaccinated, and 45%

of those fully vaccinated has received a booster dose. CDC, *Covid Data Tracker*, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last visited Apr. 12, 2022).

c. The Challenged Orders

On January 21, 2021, President Biden issued Executive Order 13998, explaining that public-health experts “have concluded that mask-wearing, physical distancing, appropriate ventilation, and timely testing can mitigate the risk of travelers spreading COVID-19.” Exec. Order No. 13,998, *Promoting COVID-19 Safety in Domestic and Int’l Travel*, 86 Fed. Reg. 7205 (Jan. 21, 2021). “Accordingly, to save lives and allow all Americans, including the millions of people employed in the transportation industry, to travel and work safely,” the President called on all relevant government agencies to “immediately take action, to the extent appropriate and consistent with applicable law, to require masks to be worn in compliance with CDC guidelines” on public-transportation systems. *Id.*

In late January 2021, the CDC issued the transportation mask order, the primary target of Plaintiffs’ motions. *See* Ex. 1. Generally, the order requires persons to “wear masks over the mouth and nose when traveling on any conveyance . . . into or within the United States” and “at transportation hubs.” *Id.* at 8026. The scientific justifications the order gives for mask-wearing are straightforward: “Masks help prevent people who have COVID-19, including those who are pre-symptomatic or asymptomatic, from spreading the virus to others.” *Id.* at 8028. They “also provide personal protection to the wearer by reducing inhalation of” “virus-laden droplets[.]” *Id.* “The community benefit of wearing masks . . . is due to the combination of these effects; individual prevention benefit increases with increasing numbers of people using masks consistently and correctly.” *Id.*

The order also explains why mask-wearing is especially important on public transportation and in commercial air travel: “[t]raveling on multi-person conveyances increases a person’s risk of getting and spreading COVID-19 by bringing persons in close contact with others, often for prolonged periods[.]” *Id.* at 8029. “Furthermore, given how interconnected most transportation systems are across the nation and the world, local transmission can grow even more quickly into interstate and international transmission when infected persons travel on non-personal conveyances

without wearing a mask and with others who are not wearing masks.” *Id.* And in the context of commercial air travel in particular, “[s]ocial distancing may be difficult if not impossible[.]” *Id.*

Beyond the obvious public-health goals, the order also explains that “[r]equiring masks will help us control this pandemic and aid in re-opening America’s economy.” *Id.* That is because “America’s transportation systems” are “essential for America’s economy and other bedrocks of American life”—whether to “carry life-saving medical supplies and medical providers into and across the nation to our hospitals, nursing homes, and physicians’ offices,” to “bring food and other essentials to our communities,” or to “bring America’s workforce to their jobs.” *Id.*

The order exempts “child[ren] under the age of 2,” and anyone “with a disability who cannot wear a mask, or cannot safely wear a mask,” among others. *Id.* at 8027. It also exempts (among other things) “[p]rivate conveyances operated solely for personal, non-commercial use.” *Id.* at 8028. And it does not apply “[w]hile eating, drinking, or taking medication, for brief periods.” *Id.* at 8027. Although the order could theoretically be enforced through criminal penalties, “CDC does not intend to rely primarily on . . . criminal penalties but instead strongly encourages and anticipates widespread voluntary compliance[.]” *Id.* at 8030 n.33.

In addition, on January 27, 2021, the Acting Secretary of Homeland Security issued a Determination of a National Emergency that directed the TSA to support “the CDC in the enforcement of any orders or other requirements necessary to . . . mitigate the spread of COVID-19 through the transportation system[.]” *Determination of Nat’l Emergency*, 86 Fed. Reg. 8217, 8218 (Feb. 4, 2021). TSA then issued a series of Security Directives, through which it assists with the enforcement of the CDC’s mask order. Those Security Directives were issued with discrete expiration dates, which have since been extended several times to allow TSA to continue to assist with enforcement of CDC’s order (which itself has no expiration date). *See* 86 Fed. Reg. at 8030. TSA most recently extended the Security Directives on March 18, for one month, with a new expiration date of April 18—now less than one week away. In doing so, TSA issued the following statement:

At CDC’s recommendation, TSA will extend the security directive for mask use on public transportation and transportation hubs for one

month, through April 18th. During that time, CDC will work with government agencies to help inform a revised policy framework for when, and under what circumstances, masks should be required in the public transportation corridor.

TSA, *Statement Regarding Face Mask Use on Public Transportation* (Mar. 10, 2022), <https://perma.cc/8D4Q-EU7E>; see TSA, *Security Directives & Emergency Amendments*, <https://www.tsa.gov/sd-and-ea> (last visited Apr. 12, 2022).

II. This Lawsuit

Plaintiffs filed this lawsuit on March 23, 2022, naming as Defendants the President of the United States, CDC, TSA, the Department of Transportation (DOT), the Federal Aviation Administration (FAA), the Department of Homeland Security (DHS), as well as senior officials at those agencies and the United States of America. Compl., ECF No. 1. Plaintiffs' one-count complaint alleges that the mask requirement (and the one-month extension of that requirement on March 18, by TSA) is arbitrary and capricious under the Administrative Procedure Act (APA). *See id.* ¶¶ 68-73.

On March 31, 2022, Plaintiffs moved for a preliminary injunction. *See* ECF Nos. 10, 11. In that motion, Plaintiffs did not request a TRO. A few days later, on April 4, 2022, Plaintiffs filed a nearly identical motion, but this time captioned as a "Motion for Temporary Restraining Order or, alternatively, for Expedited Briefing on Preliminary Injunction." *See* ECF Nos. 14, 15. The Court then issued a schedule for briefing on "Plaintiffs' Motion for Temporary Restraining Order." Order, ECF No. 17. Defendants now oppose both motions.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. The party seeking a preliminary injunction thus bears the burden to show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016) (quoting *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th

Cir. 2013)). Due to its “extraordinary” nature, no preliminary-injunction motion should be “granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements.” *Id.*²

ARGUMENT

I. The Court lacks subject-matter jurisdiction over all claims except for Plaintiffs’ claims against the CDC.

As a threshold matter, the Court lacks subject-matter jurisdiction over most of Plaintiffs’ claims—particularly, (1) all claims against DHS, TSA, FAA, and DOT (because 49 U.S.C. § 46110 requires that any such claims be filed directly in the courts of appeals); and (2) all claims against the President of the United States (who did not issue any of the challenged orders that actually require masks, and is in any event not properly subject to injunctive relief). Accordingly, whether considered as limitations on this Court’s authority to enter the requested injunctive relief, or as a reason why these claims are not likely to succeed on the merits, the Court should either deny relief on all of these claims or dismiss them outright. *See* Fed. R. Civ. P. 12(h)(3) (“If the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action.” (emphasis added)).

a. The Courts of Appeals have exclusive jurisdiction over all of Plaintiffs’ claims against TSA, DHS, DOT, and FAA.

Although the central focus of Plaintiffs’ filings is the CDC’s transportation mask order (issued in January of 2021), Plaintiffs also purport to challenge the TSA Security Directives through which TSA assists with the enforcement of the CDC’s order. Congress has prohibited this approach:

[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the

² As noted, Plaintiffs have also filed a TRO motion. But where, as here, “the opposing party actually receives notice of the application for a restraining order, the procedure that is followed does not differ functionally from that on an application for a preliminary injunction,” Charles A. Wright & Arthur R. Miller, 11A Fed. Prac. & Proc. Civ. § 2951 (3d ed.), and the TRO motion is governed by the same four-factor test for a preliminary injunction, *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). It would make little sense to issue a TRO when there is already a pending (earlier-filed) motion for a preliminary injunction, to which Defendants have responded—to say nothing of the fact that the challenged order has been in effect for 14 months. Accordingly, although the remainder of this filing will focus on Plaintiffs’ request for a preliminary injunction, their TRO motion should also be denied for the same reasons, and also because it is practically unnecessary and procedurally improper.

Transportation Security Administration . . .) in whole or in part under [part A], part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides

49 U.S.C. § 46110(a). The courts of appeals thus have “exclusive jurisdiction to affirm, amend, modify, or set aside any part of [such an] order[.]” *Id.* § 46110(c).

It is thus well settled that, pursuant to section 46110, only courts of appeals may consider challenges to aviation-related orders issued by the TSA, the Secretary of Transportation, or the FAA (which is an operating administration of DOT). *See, e.g., Ghedi v. Mayorkas*, 16 F.4th 456, 468-69 n.56 (5th Cir. 2021) (stating in dictum that “49 U.S.C. § 46110 . . . prevents district courts from reviewing certain TSA actions”); *Jones v. United States*, 625 F.3d 827, 830 (5th Cir. 2010) (“Jones’s Title VII and § 1981 claims are collateral attacks on a FAA order. . . . Hence, the district court correctly determined that § 46110(a) precludes subject-matter jurisdiction over those claims.”); *Ligon v. LaHood*, 614 F.3d 150, 154 (5th Cir. 2010) (“It is well settled that the review of any order of the FAA Administrator must be taken in a court of appeals.”). If such a claim is filed in federal district court, it must be dismissed, because “[s]pecific grants of jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts.” *Ligon*, 614 F.3d at 154-55 (citing *Leal v. Szoeke*, 917 F.2d 206, 207 (5th Cir. 1990) (“Where Congress has provided for review jurisdiction in the court of appeals, jurisdiction there is exclusive.”)).³

Indeed, when other litigants have challenged these same TSA Security Directives, they have done so by filing directly in the courts of appeals, as required by 49 U.S.C. § 46110(a). *See infra* at 14-15 (discussing petitions for review filed in the Second, Fourth, Fifth, Sixth, Eighth, Eleventh, and D.C. Circuits). Thus far, none of those efforts has succeeded on the merits, *see, e.g., Corbett*, 19 F.4th

³ *See also, e.g., Corbett v. United States*, 458 F. App’x 866, 870 (11th Cir. 2012) (district court lacked jurisdiction to review TSA screening procedure); *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006) (same, with TSA Security Directive); *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001) (“Section 46110(c) precludes federal district courts from affirming, amending, modifying, or setting aside any part of such an order.”); *Green v. Brantley*, 981 F.2d 514, 516 (11th Cir. 1993) (FAA order); *Amerijet Int’l v. DHS*, 43 F. Supp. 3d 4, 13-14 (D.D.C. 2014) (TSA Security Directive); *Durso v. Napolitano*, 795 F. Supp. 2d 63, 69 (D.D.C. 2011) (TSA screening order).

