
**United States Court Of Appeals
for the District of Columbia Circuit**

No. 21-1074

JONATHAN CORBETT,
Petitioner

v.

TRANSPORTATION SECURITY ADMINISTRATION
AND
DAVID P. PEKOSKE,
*IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR
OF THE TRANSPORTATION SECURITY ADMINISTRATION,
Respondents*

Petition for Review of Agency Orders Under 49 U.S.C § 46110

OPENING BRIEF OF PETITIONER JONATHAN CORBETT

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**CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES**

Pursuant to D.C. Cir. R. 28(a)(1), Petitioner makes the following certifications:

1. **Parties & Amici**. There were no prior proceedings in this matter. Petitioner is Jonathan Corbett, an individual, and Respondents are the U.S. Transportation Security Administration, a federal component agency of the U.S. Department of Homeland Security, and its highest-ranking official, Administrator David P. Pekoske, in his official capacity. No amici have yet appeared.
2. **Rulings Under Review**. No rulings have yet been made.
3. **Related Cases**. There are no related cases of which Petitioner is aware.

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ISSUE PRESENTED

Is the U.S. Transportation Security Administration empowered by law to create and enforce public health mandates?

STATEMENT OF THE CASE

The transition team for incoming U.S. President Joseph R. Biden was faced with an unprecedented challenge: developing and implementing a plan to deal with a pandemic killing thousands of Americans daily, and to do so with little-to-no support from the outgoing President. Likely a result of the need for quick action, their plan made a mistake: it sought the assistance of an agency that had no authority to offer such assistance. Choosing the U.S. Transportation Security Administration (“TSA”) to enforce a mask mandate within the transportation system was an understandable mistake, as they are the very visible enforcement arm of the federal government in transit hubs, but it was a mistake nevertheless because TSA’s role is confined to transportation security.

On January 31st, 2021, the acting administrator of TSA, in response to Executive Order 13,998, issued “security directives” that compel those virtually anywhere within the public transportation system to wear masks while present at virtually all times. They contemporaneously announced that civil penalties would be issued against those not in compliance. The rules announced are some of the most severe in the nation, restricting outdoor spaces as indoor spaces, requiring masks to be worn while seated at a food service table “between bites,” and forcing

private companies (airlines, airport operators, *etc.*) to report passengers in violation such that TSA may levy civil penalties.

Petitioner is a frequent flyer, subject to TSA's passenger rules dozens of times annually, and with a currently-booked flight in the near future. Exhibit A, Affirmation of Jonathan Corbett. Petitioner does not challenge the prudence of requiring the wearing of face masks while in transit and concedes that other agencies, such as the Federal Aviation Administration, would likely be free to promulgate such rules. TSA, however, may not, and Petitioner asks the Court to correct the mistake of the transition team, as implemented by TSA, and set the challenged orders aside and enjoin TSA from issuing civil penalties against individuals who fail to wear masks.

JURISDICTIONAL & STANDING STATEMENT

Petitioner discussed the general jurisdictional framework regarding challenges such as the instant one, as well as the basis for his standing, in his Motion for Stay Pending Review, pp. 2, 3, and incorporates this discussion by reference.

The Court also asked the parties to address a more specific issue: that of the impending expiration of the challenged security directives scheduled for May 11th, 2021, and whether this expiration will render this petition moot. TSA has re-issued these orders with a September 13th, 2021 expiration date. See Exhibit B, Re-Issued Orders. The Court's question regarding the possibility of mootness is therefore, itself, moot.

SUMMARY OF THE ARGUMENT

When TSA was created in 2001, it was charged with securing the nation's transportation system from terrorist attacks. Transportation security has never included general public safety goals or public health goals, and the mandate under which TSA operates speaks clearly to its authority to exclude weapons, explosives, and incendiaries, as well as dangerous individuals, from boarding an airplane. Neither TSA's enabling statutes or its own regulations, under which the challenged security directives were issued, in any way authorize TSA to regulate for the purpose of mitigating a communicable disease.

