UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HEALTH FREEDOM DEFENSE FUND, INC.; ANA CAROLINA DACA; and SARAH POPE,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; THE DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE CENTERS FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY, MD, MPH, in her official capacity as Director of the CDC; MARTIN S. CETRON, MD, in his official capacity as Director of the CDC's Division of Global Migration and Quarantine; and THE UNITED STATES OF AMERICA,

Defendants.

Case No. 8:21-cv-1693-KKM-AEP

DEFENDANTS' MOTION TO TRANSFER
UNDER LOCAL RULE 1.07(a)(2)(B)

To avoid "the probability of inefficiency or inconsistency," Local Rule 1.07(a)(2)(B), Defendants respectfully move to transfer this case to the Honorable Paul G. Byron, who is handling an earlier-filed case in this District—a case which includes

all of the claims that Plaintiffs raise here, in a challenge to the same agency action. *See Wall v. CDC*, No. 6:21-cv-00975-PGB-DCI (M.D. Fla.). In support of this request, Defendants offer the following:

I. This Litigation

1. Plaintiffs filed this action on July 12, 2021. ECF No. 1. Plaintiffs are a Wyoming not-for-profit corporation headquartered in Idaho (Health Freedom Defense Fund, Inc.) and two individual Florida residents (Ana Carolina Daza and Sarah Pope).

2. Plaintiffs named seven Defendants, all of whom are federal government agencies or officials sued in their official capacity: Joseph R. Biden, Jr., in his official capacity as President of the United States; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; the Department of Health and Human Services (HHS); the Centers for Disease Control and Prevention (CDC); Rochelle P. Walensky, MD, MPH, in her official capacity as Director of the CDC; Martin S. Cetron; in his official capacity as Director of the CDC's Division of Global Migration and Quarantine; and the United States of America.

3. Plaintiffs primarily challenge a January 29, 2021 order of the CDC, which (with certain exceptions) generally requires individuals to wear masks when traveling on public conveyances, such as commercial airline flights, buses, or trains. *See* CDC, *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025 (Feb. 3, 2021), ECF No. 1-2. That order was issued by the CDC to reduce the spread of the virus that causes COVID-19.

4. Plaintiffs bring four claims challenging the CDC's transportation mask order: (1) that the order exceeds the statutory authority delegated to the CDC in the Public Health Service Act (PHSA), 42 U.S.C. § 264(a), *see* Compl. ¶¶ 55-65 (Count I); (2) that it was issued in violation of the APA's notice-and-comment requirements, *see* Compl. ¶¶ 66-71 (Count II); (3) that it violates the APA because it is arbitrary and capricious, *see id.* ¶¶ 72-78 (Count III); and (4) that, if the order does not exceed CDC's statutory authority, then Section 264 of the PHSA is an unconstitutional delegation of legislative authority to the Executive Branch, *see id.*¶¶ 79-81 (Count IV).

5. Plaintiffs also bring two claims that purport to challenge Executive Order 13998, even though (unlike the CDC's mask order) the Executive Order does not actually impose any obligations on anyone outside of the Executive Branch. As relevant here, in Executive Order 13998, 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." Exec. Order 13998, *Promoting COVID-19 Safety in Domestic and Int'l Travel* (Jan. 26, 2021), § 2(a), ECF No. 1-1.

6. Plaintiffs challenge the Executive Order as "an unconstitutional exercise of legislative power by the Executive Branch," Compl. ¶ 83 (Count V); and as a violation of the Tenth Amendment, *see* Compl. ¶¶ 88-92 (Count VI).

7. Defendants' deadline to answer or otherwise respond to Plaintiffs' complaint is October 13, 2021. ECF No. 16.

8. No party has yet made any substantive filings in this case, although Plaintiffs and Defendants have each filed notices with this Court regarding the *Wall* litigation. *See* Pls.' Notice of Related Action, ECF No. 10 (Plaintiffs' notice identifying *Wall* for the Court, asserting that is not "a related case," but also conceding that there are "overlapping legal and constitutional issues raised" in the two cases); Defs.' Notice of a Related Action, ECF No. 17 (Defendants' notice identifying *Wall* as a related case).