478 (holding that TSA Security Directives requiring masks in public-transportation systems are lawful); *see also id.* at 490 (Henderson, J., dissenting) (dissenting on the basis that plaintiff lacked standing, but also noting that, “[o]n the merits, this petition for review is a slam dunk loser”)—but there is no question that a petition for review filed directly in the court of appeals is the only appropriate procedure. That is why the only other district court to address a challenge to TSA’s mask-related Security Directives correctly dismissed those claims (including related claims against DHS and DOT) for lack of subject-matter jurisdiction under 49 U.S.C. § 46110. *See Wall v. CDC*, No. 21-cv-975, Order at 21-23, ECF No. 187 (M.D. Fla. Dec. 18, 2021).⁴

b. Plaintiffs lack standing to challenge Executive Order 13998, and injunctive relief against the President is unavailable in any event.

The President of the United States is named Defendant in this case, for reasons that are not clear—although the President issued Executive Order 13998, that order does not impose any obligations on Plaintiffs, or on anyone outside of the Executive Branch. Instead, as relevant here, President Biden directed *his subordinates* at all “executive departments and agencies . . . that have relevant regulatory authority” to “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” various “forms of public transportation.” E.O. 13998 § 2(a), (vi), *Promoting COVID 19 Safety in Domestic and Int’l Travel*, 86 Fed. Reg. 7205 (Jan. 26, 2021). Because the CDC’s order—rather than the Executive Order—imposes the legal obligations that allegedly harm Plaintiffs, they lack standing to challenge the Executive Order. After all, “one injury does not entitle a litigant to right other wrongs that did not injure it.” *Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 365 (5th Cir. 2020). “This

⁴ Plaintiffs name DHS as a Defendant, though apparently only because TSA is a component of DHS—Plaintiffs do not actually allege that DHS violated the APA (nor could they, since DHS alone does not require anything of Plaintiffs, or anyone, with respect to mask wearing). *See* Compl. ¶ 20. Plaintiffs also name FAA as a Defendant, claiming that FAA “continues to enforce a mask mandate both in airports and on airplanes.” *Id.* ¶ 39. That is incorrect—there is no FAA mask mandate, and Plaintiffs’ allegations do not identify one (only a single FAA press release about the CDC and TSA orders). *See id.* Finally, Plaintiffs also name DOT as a Defendant, though apparently only because FAA is a component of DOT—again, Plaintiffs do not actually allege that DOT violated the APA. *See id.* ¶ 11. Regardless, whatever their merit, 49 U.S.C. § 46110 vests exclusive jurisdiction over *all* of these claims in the courts of appeals, so DHS, TSA, DOT, and FAA should all be dismissed.

principle typically arises in suits against the government, preventing plaintiffs with standing to challenge one facet of a regulatory scheme from challenging the whole regulatory scheme.” *Id.*

Even if Plaintiffs had standing to challenge the Executive Order, the President is still not an appropriate target of these motions. This Court “has no declaratory or injunctive power against” the President. *U.S. Navy SEALs 1–26 v. Biden*, No. 4:21-cv-01236-O, --- F. Supp. 3d ----, 2022 WL 34443, at *3 (N.D. Tex. Jan. 3, 2022) (O’Connor, J.); accord *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). In *Navy SEALs*, the Court “dismissed” President Biden from the case at the preliminary-injunction stage, due to the Plaintiffs’ inability to obtain relief against him. *Id.* The Court should do the same here.

II. Plaintiffs have not carried their burden to show that they would suffer irreparable harm in the absence of a preliminary injunction.

To obtain a preliminary injunction, “[w]ithout question, the irreparable harm element must be satisfied by independent proof, or no injunction may issue.” *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989). Plaintiffs have not carried that burden.

a. Plaintiffs’ 14-month delay fatally undermines any claim of irreparable harm.

“[A] party requesting a preliminary injunction must generally show reasonable diligence” in order to substantiate the asserted need for emergency relief. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). As the Fifth Circuit has recognized, a “long delay by plaintiff after learning of the threatened harm may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction.” *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 297 (5th Cir. 2012) (quoting Charles Alan Wright & Arthur R. Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (2d ed. 1995)); accord *H.D. Vest, Inc. v. H.D. Vest Mgmt. & Servs., LLC*, No. 3:09-cv-390, 2009 WL 1766095, at *4 (N.D. Tex. June 23, 2009) (“Delay in seeking a remedy is an important factor bearing on the need for a preliminary injunction. Absent a good explanation, a substantial period of delay militates against . . . a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief.”).

Here, Plaintiffs waited *14 months* after issuance of the order to seek a preliminary injunction (and later, a TRO), even though there is no doubt that, as frequent fliers, Plaintiffs were long aware

of the order. *See, e.g.*, Compl. ¶¶ 43, 46, 48, 51. Comparable (or far shorter) delays are often dispositive—indeed, the Fifth Circuit has affirmed a district court’s denial of temporary relief where the movant “waited three months before petitioning the district court” for that relief. *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975); *see also Louisiana v. Biden*, No. 22-cv-30087, 2022 WL 866282, at *3 (5th Cir. Mar. 16, 2022) (granting stay pending appeal, in part because of a five-month delay in seeking injunctive relief, and because the challenged action by then “had been in place for one year,” meaning that “[t]he status quo at this point is the continued” operation of the agency policy). “District courts in this circuit have generally declined to grant injunctive relief where a plaintiff, without sufficient explanation, delayed for five months or more in seeking injunctive relief.” *Ronaldo Designer Jewelry, Inc. v. Cox*, No. 1:17-cv-2, 2017 WL 3879095, at *10 (N.D. Miss. Sept. 5, 2017) (collecting cases). Overall, “courts generally consider anywhere from a three-month delay to a six-month delay enough to militate against issuing injunctive relief.” *Leaf Trading Cards, LLC v. Upper Deck Co.*, No. 3:17-cv-3200, 2019 WL 7882552, at *2 (N.D. Tex. Sept. 18, 2019).⁵

Sometimes, a delay in seeking preliminary relief has been excused if there is “a reasonable explanation,” such as the plaintiff’s conducting “good faith efforts to investigate[.]” *ADT, LLC v. Cap. Connect, Inc.*, 145 F. Supp. 3d 671, 699 (N.D. Tex. 2015). But that excuse is unavailable here—Plaintiffs not only knew about the order, but have apparently complied with it many times, *see* Compl. ¶¶ 43, 46, 48, 51—which is difficult to square with the idea that any additional flights will cause

⁵ *See also, e.g., Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (“A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm.”); *Quince Orchard Valley Citizens Ass’n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (affirming denial of preliminary injunction, calling six months “a long delay in seeking relief” that “indicates that speedy action is not required” (citation omitted)); *TIGI Linea Corp. v. Pro. Prods. Grp., LLC*, No. 4:19-cv-00840, 2020 WL 3154857, at *7 (E.D. Tex. May 20, 2020) (“Courts have found that the expiration of several months between discovering an act of breach and seeking injunctive relief should factor into the court’s analysis and could serve to rebut a claim of irreparable harm.”), *report & recommendation adopted*, 2020 WL 3130139 (E.D. Tex. June 12, 2020); *Villareal v. Saenz*, No. 5:20-cv-571, 2021 WL 1940620, at *4 (W.D. Tex. May 14, 2021), *report & recommendation adopted*, 2021 WL 4057570 (W.D. Tex. Aug. 4, 2021) (“Plaintiffs waited nearly nine months before seeking injunctive relief. This delay casts doubt on the irreparability of the harm alleged.”); *Embarcadero Techs., Inc. v. Redgate Software, Inc.*, No. 1:17-cv-444, 2017 WL 5588190, at *3 (W.D. Tex. Nov. 20, 2017) (five- and ten-month delays were “fatal” to a “request for a preliminary injunction”).

irreparable harm requiring emergency judicial intervention. Indeed, under Plaintiffs’ own proposed schedule, several of them would be flying before the date by which they requested a ruling. *See* Compl. ¶ 45 (flights on April 13 and April 14); *id.* ¶ 55 (April 6, April 12, and April 14). Plaintiffs have not provided “a good explanation” for their 14-month delay, *Gonannies, Inc. v. Goupair.Com, Inc.*, 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006)—indeed, they have provided no explanation at all.

In sum, even if Plaintiffs had put forth “sufficient proof of irreparable damage and ha[d] shown that they have no other viable legal remedy,” they “cannot prevail on the legal element of irreparable harm due to their delay[.]” *Texas v. United States*, 328 F. Supp. 3d 662, 740 (S.D. Tex. 2018).

b. Plaintiffs’ (inaccurate) assertions about financial costs do not support a finding of irreparable harm, particularly given the widespread availability of free masks.

Citing no evidence, Plaintiffs insist that the mask order causes them irreparable harm because they “will continue having to purchase and clean masks, at some monetary expense, to comply with the Mask Mandate for as long it continues[.]” TRO Br. at 21. But the cost of a mask is exceedingly low. *See, e.g., Premium Single Use Disposable Face Mask, Soft on Skin, Pack of 3-Ply Masks Facial Cover with Elastic Earloops* (50 Masks), <https://perma.cc/N8ZE-CALE> (50 surgical masks for sale for \$5.85, or \$0.12 each) (last visited Apr. 12, 2022). Because “an injunction is an equitable remedy,” courts should not issue them “to restrain an act the injurious consequences of which are merely trifling.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982) (quoting *Consol. Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900)). The financial cost of a mask does not rise above that level.

In any event, Plaintiffs do not need to need to purchase masks at all. For starters, local pharmacies are ready to provide Plaintiffs a high-quality mask for free. A search using CDC’s “Find Free Masks” tool (<https://perma.cc/Q4Q9-QBМК>) reveals at least 40 pharmacies offering free N95 respirators within five miles of the zip code for Dallas/Fort Worth International Airport. *See* HHS, *Strategic National Stockpile Makes High-quality Masks Available to Americans*, <https://perma.cc/KL66-R4F2> (announcing that free N95 masks “will be made available at thousands of retail pharmacies and community health centers nationwide”). Plaintiffs are also free to take a no-cost, do-it-yourself approach: the CDC order permits the use of “homemade” masks. 86 Fed. Reg. at 8027 n.6. Failing

these options, a mask may be offered to them at no cost by TSA when they arrive at the security checkpoint without one. TSA, *Coronavirus (COVID-19) FAQ* (accessed Mar. 30, 2022), <https://perma.cc/2U5N-JR68>. Each of these options is fatal to Plaintiffs’ irreparable harm theory.

