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Legal Sidebar

Legal Issues Related to Transportation Mask-Wearing Mandates

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On January 21, 2021, President Joe Biden issued an executive order directing federal agencies to require mask wearing in a range of transportation contexts nationwide. In response, the Centers for Disease Control and Prevention (CDC) issued an order (Mask Order) requiring mask wearing on commercial and public transportation. A number of other federal agencies have since taken additional actions to support the enforcement of these mask-wearing requirements. This Legal Sidebar provides a brief overview of the CDC's Mask Order and the role of other federal agencies in enforcing its requirements. It then discusses a number of related legal considerations for Congress, including the scope of the federal government's authority to impose mask-wearing requirements in transportation contexts.

CDC Mask Order

The Mask Order requires passengers and personnel on covered modes of transportation and at transportation hubs to wear masks that cover the mouth and nose. The CDC also has issued guidance listing the specific attributes of masks that satisfy CDC requirements. The Mask Order applies broadly across commercial and public transportation, such as aircraft, trains, buses, ferries, and taxis, as well as at transportation hubs, such as airports and train stations. Operators of covered modes of transportation and transportation hubs must use "best efforts" to ensure that individuals comply with the mask-wearing requirements. The Mask Order contains a number of exclusions, such as exempting certain people with disabilities and children under two years of age from the mask mandate. The order does not apply in states or localities that enforce mask-wearing requirements providing "the same level of public health protection" as the CDC's requirements.

Enforcement

The CDC states that it may enforce the mask-wearing requirements through criminal penalties, but that it "does not intend to rely primarily on these criminal penalties." Instead, the CDC expects widespread voluntary compliance, as well as support from other federal agencies in implementing civil enforcement measures. A number of federal agencies have now taken such action.

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Transportation Security Administration (TSA)

The TSA has assumed a central role in enforcing federal mask-wearing requirements throughout commercial and public transportation systems. Shortly after the CDC issued its Mask Order, the TSA issued security directives that imposed mask-wearing requirements on many of the same forms of commercial and public transportation. Additionally, the TSA announced that it may seek civil penalties against individuals who violate the mask directives, ranging from $250 for the first offense and up to $1,500 for repeated offenses.

Federal Aviation Administration (FAA)

The FAA has not directly ordered mask wearing on aircraft (although it may have a statutory basis to do so), but the agency recently extended a "zero-tolerance policy" under which it pursues civil enforcement actions—as opposed to warnings—against passengers who "interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft." For instance, the FAA sought a $12,250 penalty against a passenger who allegedly shouted profanities at flight attendants who repeatedly instructed the passenger to wear a mask and sought a $20,000 penalty against a passenger who allegedly shoved a flight attendant who instructed the passenger to wear a mask.

U.S. Customs and Border Protection (CBP) and U.S. Coast Guard

CBP and the U.S. Coast Guard both have a statutorily mandated duty to assist in enforcing quarantine rules and regulations, and the agencies have announced that they will be enforcing the CDC's mask-wearing requirements. CBP will enforce the requirements "at all air, land and sea ports of entry in the United States," and the U.S. Coast Guard will enforce the requirements for marine vessels.

Federal Railroad Administration (FRA)

The FRA regulates railroad safety. The agency recently issued an emergency order requiring freight rail carriers not covered by the TSA's mask directives to comply with the CDC's mask-wearing requirements, subject to civil penalties.

Federal Transit Administration (FTA)

The FTA, which provides financial and technical assistance to local public transit systems, recently amended its Master Agreement that contains "the standard terms and conditions that apply to every grant, cooperative agreement, and loan authorized by federal public transportation law or administered by FTA." The amended Master Agreement now incorporates the CDC's mask-wearing requirements and subjects noncompliant grant recipients to potential FTA civil enforcement actions that may result in the withholding of federal funds.

Legal Framework

CDC Statutory Authority

The CDC identifies Section 361(a) of the Public Health Service Act (42 U.S.C. § 264(a)) as authority for its Mask Order. Section 361(a) gives the Secretary of Health and Human Services (HHS) authority to make and enforce regulations "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." The provision further states, "[f]or 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 [its] judgment may be necessary." HHS has delegated this authority in part to the CDC.

As discussed in a previous Sidebar, while a broad construction of Section 361(a) may permit the CDC to require mask wearing to prevent the interstate or foreign transmission of COVID-19, that provision is also susceptible to a narrower interpretation. Indeed, in a series of lawsuits challenging the CDC's reliance on Section 361(a) as authority to order a nationwide moratorium on residential evictions, federal courts have reached sharply different conclusions about the scope of the CDC's authority under that provision.