II. The *Wall* Litigation

9. Mr. Lucas Wall, *pro se*, filed the complaint in *Wall v. CDC* on June 7, 2021. *Wall* ECF No. 1. *Wall* was filed in the Orlando Division of the Middle District of Florida, and was assigned to the Honorable Paul G. Byron. *See Wall v. CDC*, No. 6:21-cv-00975-PGB-DCI (M.D. Fla.).

10. As a practical matter, all of the Defendants in the above-captioned matter are also defendants in *Wall*. The only (arguable) exceptions are that Plaintiffs here have *also* sued some of the relevant HHS and CDC leadership in their official capacities, instead of suing only CDC and HHS. But that pleading choice has no substantive or procedural significance. *See* 5 U.S.C. § 703 ("[T]he action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.").

11. Mr. Wall, like Plaintiffs here, focuses his challenge on the CDC's transportation mask order. In challenging that order, Mr. Wall brings all four claims

that Plaintiffs bring here. *See Wall* ECF No. 1, Compl. ¶¶ 961-68 (in Count 1, Mr. Wall alleging that the mask order violates the APA's notice-and-comment requirements); *id.* ¶¶ 974-82 (in Count 3, Mr. Wall alleging that the mask order violates the APA because it is arbitrary and capricious); *id.* ¶¶ 983-85 (in Count 4, Mr. Wall alleging that the mask order exceeds the statutory authority delegated to the CDC by Congress in 42 U.S.C. § 264(a)); *id.* ¶¶ 986-91 (in Count 5, Mr. Wall alleging that, if the order does not exceed CDC's statutory authority, then Section 264 of the PHSA is an unconstitutional delegation of legislative authority to the Executive Branch).

12. In addition to bringing the same claims, Mr. Wall also makes many of the same arguments that Plaintiffs make here. *Compare, e.g.*, *Health Freedom* Compl. ¶¶ 35, 41 (alleging that mask-wearing has "potential adverse health effects" that "cannot be casually dismissed" and that "[i]n addition to safety concerns, there are substantial reasons to doubt the efficacy of masks for controlling virus spread"), *with Wall* ECF No. 130 at 31 (arguing that "masks are ineffective and harmful").

13. In addition, Mr. Wall, just like Plaintiffs here, argues that Executive Order 13998 is unlawful, and seeks relief to that effect. *See Wall* Compl. ¶ 62 (alleging that the Executive Order conflicts with the Tenth Amendment); *id.*, Prayer for Relief, ¶ A (asking the court to "Declare Defendant Biden's 'Executive Order Promoting COVID-19 Safety in Domestic & International Travel' signed Jan. 21, 2021 unconstitutional, vacate the order, and permanently enjoin its enforcement. E.O. 13998, 86 Fed. Reg. 7205 (Jan. 26, 2021)."); *Wall* ECF No. 130 at 41 ("Biden's E.O. 13998 . . . is illegal and unconstitutional, as I've argued throughout this case.").

14. As for the Executive Order, again, the parties in this case and in *Wall* make virtually identical arguments. *Compare, e.g.*, *Wall* ECF No. 130 at 42 (Mr. Wall arguing that "Defendant Biden did not cite any constitutional or statutory authority" and that the Executive Order "contains no expiration date or sunset provision, and fails to provide any guidance as to when or under what conditions it will expire"), *with Health Freedom* Compl. ¶¶ 83, 87 (alleging that the Executive Order "does not even deign to cite any statutory basis," and "contains no expiration date or sunset provision, and fails to provide any guidance as to when or under what conditions it may be deemed to have expired").

15. Mr. Wall also brings several additional claims (and names several additional defendants) that do not appear in this case. For example, Mr. Wall has also sued the Transportation Security Administration (TSA), seeking to enjoin the Security Directives through which TSA enforces and implements the CDC's mask order. But all of the claims in this case also appear in *Wall*, at least in some form.