On top of all that, Plaintiffs allege that they are frequent travelers who have complied with the mask order in the past, Compl. ¶¶ 43, 46, 48, 51, so they presumably already have masks, and they do not contend otherwise. *See, e.g., FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (fact necessary to support standing “must affirmatively appear in the record” and “cannot be ‘inferred argumentatively from averments in the pleadings’” (citations omitted)). Even if Plaintiffs previously bought masks, “because . . . past harms cannot be prevented by a preliminary injunction, they cannot form the basis of preliminary injunctive relief.” *City of Austin v. Kinder Morgan Texas Pipeline, LLC*, 447 F. Supp. 3d 558, 569 (W.D. Tex. 2020); *see also City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (past injury cannot support a claim for prospective preliminary injunctive relief).⁶

Finally, Plaintiffs assert that they are irreparably harmed by “cleaning” masks, but they have not accounted for the costs for such cleaning, nor explained why those costs are an irreparable harm. And even if Plaintiffs spend substantial sums cleaning masks, their desire for extra cleanliness—in a world in which free, brand-new masks are easy to obtain—would be a problem of their own making. “[S]elf-inflicted” harms “do not count” for purposes of irreparable harm. *Texas v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1098 (2022); accord Charles Alan Wright & Arthur R. Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.).⁷

⁶ Even if past mask purchases could somehow be remedied with prospective injunctive relief, Plaintiffs have not (and likely could not) show that it was the CDC’s order that caused them to purchase masks—rather than, for example, the State of Texas’s mask mandate, which was issued earlier, and applied in nearly all public settings. *See, e.g., State of Texas, Exec. Order GA-29, Relating to the use of face coverings during the COVID-19 disaster* (July 2, 2020), <https://perma.cc/KB4T-4CY4>, *rescinded by State of Texas, Exec. Order GA-34* (March 2, 2021), <https://perma.cc/KTR5-AGY4>.

⁷ Plaintiffs also include a passing and entirely unexplained reference to “harm from the health risks of wearing masks.” TRO Br. at 22. That fleeting reference—supported by no affidavit, evidence, or citation—is plainly insufficient to establish irreparable harm, on which Plaintiffs bear the burden. Notably, none of the Plaintiffs’ affidavits makes (let alone supports) any such assertion. And as discussed below in the context of Plaintiffs’ arbitrary-and-capricious claim, *see infra* at 20-22, Plaintiffs have misinterpreted the state of the scientific evidence on the safety of mask-wearing.

c. Every court to consider the question has rejected substantially similar requests for injunctive relief, including the Supreme Court of the United States.

In earlier-filed litigation, many other individuals have sought time-sensitive injunctive relief from the CDC or TSA orders that require masks during commercial air travel. The Supreme Court has thrice rejected that relief, and so has every Court of Appeals to consider the issue—that is, the Fourth, Eighth, Eleventh, and D.C. Circuits—as well as the U.S. District Court for the Middle District of Florida. No court has granted such relief, and not a single Judge or Justice has noted their dissent from any of these orders. This motion should meet the same fate.

The first-filed case challenging the CDC’s mask order, *Wall v. CDC*, No. 21-cv-975 (M.D. Fla.), began with an emergency request for a temporary restraining order, in which the plaintiff sought to fly maskless on an upcoming flight. The plaintiff in that case (unlike in this one) alleged that he could not safely wear a mask because of a medical condition. The district court denied relief, citing a lack of irreparable harm. Plaintiff then sought emergency relief from the Eleventh Circuit (twice), and then the Supreme Court—all of which was denied, without any noted dissent. That plaintiff’s motion for a preliminary injunction was later denied, because of the absence of irreparable harm.⁸

In addition, last year, several individuals filed petitions for review challenging TSA’s enforcement of the CDC mask order “in a coordinated effort to enjoin the Mask Directives.” *Faris v. TSA*, No. 21-3951, Order at 1 n.1 (6th Cir. Nov. 9, 2021) (collecting citations). The petitioners all filed emergency motions for stay or preliminary injunction. *See id.* The Fourth and Eighth Circuits denied the motions, and then transferred the remaining proceedings to the D.C. Circuit, where the

⁸ *Wall v. CDC*, 543 F. Supp. 3d. 1290 (M.D. Fla. 2021) (denying TRO motion for lack of irreparable harm); *Wall v. CDC*, No. 21-90017, Order (11th Cir. June 28, 2021) (denying emergency motion for permission to appeal); *Wall v. CDC*, No. 21-12179, Order (11th Cir. June 30, 2021) (dismissing appeal), *reconsideration denied*, *Wall v. CDC*, No. 21-12179, Order (11th Cir. June 30, 2021); *Wall v. CDC*, No. 21A2, Order (S. Ct. July 13, 2021) (denying application for injunctive relief presented to Justice Thomas); *Wall v. CDC*, No. 6:21-cv-975 Order at 5, ECF No. 255 (M.D. Fla. Mar. 4, 2022) (denying preliminary-injunction motion for lack of irreparable harm); *see also Wall v. Southwest Airlines*, No. 6:21-cv-1008, Order at 6-7, ECF No. 153 (M.D. Fla. Dec. 8, 2021) (in another case, denying another individual’s TRO motion for lack of irreparable harm).

first-filed petition was pending. The Second, Fifth, Sixth, and Eleventh Circuits granted no relief, and transferred the applications to the D.C. Circuit, which denied all the rest.⁹

After the D.C. Circuit had denied relief, two of the petitioners submitted an emergency application to the Supreme Court, again requesting a stay of TSA's enforcement of the CDC's mask order. Chief Justice Roberts denied the application without comment, and without referring the matter to the full Court. *See Wall v. TSA*, No. 21A198, <https://perma.cc/E7UD-HMBM>. On December 21, 2021, petitioners refiled an identical request with Justice Gorsuch. *Id.* This time, the application was referred to the full Court—but a few days later it too was denied, without any noted dissent. *Id.* This Court should not depart from this nationwide consensus across the federal judiciary.

II. The equities and the public interest weigh sharply against a preliminary injunction.

In weighing the equities, the Court should be mindful of the rule that, because “an injunction is an equitable remedy,” one should not issue “to restrain an act the injurious consequences of which are merely trifling.” *Romero-Barcelo*, 456 U.S. at 311-12 (citation omitted). Plaintiffs have shown nothing more than that here. The challenged order requires quite little: when not eating or drinking, or absent some other exemption, Plaintiffs are currently expected to wear a mask during commercial air travel—the sort of requirement that is now familiar to individuals across the globe, whether imposed by governments, private businesses, or hospitals. And it is plainly familiar to these Plaintiffs, who apparently are frequent fliers. *See* Compl. ¶¶ 43, 46, 48, 51. Importantly, unlike many other litigants who have challenged the CDC's order, *see infra* at 24 at n.11, none of these Plaintiffs allege that they have some medical or religious reason for being unable to wear a mask—they simply “do not want to wear masks on airplanes.” *See, e.g.,* Aff. of Anthony Perkins at APP. 139, ¶ 11, ECF No. 16 (“Perkins Aff.”); *accord* Aff. of Matthew Krause, ECF No. 16; Aff. of Donna Brumson, ECF No. 16. These personal travel preferences are not irreparable harm. After all, “the federal courts” are not

⁹ *Andreadakis v. TSA*, No. 21-2173, Order (4th Cir. Nov. 17, 2021); *Eades v. TSA*, No. 21-3362, Judgment (8th Cir. Nov. 17, 2021); *Abadi v. TSA*, No. 21-1258, Order (D.C. Cir. Dec. 22, 2021); *Faris v. TSA*, No. 21-1221, Order (D.C. Cir. Nov. 12, 2021); *Marcus v. TSA*, 21-1225, Order (D.C. Cir. Nov. 12, 2021); *Wall v. TSA*, Order, No. 21-1220 (D.C. Cir. Nov. 10, 2021).

“publicly funded forums for the ventilation of public grievances[.]” *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982).

On the other side of the ledger, as of this filing, over 80 million cases and over 982,000 deaths caused by COVID-19 have been identified in the United States. *See* CDC, *COVID Data Tracker*, <https://perma.cc/MY3B-72T6> (last visited Apr. 12, 2022). The need to protect crewmembers and the traveling public—including children ineligible to be vaccinated, others unable to be vaccinated for religious or medical reasons, and the elderly or immunocompromised—plainly outweighs any alleged harm that Plaintiffs might suffer in connection with their own personal travel-related inconveniences. *Cf. Competitive Enter. Inst. v. Dep’t of Transp.*, 863 F.3d 911, 919 (D.C. Cir. 2017) (“[E]-cigarette vapor in confined aircrafts could harm non-users. Especially due to the ‘involuntary nature’ of secondhand exposure on aircrafts, where individuals are often assigned seats, . . . ‘[t]hose seated next to users may not want to expose themselves (or their babies or older children)’ to even small risks[.]”). As another court concluded in litigation challenging this order, “the public interest is actually best served by preventing the further spread of COVID-19 through mask enforcement.” *Wall v. Southwest Airlines*, No. 6:21-cv-1008, Order at 9, ECF No. 153 (M.D. Fla. Dec. 8, 2021). Plaintiffs offer no basis for a different conclusion here.

III. Plaintiffs are unlikely to succeed on the merits.

For the reasons above, the Court can deny the motion without addressing the merits. *See White*, 862 F.2d at 1211. But Plaintiffs are also unlikely to succeed on the merits of their only claim: that the CDC’s order is arbitrary and capricious. Under the APA’s “deferential” standard of review, the Court “may not substitute its own policy judgment for that of the agency.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Rather, “particularly concerning the nature of the data relied upon, the role of [the] [C]ourt . . . is to ‘simply ensure that the agency has acted within a zone of reasonableness.’” *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (quoting *Prometheus*, 141 S.Ct. at 1158).