TSA is attempting to broaden the definition of security – and thus the scope of its own powers – beyond the breaking point. In opposition to Petitioner's request for a stay pending review, it argued that “in the context of a global pandemic, ensuring the public health and the security of the nation's transit are inextricably intertwined; ensuring public health *is* a security issue.” Opp. to Mot. for Stay Pending Review, p. 18¹ (*emphasis in original*). But clearly, this is not so: the outbreak of disease does not transform public health matters into security

¹ All page numbers reference ECF-stamped header page numbers, not party-provided footer page numbers.

matters. The Court should therefore hold that TSA's mask directives are *ultra vires* and enjoin TSA from enforcing them.

ARGUMENT

I. Public Health and Transportation Security Are Distinct Functions, Even During a Pandemic

The Aviation and Transportation Security Act (“ATSA”), enacted after the terrorist attacks of September 11th, 2001, created the TSA and charged it with ensuring transportation **security**, including civil aviation **security**. *See* Pub. L. No. 107-71, 115 Stat. 597 (2001). A review of 49 U.S.C., Chapter 449, makes clear that Congress’s mandate to the TSA Administrator was with regards to passenger screening, cargo screening, managing intelligence relating to threats to civil aviation, technology to detect weapons and explosives, federal air marshals, and similar matters.

When it comes to aviation safety, including air traffic control, pilot standards, aircraft standards, and passenger safety requirements, the U.S. Department of Transportation, typically through the well-known Federal Aviation Administration (FAA) sub-agency, has been assigned plenary authority over these matters. 49 U.S.C., Chapter 401. It is FAA rules that prohibit you from tampering with the lavatory smoke detector, interfering with a flight crew, or getting up when the “Fasten Seatbelt” sign is on – not TSA rules.

When it comes to general public health issues, other federal agencies, such as the Centers for Disease Control and Prevention (CDC), likely have concurrent jurisdiction with the FAA over matters relating to the public's health while in transit. Respondent's administrative record makes clear that the CDC indeed issued coronavirus-related rules that apply. AR #6, "Centers for Disease Control and Prevention Notice."

Congress has been entirely clear and consistent in separating security responsibilities from safety responsibilities, a distinction which makes perfect sense given that the two missions require very different focuses and skill sets. In other words, preventing an accident is an entirely different world from preventing an intentional attack. "Security" simply does not include every action motivated in preventing the loss of human life. No one takes "security" measures when they are diagnosed with cancer. This is despite the fact that the threat posed by coronavirus is very real, just as the threat caused by cancer is real, and just as the threat caused by terrorists is real. But the courts would never allow TSA to set smoking guidelines, emissions limits, or warning label requirements for the purpose of preventing cancer – even if these rules only applied in airports – because public health is unrelated to *transportation security*.

A review of TSA's own regulations demonstrates that TSA knows, or at least knew, the difference between security matters and non-security matters, and

has worked in furtherance of that limited former goal for the last two decades. Transportation security is about preventing “an act of criminal violence, aircraft piracy, and the introduction of an unauthorized weapon, explosive, or incendiary into an aircraft.” Opposition to Mot. for Stay Pending Review, p. 6, *citing* 49 C.F.R. § 1542.101(a)(1). Elsewhere in Title 49, Part 1542, we see regulations regarding “unauthorized entry, presence, and movement of individuals.” § 1542.201(b). We see regulations regarding training programs. § 1542.213. We see recordkeeping requirements for attempts at piracy or other law enforcement matters. § 1542.221. But we do not see anything about public health, nor preventing accidents, enforcing building codes or plane maintenance records, or the like.

The fact of the matter is that before January 2021, TSA had never attempted to include general safety matters within its security duties. “When an agency claims to discover in a long-extant statute an unheralded power to regulate” the Court must “greet its announcement with a measure of skepticism.” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*quotation marks omitted*). This skepticism should not be tempered by the urgencies of a pandemic, as powers granted during urgent times will not be yielded back when normality restores itself.

