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CDC's federal mask requirement does NOT apply to CAP METRO

On its website (<https://www.transit.dot.gov/TransitMaskUp>), The Federal Transit Administration says the following about wearing masks:

“The Centers for Disease Control and Prevention (CDC) has [announced a federal mask requirement for transit systems](#) to mitigate the risk of COVID-19 based on President Joseph R. Biden’s [Executive Order 13998](#), issued January 21, 2021. The Transportation Security Administration soon followed with a [security directive](#) implementing the CDC order.”

CAP METRO misuses that linchpin CDC order (“REQUIREMENT FOR PERSONS TO WEAR MASKS WHILE ON CONVEYANCES AND AT TRANSPORTATION HUBS”) to ILLEGALLY require passengers to wear face masks to NOT comply with Governor Abbott’s Executive Order 36, though EO-36 legally supersedes CAP METRO’S mask mandate. See my May 26, 2021 letter to Governor Abbott for details.

In fact, CDC’s order does NOT apply to CAP METRO, or any other local intrastate public transit authority, based on the order’s own application limitations [42 U.S.C. 264(a), 42 CFR 70.2, 71.31(b), 71.32(b)].

Each application limitation is now deconstructed and unpacked, in order:

42 U.S.C. 264(a)

42 U.S.C. 264(a) is under Title 42 - THE PUBLIC HEALTH AND WELFARE, CHAPTER 6A - PUBLIC HEALTH SERVICE, SUBCHAPTER II - GENERAL POWERS AND DUTIES, Part G - Quarantine and Inspection.

42 U.S.C §264. is entitled **Regulations to control communicable diseases.**

42 U.S.C. 264(a), Promulgation and enforcement by Surgeon General, says:

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.

Analysis

First, the text says “...to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States...”, clearly referring to disease “immigration” from outside the U.S. into the U.S.

Second, the text says “...to prevent the introduction, transmission, or spread of communicable diseases from one State...into any other State...”, clearly referring to interstate disease migration within the U.S.

Therefore, the text does NOT explicitly say anything about preventing the introduction, transmission, or spread of a communicable disease within a State. Therefore, *Promulgation and enforcement by Surgeon General* does NOT explicitly include applicability to intrastate introduction, transmission, or spread of a communicable disease.

Therefore, the listed, reasonably necessary measures that may be taken for purposes of carrying out and enforcing such [regulations](#) do NOT explicitly apply to intrastate introduction, transmission, or spread of a communicable disease.

However, even if they did apply, ALL the listed, reasonably necessary measures that may be taken (inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated) target NON-HUMAN pests, animals, or articles (things) that are sources of dangerous infection to human beings. Though the list is not exhaustive (“and other measures”), the stated measures are NOT intended to be done to human passengers riding public transportation.

Third, though 42 U.S.C. 264(a) is under Part G - Quarantine and Inspection, there is NO quarantine across states anywhere in the U.S., NO local quarantine in Austin or Travis County, and NO statewide quarantine in Texas.

Conclusion

Though the CDC order requiring masks for HUMAN travelers in transit cites 42 U.S.C. 264(a) as a limiting restriction, 42 U.S.C. 264(a) does NOT apply to CAP METRO because HUMAN **intrastate** travelers riding its buses and trains are NOT being quarantined.

In addition, though 42 U.S.C. 264(e) - Preemption is NOT explicitly listed as applicable to the CDC order, it encompasses all of 42 U.S.C. 264:

“Nothing in this section or section 266 or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 266 of this title.”

Therefore, 42 U.S.C. 264(e) makes clear that 42 U.S.C. 264(a) does NOT supersede Governor Abbott’s Executive Order 36, which has “...the force and effect of law” under Section 418.012 of the Texas Government Code, because EO-36 does NOT conflict with an exercise of Federal authority under section 264 or section 266 of Title 42 because there is no local quarantine in effect in Austin or statewide quarantine in effect in Texas.

42 CFR § 70.2

42 CFR § 70.2 is entitled, “**Measures in the event of inadequate local control.**”

42 CFR § 70.2 says:

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 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.

Analysis

First, the text says “...to prevent the spread of any of the communicable diseases from such State...to any other State”. Therefore, the text does NOT explicitly say anything about preventing the spread of a communicable disease within a State. This “across states” vs. “within state” distinction is reflected in the usual, disjoint difference in meanings between “interstate” (two or more states) vs. “intrastate”(one state). Therefore, **inadequate local control** does NOT explicitly include within-state spread of a communicable disease.