Plaintiffs acknowledge that the Court should adhere to the “foundational principle of administrative law that judicial review of agency action is limited to the grounds that *the agency invoked when it took the action.*” TRO Br. at 15 (quoting *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907

(2020)) (emphasis added). But Plaintiffs' arguments rely almost entirely upon references that are not a part of the administrative record. Many of these references postdate the order, so CDC could not have considered them even if it wanted to, and Defendants object to any consideration of this extra-record evidence. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court," as Plaintiffs seem to prefer. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Plaintiffs also concede that the scope of arbitrary-and-capricious review is "narrow." TRO Br. at 8 (quoting *State Farm*, 463 U.S. at 43). Nonetheless, Plaintiffs argue with CDC's weighing of scientific evidence and flyspeck the order's exceptions, such as the age cutoff and the exception for removing a mask while eating and drinking. *See id.* at 16-17. Such arguments go well beyond the "narrow" scope of rationality review. The Court's review of how an agency makes decisions "based upon its evaluation of complex scientific data within its technical expertise" is "most deferential." *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003); *see also Texas v. EPA*, 983 F.3d 826, 841 (5th Cir. 2020) (same). Moreover, agencies enjoy "wide discretion in making line-drawing decisions" and are "not required to identify the optimal threshold with pinpoint precision." *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214-15 (D.C. Cir. 2013) (citation omitted); *see also Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) ("[T]he same capacious grant of authority that empowers [the agency] to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines."). Finally, rationality review does not require an agency to address every argument "conceivable by the mind of man," particularly those that are meritless. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978). The Court should reject Plaintiffs' appeal to "direct [CDC] in a choice between rational alternatives" when it is operating on the frontiers of science. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1000 (D.C. Cir. 2008).

1. Plaintiffs first argue that CDC "overstate[d]" the "benefits of masks" and failed to account for the relative effectiveness of different types of masks, citing to a variety of studies that purportedly raise questions about their efficacy. TRO Br. at 8-9. They also characterize CDC's assessment of the

utility of masks as “conclusory.” *Id.* at 15-16. But CDC has “reasonably explained,” *Prometheus Radio Project*, 141 S. Ct. at 1158, that masks both (1) “help prevent people who have COVID-19, including those who are pre-symptomatic or asymptomatic, from spreading the virus to others,” and (2) “also provide personal protection to the wearer by reducing inhalation of” “virus-laden droplets.” 86 Fed. Reg. at 8028. CDC relied upon a significant body of scientific literature validating that conclusion. *Id.* at 8028-29 & nn. 12-28. Plaintiffs may disagree with that literature, but cannot plausibly claim that CDC did not “show its work.” TRO Br. at 15. And the unremarkable fact that some masks are more effective than others does not undermine the notion that requiring masks has significant benefits.

The evidence Plaintiffs rely upon to argue against the effectiveness of masking is not a part of the administrative record, and much of it postdates the order. But even if the Court could consider this evidence, *but see, e.g., Regents*, 140 S. Ct. at 1907, it does not render CDC’s action irrational.¹⁰ For example, the Bundgaard study explicitly asserts that its “findings *do not* provide data on the effectiveness of widespread mask wearing in the community in reducing SARS-CoV-2 infections.” Henning Bundgaard et al., *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers: A Randomized Control Trial*, ANNALS OF INTERNAL MEDICINE (2020), at 7, <https://perma.cc/K8XM-TAIG> (emphasis added). Plaintiffs also rely on a study (Shah) that found cloth masks less effective, but the CDC had evidence before it that universal masking was effective even where (as here) medical masks were not required. *See* Wei Lyu & George L. Wehby, *Community Use Of Face Masks and COVID-19: Evidence From A Natural Experiment Of State Mandates in the US*, 39 Health Affairs 1419, 1420-21 (2020) (state mask mandates, which were found to be effective, “primarily refer[] to cloth face coverings or nonmedical masks”) (cited at 86 Fed. Reg. at 8028 n.20), <https://perma.cc/U9ZM-5ZJX>. Finally, while the Marks study “did not find any

¹⁰ Plaintiffs also overlook that the body of scientific literature supporting masking has also grown since the order issued in January 2021. *See, e.g.,* Gholamhossein Bagheri et al., *An upper bound on one-to-one exposure to infectious human respiratory particles*, PROCEEDINGS OF THE NAT’L ACADEMY OF SCIENCES (2021), <https://perma.cc/3R3Q-838Y>; Adam Taylor & Ben Guarino, *Massive randomized study is proof that surgical masks limit coronavirus spread, authors say*, WASH. POST (Sept. 1, 2021), <https://perma.cc/M2E4-7E3Q>.

evidence of decreased risk of transmission in individuals who reported mask use,” the authors noted this finding “collides with the evidence reported elsewhere” regarding the effectiveness of masking, and that the design of their study “limit[ed] our ability to make clear inferences about the effect of PPE on transmission risk.” Michael Marks et al., *Transmission of COVID-19 in 282 clusters in Catalonia, Spain: a cohort study*, 21 THE LANCET 629, 635 (May 2021), <https://perma.cc/7Z5Z-KERM>. Plaintiffs cannot reasonably maintain that, in light of these studies, it was *irrational* for CDC to conclude in January 2021 that masking would inhibit the spread of COVID-19.

2. Plaintiffs next argue that it was arbitrary and capricious for CDC to require masks for air travel given high-quality filtration systems on many commercial airplanes. TRO Br. at 10. But the extra-record evidence Plaintiffs cite actually supports such a requirement. Plaintiffs tout a study by the Department of Defense (DoD) that found it would take “a minimum [of] 54 flight hours ... to produce inflight infection from aerosol transmission” for a person breathing without a mask. *Id.* (quoting D. Silcott et al., *TRANSCOM/AMC Commercial Aircraft Cabin Aerosol Dispersion Tests* 29 (Oct. 14, 2020)). However, that study “assume[d] the *infected* passenger [was] wearing a surgical mask.” S. Bushwick et al., *Evaluating COVID Risk on Planes, Trains and Automobiles*, SCIENTIFIC AMERICAN (Nov. 19, 2020), <https://perma.cc/5K6F-EU7F> (emphasis added) (discussing DoD study); *see also* Silcott, *supra*, at 30 (“Testing assumes that mask wearing is continuous, and that the number of infected personnel is low.”). The DoD study “recommend[ed] continued . . . mask-wearing” for “troop transport on commercial airlines,” despite their findings about aerosol transmission. Silcott, *supra*, at 30-31.

Likewise, the Bushwick article does not conclude that air filtration systems made mask-wearing irrational. It points to evidence early in the pandemic of significant infection on a flight caused by “a single symptomatic passenger in business class” before mask-wearing was widespread. *See* Bushwick, *supra*. Based on such experiences, the authors observed that “COVID risk [on airplanes] . . . comes down to how closely one sits to other people and for how long, whether or not everyone is wearing a mask, and how infectious any passengers are at the time.” *Id.* Those conclusions track the CDC’s finding that planes “bring[] persons in close contact with others, often for prolonged periods,”

potentially leading to the spread of COVID-19 among passengers. 86 Fed. Reg. at 8029. It was therefore not irrational for CDC to apply the masking order to airplanes.

3. Plaintiffs turn next to infection-induced immunity. They argue “Defendants should have considered whether it is necessary for” individuals who contracted, and recovered, from COVID-19 “to wear masks to the same extent as individuals who are not immune from the disease.” TRO Br. at 10-12. In fact, CDC explicitly considered, and rejected, this idea:

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.

86 Fed. Reg. at 8029. Plaintiffs ignore this explanation. Instead, they focus on two studies and a letter to the editor of a medical journal that advocate the benefits of infection-induced immunity. TRO Br. at 11. Even if it were not outside the record, this evidence would not render CDC’s judgment irrational. None of it directly addresses the question whether infection-induced immunity renders masking requirements obsolete. Indeed, it is now understood that individuals who have previously contracted COVID-19, or who have been fully vaccinated against COVID-19, are still capable of contracting and spreading COVID-19. CDC, *Reinfections and COVID-19* (updated Jan. 20, 2022), <https://perma.cc/CCM6-N875>; CDC, *The Possibility of COVID-19 After Vaccination: Breakthrough Infections* (updated Dec. 17, 2021), <https://perma.cc/3G8E-3MCL>. That reality validates the rationality of CDC’s decision not to allow any immunity-based exceptions to masking, whether derived from a vaccine or a prior infection. *See Biden*, 142 S. Ct. at 653-54 (rejecting argument about immunity).

4. Plaintiffs—the youngest of whom is 14 years old, *see* Perkins Aff. at APP. 139, ¶ 13—next challenge the application of the order to children, arguing (1) that masking harms children and (2) that children are at a much lower risk from COVID-19. TRO Br. at 12-14. Again, the CDC considered and discussed these issues. It was aware of a variety of approaches to the issue among the states that

had implemented mask mandates during the pandemic, with age cutoffs ranging from two to twelve years old. 86 Fed. Reg. at 8029 n.29. Taking all of this evidence into account, CDC imposed a similar universal masking requirement on travelers, with an age cutoff of two years. *Id.* at 8027. CDC had ample discretion to draw the line at two years, even if some experts might rationally have made a different choice. *Nat'l Shooting Sports Found.*, 716 F.3d at 214.

Plaintiffs focus on guidance from the WHO that children under the age of six should not be required to wear masks. TRO Br. at 13, 16. But Plaintiffs never explain why the WHO standard would benefit them, or why they are irreparably harmed by CDC's decision to set the age cutoff at two. None of the Plaintiffs is a child between the age of two and six, or the parent of such a child. S.P., the only minor Plaintiff in the case, is a teenager. Even if Plaintiffs disagree with the age cutoff, "standing is not dispensed in gross," and Plaintiffs do not have "the right to complain of *all* administrative deficiencies," regardless of whether those deficiencies personally affect them. *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Even so, the WHO's guidance does not make CDC's approach irrational, as the APA does not require unanimity among scientists before it can act. *Cf. Prometheus Radio Project*, 141 S. Ct. at 1160 ("[T]he FCC did not have perfect empirical or statistical data. Far from it. But that is not unusual in day-to-day agency decisionmaking within the Executive Branch.").