II. TSA Lacks Authority to Regulate the Public Health, and the Directives Should Be Set Aside

Nowhere in any statute has TSA ever been assigned responsibility for aviation safety matters or for any public health-related matter whatsoever. Given that no statute even hints at authority to delve into public health regulations, the challenged orders are *ultra vires*, and an analysis could stop there. But, the orders challenged are even more insidious, because they were not the result of formal agency rulemaking, as would be required by the Administrative Procedures Act, but rather they were issued under existing federal statutes and regulations that allow TSA to publish “security directives.” For example, Security Directive 1542-21-01 states on its face that it was issued under the authority of “49 U.S.C. 114 and 44903; 49 CFR 1542.303.” Petition for Review, Exhibit A. 49 U.S.C. § 114, in subsection (l)(2), simply allows the issuance of security directives “to protect transportation security.” 49 U.S.C. § 44903 is a section titled “Air transportation security” and does not discuss “security directives” at all. 49 C.F.R. § 1542.303 is the actual authority that details compliance requirements for security directives, but makes clear that authority is only granted when “additional security measures are necessary to respond to a threat assessment or to a specific threat against civil aviation.”

TSA, in its opposition to Petitioner's Motion to Stay Pending Review, raised three arguments as to why even if the Court finds a distinction between safety and security, its rules should be allowed to stand. Petitioner assumes these arguments will be repeated in Respondent's brief and addresses them here to begin the conversation.

First, TSA argued that even if perhaps security does not, *per se*, cover public health issues, it is nevertheless "inextricably intertwined" with public health. This argument is unsupported by law, history, or logic. The nation has survived for the 20 years since 9/11 by having the CDC deal with public health, FAA deal with airplane-specific safety matters, and TSA deal with people trying to blow up airplanes, and never before has it been necessary for one agency to creep into the mission of the other. Restricting TSA from focusing on public health matters in no way interferes with TSA's security mission: TSA is no better able to stop terrorists with passengers wearing masks. In fact, just the opposite: allowing TSA to regulate public health would distract TSA from their security mission, and if anything, face masks make it harder for TSA to identify dangerous people, not easier. Its orders are thus easily "extricable" from the rest of its mission.

Second, TSA argued that if it does not work to stop the spread of the pandemic, its employees may call out sick and thus it will not have the staffing to continue its security mission. Its authority – and its need – to stop the spread of

coronavirus outside of its own checkpoints is no greater than that of the United States Postal Service, the Internal Revenue Service, or the Federal Communications Commission, who similarly would prefer their employees to show up for work in order to accomplish their missions. This connection is simply too attenuated to bridge the gap between an issue within TSA's authority and an issue without their authority, as there would be no limit to *any* agency's ability to utilize this "loophole²."

Third, TSA argued that it is merely playing a supporting role to the Centers for Disease Control and Prevention ("CDC"). Opp. to Mot. for Stay Pending Review, p. 9 (TSA ordered by parent agency to "support 'the CDC in the enforcement of any orders or other requirements necessary to . . . mitigate the spread of COVID-19 through the transportation system.'"). Were TSA doing no more than helping the CDC to enforce its own orders, we would not be here. But, as Respondent conceded, TSA issued its own orders, creating its own additional requirements and penalties beyond those created by the CDC. Opp. to Mot. to Stay

² The petition does not challenge TSA's authority to make safety rules that apply at their own checkpoints. It is the fact that the challenged rules apply even to areas that are free of their own employees that sinks this particular argument.

Pending Review, p. 21 (“Aircraft and airport operators³ face civil penalties for failing to comply with security directives”). This is not “providing support.” This is not “coordinating.” This is regulation in a field in which TSA is not entitled to regulate. The CDC could have, but did not, create a civil penalty for non-compliance, just as it could have, but did not, order common carriers to engage in reporting of non-compliance. TSA did that, despite lacking authority to do so.

The appropriate remedy here is to set aside the TSA’s orders in their entirety... and not just for Petitioner. When “regulations are unlawful, the ordinary result is that the rules are vacated — not that their application to the individual petitioner is proscribed.” *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (*quotation marks omitted*). Any lesser remedy would serve only to incentive the agency to continue making *ultra vires* orders. This is true even during a pandemic. *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Human Servs.*, No. 20-CV-3377 (D.D.C., May 5th, 2021) (vacating coronavirus-related order of the CDC after finding CDC lacked statutory authority to issue it).

³ Likewise, the passengers themselves are subject to these civil penalties for non-compliance, as publicly confirmed by TSA. See Petition, p. 2, fn. 2 (“TSA may issue penalties to those who refuse to wear a face mask”).