Second, ALL the listed, reasonably necessary measures to be taken to prevent the spread of communicable disease target NON-HUMAN pests, animals, or articles (things). Though the list is not exhaustive, the measures do NOT appear intended to be done to human passengers riding public transportation.

Third, 42 CFR § 70.2 is under 42 CFR §70 – INTERSTATE QUARANTINE. 42 CFR § 70.1 defines *Quarantine* to mean “the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease.” Yet, not only is there NO quarantine across states anywhere in the U.S., there is NO local quarantine in Austin or Travis County, or statewide quarantine in Texas.

Conclusion

Though the CDC order requiring masks for HUMAN travelers in transit cites 42 CFR § 70.2 as a limiting restriction, 42 CFR § 70.2 does NOT appear to apply to CAP METRO because HUMAN **intrastate** travelers riding its buses and trains are NOT being quarantined.

End justifies the means insanity

However, there is a twisted, dishonest, “end justifies the means” way to cherry pick and recombine part of 42 CFR §70.2 with part of 42 CFR §70 and part of 42 CFR §70.1 to force the out-of-context transmogrification to apply in a way 42 CFR §70.2 does NOT mean and was NOT intended:

1) From 42 CFR §70.1 set apart “...to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent

such spread of the diseases as he/she deems reasonably necessary...” for the rationale and justification for the mask mandate

2) From 42 CFR §70 separate “INTERSTATE” from INTERSTATE QUARANTINE.

3) From 42 CFR §70.1 separate “interstate” from the defined phrase “interstate traffic.”

4) Isolate “...including any portion of such movement or transportation that is entirely within a State...” from *interstate traffic*’s full definition and wrongly re-purpose that part out of context to mean “intrastate travel.”

5) Connect it all back together to FALSELY mean the CDC’s mask mandate is a reasonable, necessary measure for intrastate public transportation.

Scalia’s wrath

Justice Scalia would have smashed that semantic pretzel into bits because:

1) 42 CFR §70.1 says, in full:

“General definitions.

As used in this part, terms shall have the following meaning:

...

Interstate traffic (1) Means:

(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.”

Therefore, in this full definition of *interstate*, the contextualized “including any portion of such movement or transportation that is entirely within a State or possession” part (i) means that if the movement/transportation started in Texas, went through Louisiana, and ended in Mississippi, that travel through Louisiana was part of *interstate* traffic, though the movement/transportation did NOT start or finish in Louisiana (ii). Also, if movement/transportation started in Texas, went into Louisiana, and then ended back in Texas, the travel in Louisiana was part of the *interstate* traffic, though the movement/transportation did NOT start or finish in Louisiana (iii).

Intrastate separate/distinct from interstate

Though 42 CFR §70.1 does NOT explicitly define “intrastate”, 42 CFR §70.5 (e) differentiates “intrastate” from “interstate”:

“The Director may additionally apply the provisions in paragraphs (a) through of this section (c) to individuals traveling interstate or entirely intrastate and to conveyances that transport such individuals

whenever the Director makes a determination under 42 CFR 70.2 that based on the existence of inadequate local control such measures are needed to prevent the spread of any of the communicable diseases from such State or U.S. territory to any other State or U.S. territory.”

Therefore, “interstate” does NOT encompass “intrastate”, meaning “intrastate” travel is separate and distinct from “interstate” travel.

Examining 42 CFR §70.5 (e)’s non-applicability

Interestingly, 42 CFR §70.5 (e) is NOT listed as applicable to the CDC order, though it explicitly includes the intrastate passenger transport CAP METRO does (and other local public transit authorities across the nation do) entirely within a state, and it’s explicitly connected to the interstate travel of 42 CFR 70.2, which is listed as applicable.

Because 42 CFR §70.5 is entitled, “Requirements relating to travelers under a Federal order of isolation, quarantine, or conditional release,” look at 42 CFR § 70.1’s relevant definitions:

Isolation means the separation of an individual or group reasonably believed to be infected with a quarantinable communicable disease from those who are healthy to prevent the spread of the quarantinable communicable disease.

Quarantine means the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease.

Conditional release means the temporary supervision by a public health official (or designee) of an individual or group, who may have been exposed to a quarantinable communicable disease to determine the risk of disease spread and includes public health supervision through in-person visits, telephone, or through electronic or Internet-based monitoring.

Therefore, because travelers using local transit authorities like CAP METRO are NOT under a Federal order of isolation, quarantine, or conditional release, 42 CFR §70.5(e) does NOT apply to them. Therefore, 42 CFR §70.5 (e)’s inclusion of entirely intrastate travel CANNOT be applied to local transit authorities like CAP METRO.