Once again, instead of scrutinizing the record before the CDC (which amply supports its judgment), Plaintiffs focus on extra-record evidence, much of which postdates the order. Regardless, that evidence is largely inapt. The studies (and opinion pieces) that Plaintiffs rely upon highlight health concerns related to routine mask-wearing for long periods of time on a daily basis. *See, e.g.*, Silke Schwarz et al., *Corona child studies "Co-Ki": first results of a Germany-wide register on mouth and nose covering (mask) in children*, 4 *Monatsschrift Kinderheilkunde* 353 (Feb. 22, 2021) (available in English at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7898258/>) (study cohort wore masks for an average of four and a half hours per day). None of the articles claims that these risks are manifest in a requirement to wear a mask for a relatively short duration, and only while traveling.

Plaintiffs' arguments about the resilience of children to COVID-19 also do not render the order irrational. Even if children, on average, have better outcomes after being infected with

COVID-19 than adults, it does not follow that children are also less likely to spread COVID-19 to others. That same reasoning led the CDC to reject immunity-based exceptions to the masking requirement. 86 Fed. Reg. at 8029. CDC's rule reflects the reality of asymptomatic and presymptomatic transmission of COVID-19 by declining to craft exceptions for individuals based on their individual risk of contracting a serious case of COVID-19. *Id.* at 8028-29. Instead, it chose to rely upon studies that found universal masking requirements beneficial, even as applied to children over two. That reasonable choice was well within CDC's purview.

5. Plaintiffs argue, as a backstop, that the March 18, 2022 "extension" by TSA of its mask-related Security Directives should be set aside. TRO Br. at 17-18. As explained above, this Court has no jurisdiction to review the actions of TSA (or DHS, DOT, or FAA) in this context; only the CDC's order is a proper subject for review in this Court. *See supra* at 7-9. And TSA's actions cannot possibly be construed as a decision to "extend" the CDC's order. The CDC's order was not (and did not need to be) extended. By its terms, it went into effect on February 1, 2021, and 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 . . . that a public health emergency exists." 86 Fed. Reg. at 8030. It has no expiration date. Of course, as discussed above, Plaintiffs have failed to show that the CDC's judgment is arbitrary and capricious—even if evaluated under today's conditions, using post hoc, extra-record evidence. But in keeping with the APA's requirement that agency action be evaluated at the date of the challenged action, CDC's actions must be judged by the record before it in January 2021, not March 2022. *See, e.g., Regents*, 140 S. Ct. at 1907.

6. Finally, Plaintiffs assert that CDC's recent decision to withdraw the so-called "Title 42" order, which had suspended, under a different statutory authority, the right to introduce certain migrants into the United States based on public-health concerns, *see* 42 U.S.C. § 265, confirms that this CDC order is arbitrary and capricious. TRO Br. at 18-20. "If the Title 42 protection is no longer necessary for public health," Plaintiffs assert, "then neither is the Mask Mandate." *Id.* at 19. That logic is unsound, but, regardless, that is not a compelling reason for granting the relief Plaintiffs seek here—and certainly not now. CDC has already explained that it is actively deliberating about the

future of the mask order; it expects to announce the results of those deliberations in a matter of days. And CDC's demonstrated willingness to reconsider, and rescind, pandemic measures that are no longer necessary (such as its prior guidance on indoor masking and the "Title 42" order) actually weighs in favor of denying (or deferring) this motion, at least until the CDC can announce the results of the current review process, on or before April 18.

The argument is also a non-starter on the merits. Again, Plaintiffs ignore the rudimentary principle that arbitrary and capricious review is confined to the record before the agency at the time it acted—in this case, January 2021. And their argument is based on the demonstrably false notion that if two agency actions are driven by similar rationales or motivations, the second action becomes irrational as soon as the agency concludes the first action is no longer necessary. The "Title 42" order and the mask order were intended to help prevent the introduction and spread of COVID-19 in vastly different settings, each presenting unique challenges from an epidemiological perspective. There is nothing inconsistent about concluding that one measure is no longer necessary while leaving another measure in place. To contend otherwise would suggest that whenever CDC ends one mitigation measure, it must immediately end *all* of them. That contention runs counter to the well-established principle of administrative law that an agency can address issues incrementally and "need not solve every problem before it in the same proceeding." *Mobil Oil Exploration & Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 231 (1991). Finally, Plaintiffs emphasize CDC's acknowledgement of the benefits of both infection-induced and vaccine-derived immunity in its decision to rescind the "Title 42" order, but as discussed, the mask order already acknowledged and addressed why masking should be required for all individuals, regardless of immunity. *See supra* at 20.

IV. Plaintiffs' requested relief is overbroad.

a. Any relief should be narrowly tailored.

An Article III court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Gill v. Whitford*, 138 S. Ct. 1916, 1930, 1933 (2018). Accordingly, as required by Article III and traditional principles of equity, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *id.* at 1934, and "injunctive relief should be no more

burdensome to the defendant than necessary to provide complete relief to the plaintiffs,” *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

Nationwide injunctions, by contrast, “take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). And the order at issue is currently subject to litigation in at least sixteen other cases in thirteen different federal districts, underscoring why this Court should not attempt to decide its legality for all parties nationwide. See *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (lamenting the “gamesmanship and chaos” created by the possibility of “conflicting nationwide injunctions,” as well as the “asymmetric” effects in which “the government’s hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal”).¹¹

The Fifth Circuit came to a similar conclusion just a few months ago, in granting a partial stay of a COVID-19-related preliminary-injunction order, prohibiting any application of that order outside the boundaries of the plaintiff States that had sought relief. *Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021). In doing so, the panel explained why “[p]rinciples of judicial restraint” counseled against granting relief to non-parties—particularly where, as here, “[o]ther courts are considering these same issues” at the same time. *Id.* at 263. And the Fifth Circuit specifically distinguished the nationwide injunction that it had affirmed in *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), as having been based on a “constitutional uniformity principle” unique to federal immigration law, as well as

¹¹ See *Wall v. CDC*, No. 21-cv-975 (M.D. Fla.); *Faris v. CDC*, No. 22-cv-23 (W.D. Ky.); *Seklecki v. CDC*, No. 22-cv-10155 (D. Mass.); *Andreadakis v. CDC*, No. 22-cv-52 (E.D. Va.); *Health Freedom Defense Fund v. Biden*, No. 21-cv-1693 (M.D. Fla.); *Bobay-Somers v. HHS*, No. 21-cv-335 (N.D. Ind.); *Chenge v. CDC*, No. 22-cv-165 (W.D. Mich.); *Bigtree v. CDC*, No. 22-cv-0224 (W.D. Tex.); *Carlin v. CDC*, No. 22-cv-0800 (D.D.C.); *Van Dwyne v. CDC*, No. 22-cv-122 (N.D. Tex.); *Trociano v. CDC*, No. 22-cv-0727 (D. Colo.); *Florida v. Walensky*, No. 22-cv-0718 (M.D. Fla.); *Doe v. Dep’t of Transp.*, No. 22-cv-402 (W.D. Pa.); *Massie v. CDC*, No. 22-cv-31 (W.D. Ky.); *Marcus v. CDC*, No. 22-cv-2383 (C.D. Cal.); see also *Mahwikizi v. CDC*, No. 21-cv-3467, 2022 WL 602452 (N.D. Ill. Mar. 1, 2022) (granting CDC’s motion to dismiss First Amendment challenges).

“that case’s concern that patchwork rulings would undermine an injunction limited to certain jurisdictions.” *Louisiana v. Becerra*, 20 F.4th at 263-64.

The fact that one of the Plaintiffs is an organization with members nationwide does not warrant a different result. “[S]tanding is not dispensed in gross,” and Plaintiffs must establish standing “separately for each form of relief sought.” *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (citations omitted). At most, any relief would have to be limited to members of the organization who have demonstrated an Article III injury, and who are facing imminent, irreparable harm from the mask order at the time of the Court’s order. *See, e.g., Wall v. TSA*, No. 21-1220, Order at 1 (D.C. Cir. Nov. 10, 2021) (“petitioners have not demonstrated any basis for enjoining the [TSA Security Directive regarding mask-wearing] in its entirety”); *Va. Soc’y for Hum. Life, Inc. v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001) (“[n]othing in the language of the APA” requires a court to exercise the “far-reaching power” of nationwide relief), *overruled in part on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 n.2 (4th Cir. 2012).

b. The Court should stay the effective date of any TRO or injunction for 14 days.

At a minimum, and in the alternative, the Court should stay any TRO or preliminary injunction for at least 14 days, in order (1) to give public and private-sector entities around the country time to prepare for orderly compliance; and (2) to give the Solicitor General of the United States time to consider whether to seek emergency appellate relief (and, if necessary, to seek such relief). Much of the implementation of the CDC’s order relies on cooperation with public and private-sector partners, who in practice assist in communicating these requirements to passengers, crew, and employees—whether in the form of signage, airline booking and check-in software, recorded announcements at the airport, flight-attendant instructions, and so on. It will take time to update that messaging. In the absence of a reasonable period of implementation time, passengers are likely to encounter contradictory, confusing, or inaccurate instructions about what is required of them—an untenable situation in a high-security environment like an international airport or on a commercial airline flight.

CONCLUSION

Plaintiffs’ motions for a TRO or a preliminary injunction should be denied.

Dated: April 12, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

CHAD E. MEACHAM
Acting United States Attorney

ERIC B. BECKENHAUER
Assistant Branch Director

By: /s/ Stephen M. Pezzi
STEPHEN M. PEZZI (D.C. Bar No. 995500)
MICHAEL J. GERARDI
ANDREW F. FREIDAH
JOHNNY H. WALKER
Trial Attorneys
United States Department of Justice
Civil Division
Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Telephone: 202-305-8576
Email: stephen.pezzi@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FAMILY RESEARCH COUNCIL
ACTION, INC., *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States,
et al.,

Defendants.

Civil Action No. 4:22-cv-00209-O

EXHIBIT 1

CDC – Transportation Mask Order

The rapidly changing nature of the pandemic requires not only that CDC act swiftly, but also deftly to ensure that its actions are commensurate with the threat. This necessarily involves assessing evolving conditions that inform CDC's determinations.

The conditions that existed on September 4, 2020 have only worsened. As of January 21, 2021, there have been over 24,400,000 cases and over 400,000 deaths. Data collected by Princeton University show that eviction filings are occurring; it is therefore expected that large numbers of evictions would be processed if the Order were to expire. [<https://evictionlab.org/eviction-tracking>]. Without this Order, there is every reason to expect that evictions will increase significantly, resulting in further spread of COVID-19. It is imperative to act quickly to protect the public health, and it would be impracticable and contrary to the public interest to delay the issuance and effective date of the Order pending notice-and-comment rulemaking.