For example, the U.S. Court of Appeals for the Sixth Circuit recently concluded that the eviction moratorium likely exceeds the CDC's Section 361(a) authority. To reach its conclusion, the court invoked the *ejusdem generis* doctrine of statutory construction. As applied by the Sixth Circuit in that case, the doctrine instructs that a general grant of authority to an agency following a list of specifically authorized actions should be interpreted to authorize only such additional agency actions as are similar to those specifically permitted. In the court's view, this doctrine precludes the CDC from grounding its eviction moratorium on Section 361(a)'s authorization of "other measures" because the moratorium is "radically unlike" the other "property interest restrictions" specifically authorized in Section 361(a).

Constitutional considerations also played a role in the court's decision. For example, the court reasoned that adopting the CDC's broad interpretation would raise concerns about Congress impermissibly delegating legislative power to the executive branch under the so-called nondelegation doctrine.

Nonetheless, the Sixth Circuit's decision was not a final judgment on the merits of the lawsuit challenging the eviction moratorium. The court of appeals merely denied the CDC's emergency motion to stay the district court's order prohibiting enforcement of the moratorium pending the appeal. Thus, it remains possible as a procedural matter that the Sixth Circuit might ultimately change its interpretation of Section 361(a) after the court receives full briefing and oral argument from the parties.

At least two federal district courts in other circuits have interpreted Section 361(a) more broadly. They concluded that the statute's "plain language" gives the CDC broad authority to enact measures that, in its judgment, are necessary to prevent the interstate spread of disease, even if those measures are not similar in type to the ones specifically enumerated in the provision. One of these cases is currently on appeal before the Eleventh Circuit Court of Appeals.

As legal commentators have noted, these differing interpretations of Section 361(a) could have possible implications for the CDC's Mask Order. While mask-wearing requirements would likely fall within a broad interpretation of the provision, mask wearing is arguably dissimilar to the specific measures listed in Section 361(a), particularly if those measures are "property interest restrictions" as the Sixth Circuit has suggested. On the other hand, it may be possible to characterize the mask-wearing requirements as a "sanitation" measure for transportation systems.

TSA Statutory Authority

The TSA relies on a number of provisions under the Aviation and Transportation Security Act (ATSA) as authority for its mask directives. In particular, shortly before the TSA issued its series of mask directives, the U.S. Department of Homeland Security (DHS) issued a Determination of a National Emergency under 49 U.S.C. § 114(g) that instructed the TSA to "take actions consistent with . . . 49 U.S.C. sections 106(m) and 114(f), (g), (*l*), and (m)" to implement President Biden's Executive Order and "support[] the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system." These statutory provisions generally authorize the TSA: to implement measures related to "transportation security" (49 U.S.C. §§ 114(f) and (*l*)); to provide services and personnel to other federal agencies (49 U.S.C. §§ 106(m) and 114(m)); to "coordinate" domestic transportation and other agencies'

"transportation-related responsibilities" during national emergencies, and to exercise other powers "relating to transportation during a national emergency as the Secretary of Homeland Security shall prescribe" (49 U.S.C. § 114(g)).

To date, no court appears to have addressed whether these statutory provisions authorize the TSA to implement public health measures. However, courts analyzing these authorities would generally employ established statutory interpretation tools, including looking at the ordinary meaning of the statutory terms and considering the overall statutory structure and context.

This raises the interpretive question whether "transportation security" measures under sections 114(f) and (*l*) include measures aimed at preventing disease transmission. Under a narrower construction, "security"—which is not statutorily defined—connotes the prevention of *deliberate* harms, such as terrorism or other intentional criminal acts. Some aspects of the larger statutory context could potentially support this narrower construction. Congress enacted the ATSA in response to the September 11, 2001 terrorist attacks, establishing the TSA and giving it responsibility for "security in all modes of transportation." Reflecting a counterterrorism focus, some of the TSA's statutory authorities expressly reference "terrorism" or "criminal violence."

