

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DEL BIGTREE,

Plaintiff,

-against-

CENTERS FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY in her official capacity as Director of Centers for Disease Control and Prevention; and SHERRI A. BERGER in her official capacity as Chief of Staff of Centers for Disease Control and Prevention,

Defendants.

Civil Action No. 1:22-cv-00224

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Del Bigtree brings this action against Defendants Centers for Disease Control and Prevention (“CDC”), Rochelle P. Walensky (Director of the CDC), and Sherri A. Berger (Chief of Staff of the CDC), (collectively, “**Defendants**”).

PRELIMINARY STATEMENT

1. Plaintiff seeks a declaration and injunction against Defendants’ mandate requiring individuals to wear masks while on commercial airlines, conveyances, and at transportation hubs as provided in the *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025 (Feb. 3, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-02-03/pdf/2021-02340.pdf> (the “**Mask Mandate**”).

2. It is an affront to all Americans that the federal government requires Americans to wear masks (see picture on left below) while not imposing the same requirement on themselves (see four pictures on right below). On February 27, 2022, and February 28, 2022, respectively,

Congress and the White House dropped their mask mandates, as seen in the four pictures to the right below. So, while our elected officials now have the freedom to choose whether to have to mask their faces, everyday Americans cannot. There is a term for when those that govern impose requirements on the governed but exclude themselves.



Furthermore, not only have elected representatives now formally given themselves the liberty to not wear a mask, the reality is that many of them were not wearing masks even beforehand, as seen from the following pictures from the last half of 2021:



3. Defendants should be enjoined from enforcing the Mask Mandate because none of the statutes or regulations cited by the CDC for the authority to adopt this regulation – 42 U.S.C. § 264, 42 C.F.R. §§ 70.2 (the regulation implementing § 264), 71.31(b), and 71.32(b) – permit the CDC to make or enforce the Mask Mandate. (*Infra* Count I.) Even if Congress had granted the

CDC the authority to promulgate the Mask Mandate, this authority would violate the nondelegation doctrine. (*Infra* Count II.)

PARTIES

4. Plaintiff Del Bigtree is an individual who resides in Travis County, Texas.

5. Defendant CDC is an agency of the United States and is part of Health and Human Services. Defendant Rochelle P. Walensky, MD, is the Director of the CDC and is sued in her official capacity. Defendant Sherri A. Berger, MSPH, is the Chief of Staff for the CDC and is sued in her official capacity.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346(a)(2), and 5 U.S.C. §§ 702 and 706. This Court has the authority to grant declaratory relief under 28 U.S.C. § 2201 and injunctive relief under 28 U.S.C. § 2202.

7. Venue is proper within this judicial district and division pursuant to 5 U.S.C. § 703 and 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions asserted by Plaintiff arise within this judicial district. Venue is proper in the Austin Division of the Western District of Texas pursuant to 28 U.S.C. § 124(a)(2).

FACTS

A. The Mask Mandate

8. On January 29, 2021, Defendant Berger issued the Mask Mandate and it became effective on February 3, 2021. *See* 86 Fed. Reg. 8025, 8026 (Feb. 3, 2021).

9. The Mask Mandate requires people who are “boarding, disembarking, and traveling” through a “transportation hub” or on “conveyances” into and within the United States to wear masks over their nose and mouth. *Id.* at 8029. The Mask Mandate defines the terms

“mask,” “conveyance,” and “transportation hub” as follows:

- A “mask” is defined as “a material covering the nose and mouth of the wearer, excluding face shields.” *Id.* at 8026.

- A “conveyance” is defined as “an aircraft, train, road vehicle, vessel . . . or other means of transport, including military,” and includes rideshare arrangements. *Id.* at 8027.

- A “transportation hub” is defined as “any airport, bus terminal, marina, seaport or other port, subway station, terminal (including any fixed facility at which passengers are picked-up or discharged), train station, U.S. port of entry, or any other location that provides transportation subject to the jurisdiction of the United States.” *Id.*

10. The Order requires conveyance operators and transportation hub operators to enforce the Mask Mandate. *Id.* at 8026.

11. The Mask Mandate states that “[m]asks help prevent people who have COVID-19, including those who are pre-symptomatic or asymptomatic, from spreading the virus to others,” but provides no findings that show masks have limited the interstate spread of COVID-19 through conveyances and transportation hubs. *Id.* at 8028.