Similarly, if this Order qualifies as a rule under the APA, the Office of Information and Regulatory Affairs (OIRA) has determined that it would be a major rule under the Congressional Review Act (CRA). But there would not be a delay in its effective date. The agency has determined that for the same reasons, there would be good cause under the CRA to make the requirements herein effective immediately.

If any provision of this Order, or the application of any provision to any persons, entities, or circumstances, shall be held invalid, the remainder of the provisions, or the application of such provisions to any persons, entities, or circumstances other than those to which it is held invalid, shall remain valid and in effect.

This Order shall be enforced by federal authorities and cooperating state and local authorities through the provisions of 18 U.S.C. 3559, 3571; 42 U.S.C. 243, 268, 271; and 42 CFR 70.18. However, this Order has no effect on the contractual obligations of renters to pay rent and shall not preclude charging or collecting fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis, under the terms of any applicable contract.

Criminal Penalties

Under 18 U.S.C. 3559, 3571; 42 U.S.C. 271; and 42 CFR 70.18, a person violating this Order may be subject to a fine of no more than \$100,000 if the violation does not result in a death, or a fine of no more than \$250,000 if the

violation results in a death, or as otherwise provided by law. An organization violating this Order may be subject to a fine of no more than \$200,000 per event if the violation does not result in a death or \$500,000 per event if the violation results in a death or as otherwise provided by law. The U.S. Department of Justice may initiate criminal proceedings as appropriate seeking imposition of these criminal penalties.

Notice to Cooperating State and Local Officials

Under 42 U.S.C. 243, the U.S. Department of Health and Human Services is authorized to cooperate with and aid state and local authorities in the enforcement of their quarantine and other health regulations and to accept state and local assistance in the enforcement of Federal quarantine rules and regulations, including in the enforcement of this Order.

Notice of Available Federal Resources

While this Order to prevent eviction is effectuated to protect the public health, the states and units of local government are reminded that the Federal Government has deployed unprecedented resources to address the pandemic, including housing assistance.

The Department of Housing and Urban Development (HUD) has informed CDC that all HUD grantees—states, cities, communities, and nonprofits—who received Emergency Solutions Grants (ESG) or Community Development Block Grant (CDBG) funds under the CARES Act may use these funds to provide temporary rental assistance, homelessness prevention, or other aid to individuals who are experiencing financial hardship because of the pandemic and are at risk of being evicted, consistent with applicable laws, regulations, and guidance.

HUD has further informed CDC that:

HUD's grantees and partners play a critical role in prioritizing efforts to support this goal. As grantees decide how to deploy CDBG-CV and ESG-CV funds provided by the CARES Act, all communities should assess what resources have already been allocated to prevent evictions and homelessness through temporary rental assistance and homelessness prevention, particularly to the most vulnerable households.

HUD stands at the ready to support American communities take these steps to reduce the spread of COVID-19 and maintain economic prosperity. Where gaps are identified, grantees should coordinate across available Federal, non-Federal, and philanthropic funds to ensure these critical needs are

sufficiently addressed and utilize HUD's technical assistance to design and implement programs to support a coordinated response to eviction prevention needs. For program support, including technical assistance, please visit www.hudexchange.info/program-support. For further information on HUD resources, tools, and guidance available to respond to the COVID-19 pandemic, state and local officials are directed to visit <https://www.hud.gov/coronavirus>. These tools include toolkits for Public Housing Authorities and Housing Choice Voucher landlords related to housing stability and eviction prevention, as well as similar guidance for owners and renters in HUD-assisted multifamily properties.

Similarly, the Department of the Treasury has informed CDC that the funds allocated through the Coronavirus Relief Fund and the Emergency Rental Assistance Program may be used to fund rental assistance programs to prevent eviction. Visit <https://home.treasury.gov/policy-issues/cares/state-and-local-governments> for more information about the Coronavirus Relief Fund and <https://home.treasury.gov/policy-issues/cares/emergency-rental-assistance-program> for more information about the Emergency Rental Assistance Program..

Effective Date

This Order is effective on January 31, 2021 and will remain in effect, unless extended, modified, or rescinded, through March 31, 2021.

Authority

The authority for this Order is Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 CFR 70.2.

Dated: January 29, 2021.

Sherri Berger

Acting Chief of Staff, Centers for Disease Control and Prevention.

[FR Doc. 2021-02243 Filed 1-29-21; 4:15 pm]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Requirement for Persons To Wear Masks While on Conveyances and at Transportation Hubs

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of Agency Order.

SUMMARY: The Centers for Disease Control and Prevention (CDC), a component of the U.S. Department of Health and Human Services (HHS), 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.

DATES: This Order takes effect at 11:59 p.m. Monday February 1, 2021.

FOR FURTHER INFORMATION CONTACT: Jennifer Buigut, Division of Global Migration and Quarantine, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H16-4, Atlanta, GA 30329. Email: dgmqpolicyoffice@cdc.gov.

SUPPLEMENTARY INFORMATION: The virus that causes COVID-19 spreads very easily and sustainably between people who are in close contact with one another (within about 6 feet) mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks. These droplets can land in the mouths, eyes, or noses of people who are nearby and possibly be inhaled into the lungs. Some people without symptoms also spread the virus. In general, the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.

This Order is issued to preserve human life; maintain a safe and operating transportation system; 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; and support response efforts to COVID-19 at the Federal, state, local, territorial, and tribal level.

Appropriately worn masks reduce the spread of COVID-19—particularly given the evidence of pre-symptomatic and asymptomatic transmission of COVID-19. Masks are most likely to reduce the spread of COVID-19 when they are widely used by people in public

settings. Using masks along with other preventive measures, including social distancing, frequent handwashing, and cleaning and disinfecting frequently touched surfaces, is one of the most effective strategies available for reducing COVID-19 transmission.

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 U.S.C. 247d) that a public health emergency exists.

A copy of the Order is provided below and a copy of the signed order can be found at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>

CENTERS FOR DISEASE CONTROL AND PREVENTION

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ORDER UNDER SECTION 361

OF THE PUBLIC HEALTH SERVICE ACT (42 U.S.C. 264)

AND 42 CODE OF FEDERAL REGULATIONS 70.2, 71.31(b), 71.32(b)

REQUIREMENT FOR PERSONS TO WEAR MASKS

WHILE ON CONVEYANCES AND AT TRANSPORTATION HUBS

SUMMARY:

Notice and Order; and subject to the limitations under “Applicability,” pursuant to 42 U.S.C. 264(a) and 42 CFR 70.2, 71.31(b), and 71.32(b):

(1) Persons¹ must wear² 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 States³ must require all persons onboard to wear masks for the duration of travel.

(3) A conveyance operators operating a conveyance arriving at or departing from a U.S. port of entry must require all persons on board to wear masks for

¹ As used in this Order, “persons” includes travelers (i.e., passengers and crew), conveyance operators, and any workers or service providers in the transportation hub.

² To “wear a mask” means to wear a mask over the nose and mouth.

³ This includes international, interstate, or intrastate waterways, subject to the jurisdiction of the United States.

the duration of travel as a condition of controlled free pratique.⁴

(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; and
- providing persons with prominent and adequate notice to facilitate awareness and compliance of the requirement of this Order to wear a mask; best practices may include, if feasible, advance notifications on digital platforms, such as on apps, websites, or email; posted signage in multiple languages with illustrations; printing the requirement on transit tickets; or other methods as appropriate.

(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. Best efforts include:

- Allowing entry only to those persons who wear masks;
- instructing persons that Federal law requires wearing a mask in the transportation hub and failure to comply constitutes a violation of Federal law;
- monitoring persons on the premises of the transportation hub for anyone who is not wearing a mask and seeking compliance from such persons;
- at the earliest opportunity, removing any person who refuses to comply from the premises of the transportation hub; and
- providing persons with prominent and adequate notice to facilitate awareness and compliance with the requirement of this Order to wear a mask; best practices may include, if feasible, advance notifications on digital platforms, such as on apps, websites, or

⁴ As a condition of this controlled free pratique to commence or continue operations in the United States, conveyance operators must additionally require all persons to wear masks on board conveyances departing from the United States and for the duration of their travel until the conveyance arrives at the foreign destination if at any time any of the persons on the conveyance (passengers, crew, or conveyance operators) will return to the United States while this Order remains in effect. This precaution must be followed regardless of scheduled itinerary.

email; posted signage in multiple languages with illustrations; printing the requirement on transit tickets; or other methods as appropriate.

DEFINITIONS:

Controlled free pratique shall have the same definition as under 42 CFR 71.1, meaning “permission for a carrier to enter a U.S. port, disembark, and begin operation under certain stipulated conditions.”

Conveyance shall have the same definition as under 42 CFR 70.1, meaning “an aircraft, train, road vehicle,⁵ vessel . . . or other means of transport, including military.” Included in the definition of “conveyance” is the term “carrier” which under 42 CFR 71.1 has the same definition as conveyance under 42 CFR 70.1.

Conveyance operator means an individual operating a conveyance and an individual or organization causing or authorizing the operation of a conveyance.

Mask means a material covering the nose and mouth of the wearer, excluding face shields.⁶

Interstate traffic shall have 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; or

(iii) Between a point of origin and a point of destination in the same state or possession but through any other state, possession, or contiguous foreign country.

(2) Interstate traffic does not include the following:

(i) The movement of any conveyance which is solely for the purpose of unloading persons or property transported from a foreign country or loading persons or property for transportation to a foreign country.

⁵ This includes rideshares meaning arrangements where passengers travel in a privately owned road vehicle driven by its owner in connection with a fee or service.

⁶ A properly worn mask completely covers the nose and mouth of the wearer. A mask should be secured to the head, including with ties or ear loops. A mask should fit snugly but comfortably against the side of the face. Masks do not include face shields. Masks can be either manufactured or homemade and should be a solid piece of material without slits, exhalation valves, or punctures. Medical masks and N-95 respirators fulfill the requirements of this Order. CDC guidance for attributes of acceptable masks in the context of this Order is available at: <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.

(ii) The movement of any conveyance which is solely for the purpose of effecting its repair, reconstruction, rehabilitation, or storage.”

Intrastate traffic means the movement of any conveyance or the transportation or movement of persons occurring solely within the boundaries of a state or territory, or on tribal land.