CONCLUSION

Petitioner stresses that the prudence of a mask mandate is not what is before the Court. What is before the Court is an agency rule that exceeds the agency's statutory and regulatory authority. If TSA is permitted to begin to legislate general safety matters in airports and on airplanes, there will simply no longer be any limit to their powers with regards to civil aviation and the transportation system as a whole. There is no distinction between the authority they claim to stop a virus and the authority that would be required to set crew sleep requirements, maintenance requirements for the escalator between arrivals and departures, or the speed limit on the roads entering the parking garage.

Luckily, the existence of a pandemic does not mean we must choose between following the law or protecting the public health: local governments and airlines have already taken care of the matter, and if the federal government feels that it must put its weight into the matter, there are other agencies that can do so, or Congress may pass a law granting TSA more authority. Until that time, TSA has no authority to issue the challenged orders, and it would have failed to comply with its own regulations and the Administrative Procedures Act even if it did. As such, Petitioner asks the Court to set aside any "security directives" or other policies requiring airlines or airport operators to enforce mask-related policies, and to

enjoin TSA from levying a civil penalty against a member of the public, relating to mask-wearing, where the incident happens at any location other than a TSA checkpoint or other TSA property.

The government may re-create its masks-in-transit rules under the appropriate legal frameworks – but TSA’s attempt to legislate beyond its reach must be invalidated.

Dated: Washington, D.C.
May 10th, 2021

Respectfully submitted,

/s/Jonathan Corbett

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CERTIFICATE OF COMPLIANCE

This document complies with the type volume limit of Fed. R. App P. 27(d)(2)(A) because it contains approximately 3,050 words. This document complies with the type face and style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it uses a 14-point proportionally spaced font.

Dated: Washington, D.C.
May 10th, 2021

Respectfully submitted,

/s/Jonathan Corbett

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CERTIFICATE OF SERVICE

I, Jonathan Corbett, certify that on May 10th, 2021, I effected service of this brief upon all respondents by using the CM/ECF system.

Dated: Washington, D.C.
May 10th, 2021

Respectfully submitted,

/s/Jonathan Corbett

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JONATHAN CORBETT,
Petitioner

No. 21-1074

v.

**AFFIRMATION OF JONATHAN
CORBETT**

TRANSPORTATION SECURITY
ADMINISTRATION, *and*
DAVID P. PEKOSKE, *in his official
capacity as Administrator of the
Transportation Security Administration,*
Respondents

I, Jonathan Corbett, hereby affirm the following under penalty of perjury:

1. My name is Jonathan Corbett, I am the Petitioner of the above captioned action, a member of the Bar of the Court, and over the age of majority.
2. I am, and have been for more than a decade, a “frequent flyer,” having flown several hundred thousands of miles in the past decade, including at least a dozen flights during the “pandemic period” of the previous 12 months.
3. I intend to continue this rate of travel, and have my next future flight booked for June 7th, 2021.
4. But for TSA’s security directives challenged in this action compelling me to do so, I would wear a mask at fewer times. For example, while seated at a table having a meal, I would not wear a mask “between bites” but for TSA’s

rules. I would also not wear masks while outdoors and socially-distant from other members of the public but for TSA's rules.

Dated: Washington, D.C.
May 10th, 2021

Respectfully submitted,

/s/Jonathan Corbett

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Transportation
Security
Administration

U.S. Department of Homeland Security
Transportation Security Administration
6595 Springfield Center Drive
Springfield, Virginia 20598

EMERGENCY AMENDMENT

NUMBER EA 1546-21-01A

SUBJECT Security Measures – Mask Requirements

EFFECTIVE DATE May 12, 2021

EXPIRATION DATE September 13, 2021

CANCELS AND SUPERSEDES EA 1546-21-01

APPLICABILITY Foreign air carriers regulated under 49 CFR 1546.101(a) and (b)

AUTHORITY 49 U.S.C. 114, 44902, and 44903; 49 CFR 1546.105(d)