12. The Mask Mandate applies to all travelers, irrespective of whether they have been exposed to COVID-19. It permits everyone, including healthy people and people who may or may not have been exposed to COVID-19, to not wear a mask when eating, drinking, or taking medication, “for brief periods,” when wearing of oxygen masks on airplanes is required, or when unconscious or incapacitated. *Id.* at 8027.

13. The Mask Mandate states that it was not subject to notice and comment and a delay in the effective date because “good cause” existed to forgo these basic procedural safeguards, yet the Mask Mandate remains in effect 13 months later still without any notice or comment. *Id.* at 8030.

14. Violating the Mask Mandate carries criminal penalties. *Id.* at 8030 n.33.

B. Plaintiff

15. Plaintiff Del Bigtree lives in Travis County, Texas, and frequently travels via commercial airlines subject to the Mask Mandate, taking approximately 75 to 100 flights per year, with most of these flights either originating or arriving in Austin-Bergstrom International Airport (“AUS”).

16. Plaintiff is required to wear a mask on each of these flights and while traveling through airports throughout the United States, including AUS, because of the Mask Mandate, except, of course, when he is, *inter alia*, eating, drinking or “for brief periods.”

17. Plaintiff would not wear a mask if the Mask Mandate did not exist. But Plaintiff does support the right of every individual to continue to wear as many masks as they desire.

COUNT I
AGENCY ACTION NOT IN ACCORDANCE WITH LAW AND IN EXCESS OF
AUTHORITY
(Violation of the Administrative Procedure Act)

18. Plaintiff incorporates the foregoing paragraphs as if set forth fully herein.

19. Pursuant to the Administrative Procedure Act (the “APA”), a court must “hold unlawful and set aside agency action” that is “not in accordance with law” or “in excess of statutory . . . authority, or limitations, or short of statutory right.” *See* 5 U.S.C. § 706(2)(A), (C).

20. The Mask Mandate indicates its statutory and regulatory authority is derived from 42 U.S.C. § 264, 42 C.F.R. §§ 70.2 (the regulation implementing § 264), 71.31(b), 71.32(b).

21. The Mask Mandate is in excess of that authority for three reasons.

22. First, none of the statutes or regulations it cites authorize the CDC to make or enforce regulations that amount to a blanket preventative measure against people who may or may not be carrying an infectious disease. Such a broad reading of the statute would be “tantamount

to creating a general federal police power.” *Skyworks, Ltd. v. CDC*, 524 F. Supp. 3d 745, 758 (N.D. Ohio March 10, 2021).

23. Second, the CDC’s claim of authority under 42 U.S.C. § 264(a) does not take into account the limiting language also found in that subsection. A statute must be read in context. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Section 264(a) grants the CDC the authority to “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.” This grant of authority, however, is limited by the language found in the next sentence: “For purposes of carrying out and enforcing such regulations, the [CDC] may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.” 42 U.S.C. § 264(a). The catchall provision “and other measures” is limited to “the kinds of measures” like the ones listed in the statute. *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2488-89 (2021). A mask mandate for all people, including those whose infection status is unknown, is unlike any of the measures listed in the statute.

24. Third, the CDC’s interpretation of 42 U.S.C. § 264 ignores the structure of the statute. The Mask Mandate repeatedly cites § 264(a) as its authority. But § 264(a) only allows the CDC to impose specific restrictions on property interests. The Mask Mandate is a restriction on travelers’ liberty interests, which is an issue addressed by § 264(d). Section 264(d) applies only to “any individual reasonably believed to be infected with a communicable disease” and allows for apprehension and examination only under those circumstances. Read as a whole, as courts must do, it is clear that the “other measures” clause found in § 264(a) does not allow the CDC to

restrict the liberty interest of *all* travelers by requiring them to wear a mask.

25. On its face and as applied, the Mask Mandate violates Plaintiff's right to be free from unlawful regulations, and Plaintiff will be irreparably harmed unless this Court enjoins Defendants from enforcing the Mask Mandate. Plaintiff has no plain, speedy, and adequate remedy at law to prevent the Defendants from enforcing the Mask Mandate, and if not enjoined by this Court, Defendants will continue to enforce the Mask Mandate in violation of Plaintiff's rights. Accordingly, injunctive relief is appropriate.