16. On October 7, 2021, the assigned Magistrate Judge in *Wall* issued a Report & Recommendation on the parties' dispositive motions. *Wall* ECF No. 155. The Report & Recommendation recommends that all claims against defendants DHS, DOT, TSA, and the President of the United States be dismissed with prejudice, primarily because of various jurisdictional defects that do not apply to Mr. Wall's (or Health Freedom Defense Fund's) claims against CDC and HHS. As for the claims against CDC and HHS, the *Wall* Report & Recommendation did not reach the merits, and recommended instead that Mr. Wall's claims be dismissed *without* prejudice for

violation of Federal Rule of Civil Procedure 8, such that (if the Report & Recommendation is adopted) Mr. Wall would be permitted to file an amended complaint. The deadline for the parties in *Wall* to file objections is October 21, 2021.

III. Absent a transfer, these cases "present the probability of inefficiency or inconsistency[.]" Local Rule 1.07(a)(2)(B).

17. "Pursuant to Middle District Local Rule 1.07(a)(2)(B), '[i]f actions before different judges present the probability of inefficiency or inconsistency, a party may move to transfer a later-filed action to the judge assigned to the first-filed action.'" *Mariani v. Nocco*, No. 8:20-cv-2998-CEH-CPT, 2021 WL 3172920, at *2 (M.D. Fla. July 27, 2021). Litigating both this case and *Wall* separately, before different judges in the same district, "present[s] the probability of inefficiency or inconsistency," so a transfer is warranted under the plain text of Local Rule 1.07(a)(2)(B). *Id.*

18. As for inconsistency, absent a transfer, it is possible that this Court and the district court in *Wall* could issue conflicting rulings on the exact same claims challenging the exact same agency action. Indeed, plaintiffs in both cases raise not only the same *claims*, but often the exact same *arguments*, increasing the possibility of inconsistent rulings. As plaintiffs in both cases have acknowledged, the two cases at least raise "overlapping legal and constitutional issues." *Health Freedom* Pls.' Notice of Related Action, ECF No. 10; *see also Wall* ECF No. 93 (Mr. Wall identifying this case as related to *Wall*, noting that plaintiffs in both cases challenge "the validity of Executive Order 13998 and the subsequent order issued by Defendant CDC requiring that all transportation passengers and workers wear face masks," and pointing out that

the plaintiffs in this case bring "causes of action" that are "common to [the *Wall*] matter"). And a transfer would be justified even if there were less than complete overlap. *See, e.g.*, *PEMEX Exploración y Producción v. BASF Corp.*, No. CV H-10-1997, 2011 WL 13134611, at *4 (S.D. Tex. Oct. 4, 2011) (two cases originally filed before different judges in the same federal district consolidated because "*[m]any* of the questions of law [were] common" to both cases and thus "should be adjudicated by one court to avoid inconsistent rulings") (emphasis added).

19. As for inefficiency, litigating both this case and *Wall* separately in the same district will require multiple judges of this district court to consider arguments on identical issues, thus doubling the expenditure of judicial time, effort, and resources.

20. In addition, plaintiffs in both cases have requested nationwide relief. Although defendants are likely to oppose that request in both cases, those requests further illustrate the potential inefficiencies created by litigating these cases separately. If plaintiffs in *either* case successfully obtain nationwide relief, then the litigation in the trailing case would be rendered practically meaningless—an obvious source of "inefficiency" for the judicial system at large, and for the judges of this District. Local Rule 1.07(a)(2)(B). Likewise, if plaintiffs in one of these cases lose on the merits (or on the question of the scope of relief), absent a transfer, defendants could be deprived of the benefit of that victory if plaintiffs in the second case were to prevail—an inconsistent, inefficient, and inequitable result. *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"). Transfer would effectively reduce to zero the risk that these two cases reach conflicting or inconsistent outcomes. *See, e.g.*, *Weir-Cove Moving & Storage Co. v. Fleet Owners Ins. Fund*, No. 1:18-cv-74, 2019 WL 266422, at *3 (N.D. Ohio Jan. 18, 2019) ("[T]he fact that both cases are pending before the same judicial officer already minimizes the risk of inconsistent results and lessens the burden on the Court.").