Examining 42 CFR §70.5 (d)’s non-applicability

Intrastate travel is also explicitly included in 42 CFR §70.5 (d):

“The Director may additionally apply the provisions in paragraphs (a) through (c) of this section to individuals traveling entirely intrastate and to conveyances that transport such individuals upon the request of a State or local health authority of jurisdiction. The Director shall consider the State or local health authority's request for assistance and taking into consideration the risk of introduction, transmission, or spread of the communicable disease, grant or deny, in his/her discretion, the request for assistance.”

Therefore, because travelers using local transit authorities like CAP METRO are NOT under a Federal order of isolation, quarantine, or conditional release, 42 CFR §70.5 (d) does NOT apply to them.

Therefore, 42 CFR §70.5 (d)'s inclusion of entirely intrastate travel cannot be applied to local transit authorities like CAP METRO, even if a State or local health authority of jurisdiction requests it.

Therefore, per the definition of "Director" in 42 CFR §70.1, the Director, Centers for Disease Control and Prevention, Department of Health and Human Services, and/or another authorized representative as approved by the CDC Director or the Secretary of Health and Human Services CANNOT use 42 CFR §70.5 (d) or 42 CFR §70.5 (e) to cross the intrastate travel jurisdiction line if travelers within that state are NOT under a Federal order of isolation, quarantine, or conditional release, explaining why neither - 42 CFR §70.5 (d) nor 42 CFR §70.5 (e) is listed as applicable on the CDC order..

42 CFR §71.31(b)

42 CFR §71.31, General provisions, is under Subpart D—Health Measures at U.S. Ports: Communicable Diseases under PART 71—FOREIGN QUARANTINE

42 CFR §71.31(b) says:

The Director may require detention of a carrier until the completion of the measures outlined in this part that are necessary to prevent the introduction or spread of a communicable disease. The Director may issue a controlled free pratique to the carrier stipulating what measures are to be met, but such issuance does not prevent the periodic boarding of a carrier and the inspection of persons and records to verify that the conditions have been met for granting the pratique.

Clearly, 42 CFR §71.31(b) is for arriving carriers (usually ships) at U.S. ports because of PART 71 (FOREIGN QUARANTINE), Subpart D (Health Measures at U.S. Ports: Communicable Diseases), and "pratique" meaning clearance given an incoming ship by the health authority of a port (<https://www.merriam-webster.com/dictionary/pratique>).

Since CAP METRO does NOT service a U.S. port and does NOT transport passengers on ships, 42 CFR §71.31(b) does NOT apply to CAP METRO.

42 CFR §71.32(b)

42 CFR §71.32, Persons, carriers, and things, is under Subpart D—Health Measures at U.S. Ports: Communicable Diseases under PART 71—FOREIGN QUARANTINE

42 CFR §71.32(b) says:

Whenever the Director has reason to believe that any arriving carrier or article or thing on board the carrier is or may be infected or contaminated with a communicable disease, he/she may require detention, disinfection, disinfestation, fumigation, or other related measures respecting the carrier or article or thing as he/she considers necessary to prevent the introduction, transmission, or spread of communicable diseases.

Clearly, 42 CFR §71.32(b) is for arriving carriers (usually ships) at U.S. ports because of PART 71 (FOREIGN QUARANTINE), Subpart D (Health Measures at U.S. Ports: Communicable Diseases).

42 CFR §71.32(b) focuses on the carrier itself or anything on board the carrier that may be infected or contaminated with a communicable disease, NOT person-to-person introduction, transmission, or spread of communicable diseases requiring Passengers to wear face masks.

The listed measures to be taken to prevent the introduction, transmission, or spread of communicable diseases exclusively target the carrier itself or anything on board the carrier that may be contaminated, NOT on-board human passengers.

Also, since CAP METRO does NOT service a U.S. port and does NOT transport passengers on ships, 42 CFR §71.31(b) does NOT apply to CAP METRO.

CONCLUSION

Based on the preceding plain language, common sense interpretation and analysis of its four application limitations [42 U.S.C. 264(a), 42 CFR 70.2, 71.31(b), 71.32(b)], the CDC order, “REQUIREMENT FOR PERSONS TO WEAR MASKS WHILE ON CONVEYANCES AND AT TRANSPORTATION HUBS”, does NOT apply to CAP METRO, or any other local intrastate public transit authority.

Therefore, CAP METRO is legally bound to comply with Governor Abbott’s Executive Order 36 by NOT requiring passengers to wear any kind of facial covering to board and ride.