26. An actual and substantial controversy exists between Plaintiff and Defendants as to their legal rights and duties with respect to whether the Mask Mandate exceeds the CDC's statutory authority. The case is presently justiciable because the Mask Mandate applies to Plaintiff on its face, and Plaintiff will face sanctions if he does not comply. Declaratory relief is therefore appropriate to resolve this controversy.

COUNT II
AGENCY ACTION VIOLATES THE NONDELEGATION DOCTRINE
(Violation of U.S. Const. Art. I, § I)

27. Plaintiff incorporates the foregoing paragraphs as if set forth fully herein.

28. Article I, Section I of the U.S. Constitution states, "All legislative powers herein granted shall be vested in a Congress of the United States." Beyond exceeding the authority granted to the CDC under 42 U.S.C. § 264 and the relevant regulations, the Mask Mandate also constitutes an unconstitutional delegation of legislative power to the CDC.

29. To comply with the nondelegation doctrine, a statute must delineate: (1) a general policy; (2) the agency to apply it; and (3) the boundaries of the delegated authority. *See Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). The boundaries of the delegated authority must meaningfully constrain the Executive Branch's discretion.

30. 42 U.S.C. § 264, if it in fact could be read to authorize the CDC to implement the Mask Mandate (which should not be the case), does not provide adequate boundaries that meaningfully constrain the agency's authority. Accordingly, it violates the nondelegation doctrine. Plaintiff alleges that both on its face and as applied, the Mask Mandate violates his constitutional rights.

31. Plaintiff will be irreparably harmed unless this Court enjoins Defendants from enforcing the Mask Mandate, and Plaintiff has no plain, speedy, and adequate remedy at law to prevent the Defendants from enforcing the Mask Mandate. If not enjoined by this Court, Defendants will continue to enforce the Mask Mandate in violation of Plaintiff's rights. Accordingly, injunctive relief is appropriate.

32. An actual and substantial controversy exists between Plaintiff and Defendants as to their legal rights and duties with respect to whether the Mask Mandate violates the United States Constitution. The case is presently justiciable because the Mask Mandate applies to Plaintiff on its face, and Plaintiff would face sanctions if he did not comply. Declaratory relief is therefore appropriate to resolve this controversy.

PRAYER FOR RELIEF

Pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, it is appropriate and proper that a declaratory judgment be issued by this Court, declaring that the Mask Mandate is beyond the CDC's statutory authority or is unconstitutional, and that the Court issue preliminary and permanent injunctions prohibiting Defendants from enforcing the Mask Mandate pursuant to 28 U.S.C. § 2202 and Fed. R. Civ. P. 65.

WHEREFORE, Plaintiff prays for judgment against Defendants and that the Court:

(1) Declare that the Mask Mandate is beyond the CDC's statutory authority because it

is not authorized by 42 U.S.C. § 264;

- (2) Declare that the Mask Mandate is invalid under the Administrative Procedure Act, 5 U.S.C. § 706, because it exceeds the CDC's statutory authority;
- (3) Declare that the Mask Mandate violates the nondelegation doctrine of the U.S. Constitution and is therefore a violation of the separation of powers;
- (4) Hold unlawful and set aside the Mask Mandate;
- (5) Issue a preliminary injunction against the Defendants, as well as all agents, administrators, employees, or other persons acting on behalf of the Defendants, from enforcing the Mask Mandate;
- (6) Award Plaintiff his costs and expenses incurred in bringing this action, including, but not limited to, reasonable attorney fees pursuant to 28 U.S.C. § 2412; and
- (7) Grant such other and further relief as the Court deems equitable, just, and proper.