21. To be sure, in the somewhat distinct context of a motion to transfer venue under 28 U.S.C. § 1404(a),[1] courts often show at least some deference to the plaintiff's chosen forum, although plaintiff's preference is not dispositive. *See, e.g.*, *Response Reward Sys., L.C. v. Meijer, Inc.*, 189 F. Supp. 2d 1332, 1339 (M.D. Fla. 2002) (noting that "considerations of convenience, cost, judicial economy, and expeditious discovery and trial process" can override plaintiff's chosen forum). But the text of Local Rule 1.07(a)(2)(B) makes no reference to any such principle of deference. And even in the context of a Section 1404 transfer, deference should not apply—or should

[1] To the extent 28 U.S.C. § 1404 is relevant here, it would be the lesser-used subsection (b), which provides that "[u]pon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district." But because the U.S. District Court for the Middle District of Florida has a Local Rule that is consistent with and more specific than Section 1404(b), Defendants have focused this filing on the "probability of inefficiency or inconsistency" standard created by Local Rule 1.07(a)(2)(B). Out of an abundance of caution, however, in the alternative, to the extent necessary, Defendants also move for a transfer to the Orlando division under 28 U.S.C. § 1404.

at least be substantially diminished—when the proposed transfer would keep the case within the same federal district already selected by Plaintiffs. *See, e.g.*, *White v. ABCO Eng'g Corp.*, 199 F.3d 140, 144 (3d Cir. 1999) (because a case subject to an "intra-district . . . transfer can be handled by the same lawyer(s) and will be governed by the same rules and procedures," and is not "unloaded onto an entirely new system," the standard is less exacting for intra-district as opposed to inter-district transfers).

22. On top of all that, the lead Plaintiff here is a Wyoming corporation headquartered in Idaho, which appears to have minimal ties (if any) to either Tampa or Orlando, and is roughly equidistant from the two locations. *See, e.g.*, *Suomen Colorize Oy v. DISH Network LLC*, 801 F. Supp. 2d 1334, 1338 (M.D. Fla. 2011) ("[T]he Court lends less deference to Suomen's choice of forum because Suomen, a Finnish Corporation with no business operations in Florida, has no connection to the Middle District of Florida."); *Cellularvision Tech. & Telecomm., L.P. v. Alltel Corp.*, 508 F.Supp.2d 1186, 1189 (S.D. Fla. 2007) ("[W]here a plaintiff has chosen a forum that is not its home forum, only minimal deference is required, and it is considerably easier to satisfy the burden of showing that other considerations make transfer proper."). And as for the two individual Plaintiffs, both appear to reside within driving distance of Orlando, in the (presumably unlikely) event that there are any in-person proceedings in this case that require the physical presence of Plaintiffs (rather than their counsel, none of whom are based in Tampa). So while Defendants and the judicial system in general will gain significant efficiency benefits from a transfer, Plaintiffs will suffer no meaningful prejudice.

23. In recent years, it has not been uncommon for multiple lawsuits to be filed around the country challenging the same agency policy. But even in those instances, cases filed within the same federal district have been routinely related or consolidated before a single judge in that district—even if separate litigation continued around the country. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (five challenges to the rescission of DACA related before one judge in the Northern District of California, two before one judge in the District of Columbia, and two before one judge in the Eastern District of New York); *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (two challenges to the inclusion of a citizenship question on the census questionnaire consolidated before one judge in the Southern District of New York, two related before one judge in the Northern District of California, and two consolidated before one judge in the District of Maryland); *Dep't of Homeland Sec. v. New York*, No. 20-449 (U.S.) (two challenges to DHS's public-charge rule related before one judge in the Southern District of New York, three before one judge in the Northern District of California, and two before one judge in the District of Maryland). This precedent further supports allowing one judge in this District to handle both of these cases.

* * *

Because Judge Byron is already handling an earlier-filed case that includes all of the same claims challenging the same policies at issue in this case, Defendants respectfully request that this case be transferred to Judge Byron under Local Rule 1.07(a)(2)(B).

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), on October 12, 2021, counsel for Defendants conferred with counsel for Plaintiffs by email and telephone. Plaintiffs reported that they oppose the relief requested in this motion.

Dated: October 13, 2021

Respectfully submitted,

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