Possession shall have the same definition as under 42 CFR 70.1 and 71.1, meaning a “U.S. territory.”

State shall have the same definition as under 42 CFR 70.1, meaning “any of the 50 states, plus the District of Columbia.”

Territory shall have the same definition as “U.S. territory” under 42 CFR 70.1 and 71.1, meaning “any territory (also known as possessions) of the United States, including American Samoa, Guam, the [Commonwealth of the] Northern Mariana Islands, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.”

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.

Transportation hub operator means an individual operating a transportation hub and an individual or organization causing or authorizing the operation of a transportation hub.

U.S. port shall have the same definition as under 42 CFR 71.1, meaning any “seaport, airport, or border crossing point under the control of the United States.”

STATEMENT OF INTENT:

This Order shall be interpreted and implemented in a manner as to achieve the following objectives:

- Preservation of human life;
- Maintaining a safe and secure operating transportation system;
- Mitigating 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; and
- Supporting response efforts to COVID-19 at the Federal, state, local, territorial, and tribal levels.

APPLICABILITY:

This Order shall not apply within any state, locality, territory, or area under the jurisdiction of a Tribe that (1) requires a person to wear a mask on conveyances; (2) requires a person to wear a mask at transportation hubs; and (3) requires conveyances to transport only persons wearing masks. Such

requirements must provide the same level of public health protection as—or greater protection than—the requirements listed herein.

In addition, the requirement to wear a mask shall not apply under the following circumstances:

- While eating, drinking, or taking medication, for brief periods;
- While communicating with a person who is hearing impaired when the ability to see the mouth is essential for communication;
- If, on an aircraft, wearing of oxygen masks is needed because of loss of cabin pressure or other event affecting aircraft ventilation;
- If unconscious (for reasons other than sleeping), incapacitated, unable to be awakened, or otherwise unable to remove the mask without assistance;⁷ or
- When necessary to temporarily remove the mask to verify one’s identity such as during Transportation Security Administration screening or when asked to do so by the ticket or gate agent or any law enforcement official.

This Order exempts the following categories of persons:⁸

- A child under the age of 2 years;
- A person with a disability who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*).⁹

⁷ Persons who are experiencing difficulty breathing or shortness of breath or are feeling winded may remove the mask temporarily until able to resume normal breathing with the mask. Persons who are vomiting should remove the mask until vomiting ceases. Persons with acute illness may remove the mask if it interferes with necessary medical care such as supplemental oxygen administered via an oxygen mask.

⁸ Operators of conveyances or transportation hubs may impose requirements, or conditions for carriage, on persons requesting an exemption from the requirement to wear a mask, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the operator, as well as require evidence that the person does not have COVID-19 such as a negative result from a SARS-CoV-2 viral test or documentation of recovery from COVID-19. CDC definitions for SARS-CoV-2 viral test and documentation of recovery are available in the Frequently Asked Questions at: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>. Operators may also impose additional protective measures that improve the ability of a person eligible for exemption to maintain social distance (separation from others by 6 feet), such as scheduling travel at less crowded times or on less crowded conveyances, or seating or otherwise situating the individual in a less crowded section of the conveyance or transportation hub. Operators may further require that persons seeking exemption from the requirement to wear a mask request an accommodation in advance.

⁹ This is a narrow exception that includes a person with a disability who cannot wear a mask

• A person for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.

This Order exempts the following categories of conveyances, including persons on board such conveyances:

- Private conveyances operated solely for personal, non-commercial use;
- Commercial motor vehicles or trucks as these terms are defined in 49 CFR 390.5, if the driver is the sole occupant of the vehicle or truck;
- Conveyances operated or chartered by the U.S. military services provided that such conveyance operators observe Department of Defense precautions to prevent the transmission of COVID-19 that are equivalent to the precautions in this Order.

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.

To the extent permitted by law, and consistent with President Biden's Executive Order of January 21, 2021 (Promoting COVID-19 Safety in Domestic and International Travel),¹⁰ Federal agencies are required to implement additional measures enforcing the provisions of this Order.

BACKGROUND:

There is currently a pandemic of respiratory disease (coronavirus disease 2019 or "COVID-19") caused by a novel coronavirus (SARS-CoV-2). As of January 27, 2021, there have been 99,638,507 confirmed cases of COVID-19 globally, resulting in more than 2,141,000 deaths. As of January 27, 2021, there have been over 25,000,000 cases identified in the United States and over 415,000 deaths due to the disease. New SARS-CoV-2 variants have emerged in recent weeks, including at

for reasons related to the disability. CDC will issue additional guidance regarding persons who cannot wear a mask under this exemption. <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.

¹⁰ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-promoting-covid-19-safety-in-domestic-and-international-travel/>.

least one with evidence of increased transmissibility.¹¹

The virus that causes COVID-19 spreads very easily and sustainably between people who are in close contact with one another (within about 6 feet) mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks. These droplets can land in the mouths, eyes, or noses of people who are nearby and possibly be inhaled into the lungs. Infected people without symptoms (asymptomatic) and those in whom symptoms have not yet developed (pre-symptomatic) can also spread the virus. In general, the more closely an infected person interacts with others and the longer those interactions, the higher the risk of COVID-19 spread. COVID-19 may be transmitted by touching surfaces or objects that have the virus on them and then touching one's own or another person's eyes, nose, or mouth.

Masks help prevent people who have COVID-19, including those who are pre-symptomatic or asymptomatic, from spreading the virus to others.¹² Masks are primarily intended to reduce the emission of virus-laden droplets, *i.e.*, they act as source control by blocking exhaled virus.¹³ This is especially relevant for asymptomatic or pre-symptomatic infected wearers who feel well and may be unaware of their infectiousness to others, and who are estimated to account for more than 50% of transmissions.^{14 15} Masks also provide personal protection to the wearer by reducing inhalation of these droplets, *i.e.*, they reduce wearers' exposure through filtration.¹⁶ The community benefit of wearing masks for SARS-CoV-2 control is due to the combination of these effects; individual prevention benefit increases with increasing

¹¹ <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/scientific-brief-emerging-variants.html>.

¹² <https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html>.

¹³ Leung NHL, Chu DKW, Shiu EYC, et al. Respiratory virus shedding in exhaled breath and efficacy of face masks. *Nature Medicine*. 2020;26(5):676–680. <https://dx.doi.org/10.1038/s41591-020-0843-2>.

¹⁴ Moghadas SM, Fitzpatrick MC, Sah P, et al. The implications of silent transmission for the control of COVID-19 outbreaks. *Proc Natl Acad Sci U S A*. 2020;117(30):17513–17515. <https://doi.org/10.1073/pnas.2008373117>. <https://www.ncbi.nlm.nih.gov/pubmed/32632012>.

¹⁵ Johansson MA, Quandelacy TM, Kada S, et al. SARS-CoV-2 Transmission From People Without COVID-19 Symptoms. *Johansson MA, et al. JAMA Netw Open*. 2021 Jan 4;4(1):e2035057. <https://doi.org/10.1001/jamanetworkopen.2020.35057>.

¹⁶ Ueki H, Furusawa Y, Iwatsuki-Horimoto K, et al. Effectiveness of Face Masks in Preventing Airborne Transmission of SARS-CoV-2. *mSphere*. 2020;5(5):10.1128/mSphere.00637–20. <https://www.ncbi.nlm.nih.gov/pubmed/33087517>.

numbers of people using masks consistently and correctly.

Appropriately worn masks reduce the spread of COVID-19—particularly given the evidence of pre-symptomatic and asymptomatic transmission of COVID-19. Seven studies have confirmed the benefit of universal masking in community level analyses: in a unified hospital system,¹⁷ a German city,¹⁸ a U.S. State,¹⁹ a panel of 15 U.S. States and Washington, DC,^{20 21} as well as both Canada²² and the United States²³ nationally. Each analysis demonstrated that, following directives from organizational and political leadership for universal masking, new infections fell significantly. Two of these studies^{24 25} and an additional analysis of data from 200 countries that included localities within the United States²⁶ also demonstrated reductions in

¹⁷ Wang X, Ferro EG, Zhou G, Hashimoto D, Bhatt DL. Association Between Universal Masking in a Health Care System and SARS-CoV-2 Positivity Among Health Care Workers. *JAMA*. 2020.10.1001/jama.2020.12897. <https://www.ncbi.nlm.nih.gov/pubmed/32663246>.

¹⁸ Mitze T., Kosfeld R., Rode J., Wälde K. *Face Masks Considerably Reduce COVID-19 Cases in Germany: A Synthetic Control Method Approach*. IZA—Institute of Labor Economics (Germany);2020.ISSN: 2365–9793, DP No. 13319. <http://ftp.iza.org/dp13319.pdf>.

¹⁹ Gallaway MS, Rigler J, Robinson S, et al. Trends in COVID-19 Incidence After Implementation of Mitigation Measures—Arizona, January 22–August 7, 2020. *MMWR Morb Mortal Wkly Rep*. 2020;69(40):1460–1463. <https://doi.org/10.15585/mmwr.mm6940e3>. <https://www.ncbi.nlm.nih.gov/pubmed/33031366>.

²⁰ Lyu W, Wehby GL. Community Use Of Face Masks And COVID-19: Evidence From A Natural Experiment Of State Mandates In The US. *Health Aff (Millwood)*. 2020;39(8):1419–1425. <https://doi.org/10.1377/hlthaff.2020.00818>. <https://www.ncbi.nlm.nih.gov/pubmed/32543923>.

²¹ Hatzius J, Struyven D, Rosenberg I. Face Masks and GDP. *Goldman Sachs Research* <https://www.goldmansachs.com/insights/pages/face-masks-and-gdp.html>. Accessed January 20, 2021.

²² Karaivanov A., Lu SE, Shigeoka H., Chen C., Pamplona S. *Face Masks, Public Policies and Slowing the Spread of Covid-19: Evidence from Canada* National Bureau of Economic Research 2020. Working Paper 27891. <http://www.nber.org/papers/w27891>.

²³ Chernozhukov V, Kasahara H, Schrimpf P. Causal Impact of Masks, Policies, Behavior on Early Covid-19 Pandemic in the U.S. *J Econom*. 2021 Jan;220(1):23–62. <https://doi.org/10.1016/j.jeconom.2020.09.003>. Epub 2020 Oct 17.

