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ATTORNEY GENERAL OF TEXAS

August 11, 2021

The Honorable Senfronia Thompson
Chair, House Committee on Licensing &
Administrative Procedures
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0380

Re: Effect of the Governor's executive orders on the federal requirements related to face coverings on public transit (RQ-0409-KP)

Dear Representative Thompson:

You ask about "the effect of Governor Greg Abbott's May 18, 2021 Executive Order No. GA-36 on the existing federal mask mandate related to face coverings on public transit."¹ The Governor recently superseded Executive Order GA-36 with Executive Order GA-38, but the relevant requirements related to face coverings remain in effect. We therefore address your questions under the Governor's more recent Executive Order GA-38.

I. Texas Executive Order GA-38 prohibits governmental entities from requiring any person to wear a face covering or to mandate that another person wear a face covering.

On July 29, 2021, the Governor issued Executive Order GA-38, "relating to the continued response to the COVID-19 disaster."² That order provides in relevant part, and with limited exceptions: "No governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering" Exec. Order GA-38 at 4. Executive Order GA-38 further provides that "the imposition of any such face-covering requirement by a local

¹Letter from Honorable Senfronia Thompson, Chair, House Comm. on Licensing & Admin. Procedures, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (May 20, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0409KP.pdf> ("Request Letter"); *see* The Governor of the State of Tex., Executive Order GA-36, 46 Tex. Reg. 3325, 3325–26 (2021) ("Executive Order GA-36").

²*See* GOVERNOR OF THE STATE OF TEXAS, EXECUTIVE ORDER 38 (July 29, 2021), https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf ("Executive Order GA-38").

governmental entity or official constitutes a ‘failure to comply with’ this executive order that is subject to a fine up to \$1,000.” *Id.*

The order does not expressly name public transit authorities or other public transportation entities as entities subject to the order. However, the word “including” is generally understood to be a term “of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.” TEX. GOV’T CODE § 311.005(13). Executive Order GA-38 applies to all governmental entities, which would be construed to include public transportation entities created under state law. *Cf.* TEX. TRANSP. CODE § 228.251(2) (defining “local governmental entity” to include a “transportation corporation created under Chapter 431”); TEX. LOC. GOV’T CODE § 335.075(a) (referring to a metropolitan rapid transit authority as a political subdivision). Thus, Executive Order GA-38 prohibits public transit authorities from requiring any person to wear a face covering.

II. Federal orders attempt to require persons traveling on public transit to wear a mask and to require local transit authorities to enforce the federal mandate.

Prior to issuance of Executive Order GA-38, the federal Centers for Disease Control (“CDC”) issued an order purporting to require a person to “wear a mask while boarding, disembarking, and traveling on any conveyance into or within the United States.” *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025, 8029 (Feb. 3, 2021) (“CDC Order”). The CDC Order expressly applies to “persons on conveyances³ and at transportation hubs directly operated by U.S. state, local, territorial, or tribal government authorities, as well as the operators themselves.” *Id.* at 8028. Regarding enforcement, the CDC Order states that the “CDC reserves the right to enforce through criminal penalties” but that it “does not intend to rely primarily on these criminal penalties but instead strongly encourages and anticipates widespread voluntary compliance.” *Id.* at 8030 n.33.⁴

Shortly after the CDC issued its order, the Transportation Security Administration (“TSA”) issued a security directive to “owners and operators of ground transportation.”⁵ That directive specifically applies to “[e]ach owner/operator identified in 49 C.F.R. § 1582.1(a),” which includes “[e]ach public transportation agency.” 49 C.F.R. § 1582.1(a)(2). “Public transportation agency” is further defined as “any publicly-owned or operated provider of regular and continuing public transportation,” including, among others, “heavy or light rail transit service, whether on or off the general railroad system of transportation” and “bus transit or commuter bus service.” *Id.* § 1500.3.

³“Conveyance” includes “aircraft, train, road vehicle, vessel . . . or other means of transport, including military.” 42 C.F.R. § 70.1.

⁴Federal law authorizes “a fine of not more than \$1,000 or imprisonment for not more than one year, or both” for a person who violates a regulation prescribed under sections 264 to 266 of title 42 of the U.S. Code. 42 U.S.C. § 271(a). The CDC’s purported authority for issuing the order is an emergency action taken under the existing authority of 42 U.S.C. § 264(a). *See* CDC Order at 8030.

⁵U.S. Dep’t of Homeland Security, Transp. Security Admin., Security Directive SD 1582/84-21-01A (May 12, 2021), <https://www.tsa.gov/sites/default/files/sd-1582-84-21-01a.pdf> (“SD 1582/84-21-01A”). By its terms, this directive expires September 13, 2021.