On the other hand, "security" can more broadly refer to "[f]reedom from danger or threat," which might include protecting against the unintentional spread of a dangerous disease. Notably, sections 114(f) and (*l*) use general language authorizing the TSA to take measures related to "transportation security," without reference to terrorism or criminal violence. This could potentially suggest that these authorities extend more broadly to other threats. Where a statutory provision more clearly captures a proposed construction, courts sometimes interpret the absence of such language in a disputed provision of the same statute as evidence that the disputed provision should not be given that construction. Consistent with this broader construction, the TSA has asserted since 2007 that it has authority to protect travelers from communicable diseases by partnering with the CDC to enforce the "Do Not Board List." In contrast to the "No Fly List" the TSA uses to screen suspected terrorists from flights, the TSA uses the "Do Not Board List" to deny boarding to people the CDC has determined are contagious with certain diseases of public health concern. To date, the list has generally focused on tuberculosis and measles.

Additionally, apart from the TSA's authority to protect transportation security under sections 114(f) and (*l*), the TSA's emergency authorities under section 114(g) appear to provide a potential independent basis for TSA enforcement of mask-wearing requirements. DHS's Determination of a National Emergency triggered TSA's authority under section 114(g) to, among other things, "coordinate and oversee the transportation-related responsibilities of other departments and agencies," and "carry out such other duties, and exercise such other powers, relating to transportation during a national emergency as the Secretary of Homeland Security shall prescribe." Combined with TSA's authority under sections 106(m) and 114(m) to provide "services" and "personnel" to other agencies, these emergency provisions potentially give TSA broad authority to assist the CDC in enforcing mask-wearing requirements.

If a court determines that the TSA's statutory authorities are ambiguous with respect to authorizing the enforcement of mask-wearing requirements, the court might defer to TSA's interpretation under a legal doctrine known as "*Chevron* deference." Under this doctrine, courts sometimes defer to an agency's interpretation of a statute the agency administers where the statute is "silent or ambiguous with respect to the specific issue" and the agency's interpretation is reasonable. While courts are more likely to apply *Chevron* deference to agency interpretations formulated through formal procedures, such as notice-and-comment rulemaking, courts sometimes accord deference to agency interpretations issued through less formal procedures. Thus, although the TSA issued its mask directives under a statutory provision permitting it to bypass notice-and-comment procedures, a court might nevertheless defer to the TSA's reasonable interpretation of the statute.

Considerations for Congress

Federal agencies rely on Congress's statutory delegations of power as the basis for their authority to enforce the CDC's masks requirements. Accordingly, the agencies' delegated authority cannot exceed Congress's powers enumerated in the Constitution. Federal laws regulating public health or transportation are generally rooted in the Commerce Clause, which grants Congress the power to "regulate Commerce . . . among the several States." In *United States v. Lopez*, the Supreme Court held that there are "three broad categories of activity that Congress may regulate under its commerce power": (1) "the use of the channels of interstate commerce"; (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities that substantially affect interstate commerce." All three *Lopez* categories are relevant to an analysis of the CDC's mask requirements.

Many of the transportation modes covered under the CDC's Mask Order involve channels or instrumentalities of interstate commerce. "Channels" of interstate commerce are "the interstate transportation routes through which persons and goods move," such as highways, airspace, and navigable waterways. It is a "well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce" to prevent those channels from being used to spread harm, including "physical, moral or economic" harm. "Instrumentalities" of interstate commerce are the means of interstate commerce, such as airplanes, trains, and ships, and Congress may regulate and protect "the persons or things that the instrumentalities are moving." Indeed, Congress may address a threat to people traveling in interstate commerce even where the threat "come[s] only from intrastate activities."

The Mask Order also covers some transportation that arguably does not involve a "channel" or "instrumentality" of interstate commerce. For example, the order covers cars transporting passengers for hire locally within a state. Some federal circuit courts have concluded that motor vehicles are inherently instrumentalities of interstate commerce, even when not driven between states, but at least one circuit court has expressed doubt about that conclusion. Under the third *Lopez* category, however, Congress also may regulate *intrastate* activities that in the aggregate have a substantial effect on interstate commerce. The Supreme Court has ruled in a number of cases that legislation exceeded this aspect of Congress's Commerce Clause power when Congress relied on aggregating the effects of *noneconomic* intrastate activities. However, the Mask Order expressly exempts private transportation operated for noncommercial use, and therefore appears to raise less concern under the third *Lopez* category.

In sum, Congress has power to regulate transportation and protect travelers, but the scope of federal agencies' existing statutory authority to mandate masks in this context is an open legal question. If Congress wishes to eliminate uncertainty over the scope of federal agencies' statutory authority to implement and enforce public health measures in the transportation sector, Congress could consider legislation that expressly authorizes or precludes such measures.

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