²⁴ Hatzius J, Struyven D, Rosenberg I. Face Masks and GDP. *Goldman Sachs Research* <https://www.goldmansachs.com/insights/pages/face-masks-and-gdp.html>. Accessed January 20, 2021.

²⁵ Chernozhukov V, Kasahara H, Schrimpf P. Causal Impact of Masks, Policies, Behavior on Early Covid-19 Pandemic in the U.S. *J Econom*. 2021 Jan;220(1):23–62. <https://doi.org/10.1016/j.jeconom.2020.09.003>. Epub 2020 Oct 17.

²⁶ Leffler CT, Ing EB, Lykins JD, Hogan MC, McKeown CA, Gzybowski A. Association of country-wide coronavirus mortality with demographics, testing, lockdowns, and public wearing of masks. *Am J Trop Med Hyg*. 2020 Dec;103(6):2400–2411. <https://doi.org/10.4269/ajtmh.20-1015>. Epub 2020 Oct 26.

mortality. An economic analysis using U.S. data found that, given these effects, increasing universal masking by 15% could prevent the need for lockdowns and reduce associated losses of up to \$1 trillion or about 5% of gross domestic product.²⁷

Wearing a mask especially helps protect those at increased risk of severe illness from COVID-19²⁸ and workers who frequently come into close contact with other people (e.g., at transportation hubs). Masks are most likely to reduce the spread of COVID-19 when they are widely used by people in public settings. Using masks along with other preventive measures, including social distancing, frequent handwashing, and cleaning and disinfecting frequently touched surfaces, is one of the most effective strategies available for reducing COVID-19 transmission.

Traveling on multi-person conveyances increases a person's risk of getting and spreading COVID-19 by bringing persons in close contact with others, often for prolonged periods, and exposing them to frequently touched surfaces. Air travel often requires spending time in security lines and crowded airport terminals. Social distancing may be difficult if not impossible on flights. People may not be able to distance themselves by the recommended 6 feet from individuals seated nearby or those standing in or passing through the aircraft's aisles. Travel by bus, train, vessel, and other conveyances used for international, interstate, or intrastate transportation pose similar challenges.

Intrastate transmission of the virus has led to—and continues to lead to—interstate and international spread of the virus, particularly on public conveyances and in travel hubs, where passengers who may themselves be traveling only within their state or territory commonly interact with others traveling between states or territories or internationally. Some states, territories, Tribes, and local public health authorities have imposed mask-wearing requirements within their jurisdictional boundaries to protect public health.²⁹

²⁷ Hatzius J, Struyven D, Rosenberg I. Face Masks and GDP. *Goldman Sachs Research* <https://www.goldmansachs.com/insights/pages/face-masks-and-gdp.html>. Accessed January 20, 2021.

²⁸ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>.

²⁹ Based on internet sources, 37 states plus DC and Puerto Rico mandate the wearing of masks in public. Among the jurisdictions that have imposed mask mandates, variations in requirements exist. For example, exemptions for children range in cutoff age from 2 to 12, but masks are generally required in indoor public spaces such as restaurants and stores, on public transit and ride-hailing services, and outdoors when unable to maintain 6

Any state or territory without sufficient mask-wearing requirements for transportation systems within its jurisdiction has not taken adequate measures to prevent the spread of COVID-19 from such state or territory to any other state or territory. That determination is based on, *inter alia*, the rapid and continuing transmission of the virus across all states and territories and across most of the world. Furthermore, given how interconnected most transportation systems are across the nation and the world, local transmission can grow even more quickly into interstate and international transmission when infected persons travel on non-personal conveyances without wearing a mask and with others who are not wearing masks.

Therefore, I have determined that the mask-wearing requirements in this Order are reasonably necessary to prevent the further introduction, transmission, or spread of COVID-19 into the United States and among the states and territories. Individuals traveling into or departing from the United States, traveling interstate, or traveling entirely intrastate, conveyance operators that transport such individuals, and transportation hub operators that facilitate such transportation, must comply with the mask-wearing requirements set forth in this Order.

America's transportation systems are essential. Not only are they essential for public health, they are also essential for America's economy and other bedrocks of American life. Those transportation systems carry life-saving medical supplies and medical providers into and across the nation to our hospitals, nursing homes, and physicians' offices. Trains, planes, ships, and automobiles bring food and other essentials to our communities and to our homes. Buses bring America's children and teachers to school. Buses, trains, and subways, bring America's workforce to their jobs.

Requiring masks on our transportation systems will protect Americans and provide confidence that we can once again travel safely even during this pandemic. Therefore, requiring masks will help us control this pandemic and aid in re-opening America's economy.

The United States and countries around the world are currently embarking on efforts to vaccinate their populations, starting with healthcare personnel and other essential workers at increased risk of exposure to SARS-

feet of distance from others. See <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html> (accessed January 28, 2021).

CoV-2 and people at increased risk for severe illness from the virus. 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.³⁰ Therefore, this mask requirement, as well as CDC recommendations to prevent spread of COVID-19,³¹ 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;³² therefore, this mask requirement also applies to people who have recovered from COVID-19.

ACTION:

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 also wear a mask at any transportation hub that provides transportation within the United States.

Conveyance operators traveling into or within the United States may transport only persons wearing masks and must use best efforts to ensure that masks are worn when embarking, disembarking, and throughout the duration of travel. 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.

As a condition of receiving controlled free pratique under 42 CFR 71.31(b) to enter a U.S. port, disembark passengers, and begin operations at any U.S. port of entry, conveyances arriving into the United States must require persons to wear masks while boarding, disembarking, and for the duration of travel. Conveyance operators must also require all persons to wear masks while boarding and for the duration of their travel on board conveyances departing from the United States until the conveyance arrives at the foreign destination, if at any time any of the persons onboard (passengers, crew, or conveyance operators) will return to the United States while this Order remains in effect. These travel conditions are

³⁰ <https://www.cdc.gov/vaccines/covid-19/info-by-product/clinical-considerations.html>.

³¹ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

³² <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html>.

necessary to mitigate the harm of further introduction of COVID-19 into the United States.

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 U.S.C. 264(a) and 42 CFR 71.32(b). Among other benefits, masks help prevent dispersal of an infected person's respiratory droplets that carry the virus. That precaution helps prevent droplets from landing in the eye, mouth, or nose or possibly being inhaled into the lungs of an uninfected person, or from landing on a surface or object that an uninfected person may then touch and then touch his or her own or another's eyes, nose, or mouth. Masks also provide some protection to the wearer by helping reduce inhalation of respiratory droplets.

This Order shall not apply within any state, locality, territory, or area under the jurisdiction of a Tribe, where the controlling governmental authority: (1) Requires a person to wear a mask on conveyances; (2) requires a person to wear a mask at transportation hubs; and (3) requires conveyances to transport only persons wearing masks. Those requirements must provide the same level of public health protection as—or greater protection than—the requirements listed herein.

In accordance with 42 U.S.C. 264(e), state, local, territorial, and tribal authorities may impose additional requirements that provide greater public health protection and are more restrictive than the requirements in this Order. Consistent with other federal, state, or local legal requirements, this Order does not preclude operators of conveyances or transportation hubs from imposing additional requirements, or conditions for carriage, that provide greater public health protection and are more restrictive than the requirements in this Order (e.g., requiring a negative result from a SARS-CoV-2 viral test or documentation of recovery from COVID-19 or imposing requirements for social distancing or other recommended protective measures).

This Order is not a rule within the meaning of the Administrative Procedure Act ("APA") but rather is an emergency action taken under the existing authority of 42 U.S.C. 264(a) and 42 CFR 70.2, 71.31(b), 71.32(b). In the event that a court determines this Order qualifies as a rule under the APA, notice and comment and a delay in effective date are not required because there is good cause to dispense with prior public notice and comment and

the opportunity to comment on this Order and the delay in effective date. Considering the public health emergency caused by COVID-19, it would be impracticable and contrary to the public's health, and by extension the public's interest, to delay the issuance and effective date of this Order. Similarly, the Office of Information and Regulatory Affairs has determined that if this Order were a rule, it would be a major rule under the Congressional Review Act, but there would not be a delay in its effective date as the agency has determined that there would be good cause to make the requirements herein effective immediately under the APA.

This order is also an economically significant regulatory action under Executive Order 12866 and has therefore been reviewed by the Office of Information and Regulatory Affairs of the Office of Management and Budget. The agency is proceeding without the complete analysis required by Executive Order 12866 under the emergency provisions of 6(a)(3)(D) of that Order.

If any provision of this Order, or the application of any provision to any carriers, conveyances, persons, or circumstances, shall be held invalid, the remainder of the provisions, or the application of such provisions to any carriers, conveyances, persons, or circumstances other than those to which it is held invalid, shall remain valid and in effect.

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 U.S.C. 106, 114, 44902, 44903, and 46301; and 49 CFR part 1503, 1540.105, 1542.303, 1544.305 and 1546.105.

This Order shall be further enforced by other federal authorities and may be enforced by cooperating state and local authorities through the provisions of 18 U.S.C. 3559, 3571; 42 U.S.C. 243, 268, 271; and 42 CFR 70.18 and 71.2.³³

EFFECTIVE DATE:

This Order shall enter into effect on February 1, 2021, at 11:59 p.m. and will

³³ While this Order may be enforced and CDC reserves the right to enforce through criminal penalties, CDC does not intend to rely primarily on these criminal penalties but instead strongly encourages and anticipates widespread voluntary compliance as well as support from other federal agencies in implementing additional civil measures enforcing the provisions of this Order, to the extent permitted by law and consistent with President Biden's Executive Order of January 21, 2021 (Promoting COVID-19 Safety in Domestic and International Travel).

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 U.S.C. 247d) that a public health emergency exists.

Dated: February 1, 2021.

Sherri Berger,

Acting Chief of Staff, Centers for Disease Control and Prevention.

[FR Doc. 2021-02340 Filed 2-1-21; 4:15 pm]

BILLING CODE 4163-18-P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX20EG31DW50100; OMB Control Number 1028-New]

Agency Information Collection Activities; Hydrography Addressing tool

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Geological Survey (USGS) are proposing a new information collection. **DATES:** Interested persons are invited to submit comments on or before April 5, 2021.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192; or by email to gs-info_collections@usgs.gov. Please reference OMB Control Number 1028-xxxx in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Michael Tinker by email at mdtinker@usgs.gov or by telephone at 303-202-4476.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below.