The TSA directive requires public transportation agencies to “notify passengers with prominent and adequate notice” that: (1) federal law requires wearing a mask while on the conveyance and failure to comply may result in denial of boarding or removal; and (2) refusing to wear a mask is a violation of federal law and passengers may be subject to penalties under federal law. SD 1582/84-21-01A, at 2. Furthermore, the TSA directive requires, with certain exceptions, owners and operators of public transportation to require that “any persons in public transportation, passenger railroad, or bus conveyance covered by this SD” as well as “any person in public areas of transportation hubs/facilities controlled by the owner/operator . . . for the duration of travel, boarding, and disembarking” wear a mask. *Id.* at 2–3. And it requires the owner/operators to “ensure that direct employees and contractor employees wear a mask at all times when in conveyances or in or around transportation facilities under their control.” *Id.* at 3. It also requires owner/operators to “establish procedures to manage situations with persons who refuse to comply with the requirement to wear a mask,” including, at a minimum, denying boarding, making best efforts to disembark the individual as soon as practicable, or making best efforts to remove the individual from the transportation hub/facility. *Id.* at 4. Thus, multiple federal orders attempt to require persons traveling on public transit to wear a face covering.

III. A court could conclude that the CDC and the TSA lack authority to issue the face covering orders, particularly with respect to intrastate public transit systems.

Per the CDC order, it is “an emergency action taken under the existing authority of 42 U.S.C. [§] 264(a) and 42 C.F.R. [§§] 70.2, 71.31(b), 71.32(b).” CDC Order at 8030. Subsection 264(a) provides:

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

42 U.S.C. § 264(a).⁶

⁶Title 42, section 70.2 of the Code of Federal Regulations provides:

Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to

(continued...)

A. A court could conclude that the CDC order exceeds the limited authority granted in subsection 264(a) to prevent the spread of communicable diseases.

The CDC has argued that the catchall phrase “and other measures” at the end of subsection 264(a) grants the CDC broad authority to impose far-reaching measures to limit the spread of communicable diseases. *See Tiger Lily, L.L.C. v. U.S. Dep’t of Housing & Urban Dev.*, 992 F.3d 518, 522 (6th Cir. 2021). But some courts addressing federal eviction moratoriums issued in response to COVID-19 have emphasized that the authority granted by Congress to the CDC under section 264(a) is narrower. *Id.*; *State v. Becerra*, 2021 WL 2514138, at *19–20 (M.D. Fla. June 18, 2021); *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 2021 WL 911720, at *10 (N.D. Ohio Mar. 10, 2021).⁷

Under the canon of *ejusdem generis*, “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (citation omitted). Pursuant to this canon, the “other measures” identified in subsection 264(a) are limited to those actions similar to “inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated.” 42 U.S.C. § 264(a). The actions subsection 264(a) expressly articulates involve buildings or property found to be infected or contaminated. *Id.* They do not involve regulating individuals or placing restrictions on all persons regardless of infection status as the CDC has attempted to do. Separately, subsection 264(d) authorizes the CDC to issue regulations “for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease.” *Id.* § 264(d)(1). The CDC does not claim authority for its order under this subsection, and such authority is limited to “persons reasonably believed to be infected.” *Id.* Thus, a court has a basis to conclude that in issuing the federal order to wear face coverings on

any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.

42 C.F.R. § 70.2. Sections 71.31 and 71.32 address health measures at U.S. ports to prevent the spread of communicable diseases. *See* 42 C.F.R. §§ 71.31, 71.32.

⁷Other federal courts have construed the language in subsection 264(a) broadly to confer authority on the CDC to issue far-reaching regulations, including the federal eviction moratorium. *See Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Human Servs.*, 2021 WL 2221646, at *2 (D.C. Cir. June 2, 2021) (construing section 264(a) as “language of expansion, not contraction” and suggesting that the federal eviction moratorium will be upheld); *Chambless Enters., L.L.C. v. Redfield*, 508 F. Supp. 3d 101, 112 (W.D. La. 2020). In *Alabama Association of Realtors*, the D.C. Circuit Court of Appeals denied a motion to vacate a stay of an order vacating the nationwide eviction moratorium, concluding that “HHS has made a strong showing that it is likely to succeed on the merits” of the appeal due to the expansive authority granted by section 264(a). *Alabama Ass’n of Realtors*, 2021 WL 2221646, at *1. In a 5-4 decision, the U.S. Supreme Court denied a motion to vacate that stay. *Alabama Ass’n of Realtors v. Dep’t of Health Servs.*, 141 S. Ct. 2320 (June 29, 2021). But in his concurrence, Justice Kavanaugh indicated his position that the CDC “exceeded its existing statutory authority by issuing a nationwide eviction moratorium” but that the forthcoming expiration of the moratorium resulted in his vote to deny the motion to vacate the stay. *Alabama Ass’n of Realtors*, 141 S. Ct. at 2320. Thus, it is quite possible that a majority of the U.S. Supreme Court would apply a narrower construction to subsection 264(a) than the CDC claims it possesses.

public transportation, the CDC exceeded the limited authority conferred on it by subsection 264(a) to prevent the spread of communicable diseases.