Dated: March 8, 2022

SIRI & GLIMSTAD LLP

By: /s/ Aaron Siri

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
DEL BIGTREE
(b) County of Residence of First Listed Plaintiff Travis
(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS CENTERS FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY in her official capacity as Director of Centers for Disease Control and Prevention; and SHERRI A. BERGER in her official capacity as Chief of Staff of Centers for Disease Control and Prevention,
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State [X] 1 [] 1
Citizen of Another State [] 2 [] 2
Citizen or Subject of a Foreign Country [] 3 [] 3
Incorporated or Principal Place of Business In This State [] 4 [] 4
Incorporated and Principal Place of Business In Another State [] 5 [] 5
Foreign Nation [] 6 [] 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT: 110 Insurance, 120 Marine, 130 Miller Act, 140 Negotiable Instrument, 150 Recovery of Overpayment & Enforcement of Judgment, 151 Medicare Act, 152 Recovery of Defaulted Student Loans (Excludes Veterans), 153 Recovery of Overpayment of Veteran's Benefits, 160 Stockholders' Suits, 190 Other Contract, 195 Contract Product Liability, 196 Franchise
REAL PROPERTY: 210 Land Condemnation, 220 Foreclosure, 230 Rent Lease & Ejectment, 240 Torts to Land, 245 Tort Product Liability, 290 All Other Real Property
TORTS: PERSONAL INJURY: 310 Airplane, 315 Airplane Product Liability, 320 Assault, Libel & Slander, 330 Federal Employers' Liability, 340 Marine, 345 Marine Product Liability, 350 Motor Vehicle, 355 Motor Vehicle Product Liability, 360 Other Personal Injury, 362 Personal Injury - Medical Malpractice
PERSONAL INJURY: 365 Personal Injury - Product Liability, 367 Health Care/Pharmaceutical Personal Injury Product Liability, 368 Asbestos Personal Injury Product Liability, 370 Other Fraud, 371 Truth in Lending, 380 Other Personal Property Damage Product Liability
PRISONER PETITIONS: Habeas Corpus: 463 Alien Detainee, 510 Motions to Vacate Sentence, 530 General, 535 Death Penalty; Other: 540 Mandamus & Other, 550 Civil Rights, 555 Prison Condition, 560 Civil Detainee - Conditions of Confinement
FORFEITURE/PENALTY: 625 Drug Related Seizure of Property 21 USC 881, 690 Other
LABOR: 710 Fair Labor Standards Act, 720 Labor/Management Relations, 740 Railway Labor Act, 751 Family and Medical Leave Act, 790 Other Labor Litigation, 791 Employee Retirement Income Security Act
IMMIGRATION: 462 Naturalization Application, 465 Other Immigration Actions
BANKRUPTCY: 422 Appeal 28 USC 158, 423 Withdrawal 28 USC 157
PROPERTY RIGHTS: 820 Copyrights, 830 Patent, 835 Patent - Abbreviated New Drug Application, 840 Trademark, 880 Defend Trade Secrets Act of 2016
SOCIAL SECURITY: 861 HIA (1395ff), 862 Black Lung (923), 863 DIWC/DIWW (405(g)), 864 SSID Title XVI, 865 RSI (405(g))
FEDERAL TAX SUITS: 870 Taxes (U.S. Plaintiff or Defendant), 871 IRS—Third Party 26 USC 7609
OTHER STATUTES: 375 False Claims Act, 376 Qui Tam (31 USC 3729(a)), 400 State Reapportionment, 410 Antitrust, 430 Banks and Banking, 450 Commerce, 460 Deportation, 470 Racketeer Influenced and Corrupt Organizations, 480 Consumer Credit (15 USC 1681 or 1692), 485 Telephone Consumer Protection Act, 490 Cable/Sat TV, 850 Securities/Commodities/Exchange, 890 Other Statutory Actions, 891 Agricultural Acts, 893 Environmental Matters, 895 Freedom of Information Act, 896 Arbitration, 899 Administrative Procedure Act/Review or Appeal of Agency Decision, 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)
[X] 1 Original Proceeding [] 2 Removed from State Court [] 3 Remanded from Appellate Court [] 4 Reinstated or Reopened [] 5 Transferred from Another District (specify) [] 6 Multidistrict Litigation - Transfer [] 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 U.S.C. § 706; 42 U.S.C. § 264; U.S. Const. Art. I, § 1
Brief description of cause:
Challenge to Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 3, 2021)

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint:
JURY DEMAND: [] Yes [X] No

VIII. RELATED CASE(S) IF ANY (See instructions):
JUDGE DOCKET NUMBER

DATE 3/08/2022 SIGNATURE OF ATTORNEY OF RECORD /s/ Aaron Siri

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.