LOCATION(S) All flights to, from, or within the United States

PURPOSE AND GENERAL INFORMATION

Due to the ongoing COVID-19 pandemic and to reduce the spread of the virus, the President issued an Executive Order, *Promoting COVID-19 Safety in Domestic and International Travel*, on January 21, 2021, requiring masks to be worn in **and on** airports, on commercial aircraft, and in various modes of surface transportation.¹ On January 27, 2021, the Acting Secretary of Homeland Security determined a national emergency existed² requiring the Transportation Security Administration (TSA) to issue this Emergency Amendment (EA) to implement the Executive Order and enforce the related Order³ issued by the Centers for Disease Control and Prevention (CDC), pursuant to the authority of 49 U.S.C. sections 114, 44902, and 44903. Consistent with these mandates and the TSA's authority, TSA is issuing this EA requiring masks to be worn to mitigate the spread of COVID-19 during air travel. The requirements in this EA

¹ 86 FR 7205 (published Jan. 26, 2021).

² Acting Secretary David P. Pekoske, *Determination of a National Emergency Requiring Actions to Protect the Safety of Americans Using and Employed by the Transportation System (Jan. 27, 2021)*, available at <https://www.dhs.gov/publication/determination-national-emergency-requiring-actions-protect-safety-americans-using-and> (accessed Feb. 22, 2021). The Acting Secretary's determination directs TSA to take actions consistent with its statutory authorities "to implement the Executive Order to promote safety in and secure the transportation system." In particular, the determination directs TSA to support "the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system, including passengers and employees, from COVID-19 and to mitigate the spread of COVID-19 through the transportation system."

³ See Order Under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 Code of Federal Regulations (CFR) §§ 70.2, 71.31(B), 71.32(B); Requirement for Persons to Wear Masks While on Conveyances and at Stations, Ports, or Similar Transportation Hubs (January 29, 2021)

must be applied to all persons onboard a commercial aircraft operated by a foreign air carrier, including passengers and crewmembers, **and those already vaccinated**. TSA developed these requirements in consultation with the Federal Aviation Administration and CDC.

DEFINITIONS

For the purposes of this EA, the following definitions apply:

Conveyance has the same definition as under 42 CFR 70.1, meaning “an aircraft, train, road vehicle, vessel...or other means of transport, including military.”

Mask means a material covering the nose and mouth of the wearer, excluding face shields.⁴

ACTIONS REQUIRED

A. The foreign air carrier must provide passengers with prominent and adequate notice of the mask requirements to facilitate awareness and compliance.⁵ At a minimum, this notice must inform passengers, at or before check-in and as a pre-flight announcement, of the following:

1. Federal law requires each person to wear a mask at all times throughout the flight, including during boarding and deplaning.
2. Refusing to wear a mask is a violation of federal law and may result in denial of boarding, removal from the aircraft, and/or penalties under federal law.
3. If wearing oxygen masks is needed because of loss of cabin pressure or other event affecting aircraft ventilation, masks should be removed to accommodate oxygen masks.

B. The foreign air carrier must not board any person who is not wearing a mask, except as described in Sections D., E., and F.

C. The foreign air carrier must ensure that direct employees and authorized representatives wear a mask at all times while on an aircraft or in a U.S.⁶ airport location under the control of the foreign air carrier, except as described in Sections D., E., and F.

D. The requirement to wear a mask does not apply under the following circumstances:

⁴ A properly worn mask completely covers the nose and mouth of the wearer. A mask should be secured to the head, including with ties or ear loops. A mask should fit snugly but comfortably against the side of the face. Masks do not include face shields. Masks can be either manufactured or homemade and should be a solid piece of material without slits, exhalation valves, or punctures. Medical masks and N-95 respirators fulfill the requirements of this EA. CDC guidance for attributes of acceptable masks in the context of this EA is available at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.

⁵ Notice may include, if feasible, advance notifications on digital platforms, such as on apps, websites, or email; posted signage in multiple languages with illustrations; printing the requirement on boarding passes; or other methods as appropriate.