Furthermore, Congress limited the CDC's authority to issue regulations 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) (emphasis added). The authority granted does not expressly include the ability to issue regulations pertaining to the intrastate spread of communicable diseases. *See Skyworks, Ltd.*, 2021 WL 911720, at *10 (emphasizing that the CDC's measures implemented pursuant to section 264(a) must "have the required nexus with interstate or foreign commerce"). Thus, a court has a basis to conclude that the CDC exceeded its authority in requiring individuals to wear face coverings while using intrastate public transportation systems.

B. A court could conclude that the TSA's authority to regulate transportation security does not include authority to issue public health measures that require facial coverings on public transportation.

The TSA is "responsible for *security* in all modes of transportation." 49 U.S.C. § 114(d) (emphasis added). Congress established the TSA in response to the September 11, 2001 attacks, and the traditional understanding of transportation "security" has involved the prevention of deliberate harms like terrorism or other criminal acts. *See id.* § 114(h)(2) (requiring the TSA to establish procedures to notify law enforcement officials and others about individuals known to pose a risk of air piracy or terrorism or a threat to airline or passenger safety). We find no court decisions addressing whether TSA, in furtherance of transportation security, may implement or enforce public health measures such as the federal mask mandate on public transportation. While it is possible a court could construe the term "security" broadly to encompass prevention of the spread of disease, Congress has not given the TSA express authority to implement public health measures to prevent the unintentional spread of communicable diseases. Reading the Aviation and Transportation Security Act as a whole, a court would have a basis to conclude that the TSA lacks authority to require all individuals using public transportation to wear facial coverings.

Given the many concerns raised regarding the authority of the CDC and TSA to issue the federal orders requiring facial coverings on public transport, we are unable to definitively conclude that they preempt the Governor's Executive Order GA-38.

C. A court could conclude that the TSA's directive requires a public transportation system to violate other law.

The Americans with Disability Act ("ADA") requires reasonable accommodations be made for individuals with disabilities. *See* 42 U.S.C. §§ 12101-12213. To the extent a public transportation system's enforcement of federal orders requiring facial coverings precludes the public transportation system from providing that reasonable accommodation, a court may have a basis to conclude the federal orders violate the ADA.

IV. To the extent the federal orders require local public transit authorities to enforce the federal mask mandate, a court may have a basis to conclude the orders violate the Tenth Amendment.

“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 935 (1997); *see also New York v. United States*, 505 U.S. 144, 188 (1992). Contrary to this doctrine, rather than directly enforce the TSA directive by the use of federal security officers, the TSA directive requires local governmental entities, their officials, and their employees to “establish procedures to manage situations with persons who refuse to comply with the requirement to wear a mask” and to deny boarding to those who do not. SD 1582/84-21-01A, at 4. Thus, it commandeers local officials to enforce a federal regulatory scheme that not only does not exist under state law but is in direct conflict with current state law.

Considering a federal regulatory scheme requiring local officials to perform background checks on prospective handgun purchasers, the U.S. Supreme Court described why doing so was unlawful:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Printz, 521 U.S. at 930. The Court ultimately ruled that the federal program violated the Tenth Amendment principle that the federal government may not compel the States to enact or administer a federal regulatory program. *Id.* at 933.

Here, the TSA is similarly demanding that local public transit authorities implement a federal mandate to wear facial coverings, placing a financial burden on those entities and forcing them to enforce an unpopular regulatory scheme. Using the *Printz* analysis, a court may have a basis to conclude that TSA’s directive is an unconstitutional attempt to commandeer local officials to enforce a federal regulatory scheme and that it cannot be enforced against public transit authorities.

The federal orders authorize enforcement actions against entities who do not comply, including the potential of withholding federal funds. CDC Order at 8030; *see* 49 U.S.C. § 5329(g) (authorizing the Secretary of Transportation to take enforcement actions, including withholding of federal funds, for failure to comply with federal orders). The U.S. Supreme Court has recognized that the federal government may attach conditions on the receipt of federal funds in certain circumstances. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987). But the Court has distinguished between creating an incentive for states to act in accordance with federal policies and compelling states to do so, recognizing that the later “runs contrary to our system of

federalism.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–78 (2012). Ultimately, a court addressing this issue would need to engage in a factual inquiry about whether TSA’s actions amount to coercion in violation of the Tenth Amendment.

S U M M A R Y

Texas Executive Order GA-38 prohibits governmental entities from requiring any person to wear a face covering or to mandate that another person wear a face covering.

Federal orders issued by the Centers for Disease Control (“CDC”) and the Transportation Security Administration (“TSA”) attempt to require persons traveling on public transit to wear a mask and to require local transit authorities to enforce the federal mandate. However, a court could conclude that the CDC and the TSA lack statutory authority to issue the face covering orders, particularly with respect to intrastate public transit systems. Furthermore, a court may have a basis to conclude that TSA’s directive violates the Americans with Disabilities Act or is an unconstitutional attempt to commandeer local officials to enforce a federal regulatory scheme.

Given the many concerns regarding the authority of the CDC and TSA to issue the federal orders requiring facial coverings on public transport, we are unable to definitively conclude that those orders preempt the Governor’s Executive Order GA-38.

Very truly yours,



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