⁶ Including U.S. territories: American Samoa, Guam, the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

1. When necessary to temporarily remove the mask for identity verification purposes.
2. While eating, drinking, or taking oral medications for brief periods.⁷ Prolonged periods of mask removal are not permitted for eating or drinking; the mask must be worn between bites and sips.
3. While communicating with a person who is deaf or hard of hearing, when the ability to see the mouth is essential for communication.
4. If wearing oxygen masks is needed because of loss of cabin pressure or other event affecting aircraft ventilation.
5. If unconscious (for reasons other than sleeping), incapacitated, unable to be awakened, or otherwise unable to remove the mask without assistance.⁸

E. The following conveyances are exempted from this EA:

1. Persons in private conveyances operated solely for personal, non-commercial use.
2. A driver, when operating a commercial motor vehicle as this term is defined in 49 CFR 390.5, if the driver is the sole occupant of the vehicle.

F. This EA exempts the following categories of persons from wearing masks:⁹

1. Children under the age of 2.
2. People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.).¹⁰

⁷ The CDC has stated that brief periods of close contact without a mask should not exceed 15 minutes. *See* <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>

⁸ Persons who are experiencing difficulty breathing or shortness of breath or are feeling winded may remove the mask temporarily until able to resume normal breathing with the mask. Persons who are vomiting should remove the mask until vomiting ceases. Persons with acute illness may remove the mask if it interferes with necessary medical care such as supplemental oxygen administered via an oxygen mask.

⁹ Foreign air carriers may impose requirements, or conditions of carriage, on persons requesting an exemption from the requirement to wear a mask, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the foreign air carrier, as well as require evidence that the person does not have COVID-19 such as a negative result from a SAR-CoV-2 viral test or documentation of recovery from COVID-19. CDC definitions for SAR-CoV-2 viral test and documentation of recovery are available in Frequently Asked Questions at: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>. Foreign air carriers may also impose additional protective measures that improve the ability of a person eligible for exemption to maintain social distance (separation from others by 6 feet), such as scheduling travel at less crowded times or on less crowded conveyances, or seating or otherwise situating the individual in a less crowded section of the conveyance or airport. Foreign air carriers may further require that persons seeking exemption from the requirement to wear a mask request an accommodation in advance.

¹⁰ This is a narrow exception that includes a person with a disability who cannot wear a mask for reasons related to the disability; who, e.g., do not understand how to remove their mask due to cognitive impairment, cannot remove a

3. People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.
- G. If a passenger refuses to comply with an instruction given by a crew member with respect to wearing a mask, the foreign air carrier must:
1. Make best efforts to disembark the person who refuses to comply as soon as practicable; and
 2. Follow incident reporting procedures in accordance with its TSA-accepted security program or any applicable EAs and provide the following information, if available:
 - a. Date and flight number;
 - b. Passenger's full name and contact information;
 - c. Passenger's seat number on the flight;
 - d. Name and contact information for any crew members involved in the incident; and
 - e. The circumstances related to the refusal to comply.

PREEMPTION

The requirements in this EA do not preempt any host government, State, local, Tribal, or territorial rule, regulation, order, or standard necessary to eliminate or reduce a local safety hazard, which includes public health measures that are the same or more protective of public health than those required in this EA, if that provision is not incompatible with this EA.

ACKNOWLEDGMENT OF RECEIPT

The foreign air carrier must immediately provide written confirmation of receipt of this EA to its International Industry Representative (IIR).

DISSEMINATION REQUIRED

The foreign air carrier must immediately pass the information and measures set forth in this EA to any personnel having responsibilities in implementing the provisions of this directive. The foreign air carrier may share this EA with anyone subject to the provisions of this directive to

mask on their own due to dexterity/mobility impairments, or cannot communicate promptly to ask someone else to remove their mask due to speech impairments or language disorders, or cannot wear a mask because doing so would impede the function of assistive devices/technology. It is not meant to cover persons for whom mask-wearing may only be difficult. **The CDC issued additional guidance on disability exemptions on March 23, 2021, which is available at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.**

include but not limited to: host government, federal, state, and local government personnel; authorized representatives; catering personnel; vendors; airline club staff; contractors; etc.

APPROVAL OF ALTERNATIVE MEASURES

The foreign air carrier must immediately notify its IIR if unable to implement any of the measures in this EA, or in any TSA-approved alternative measure. In accordance with 49 CFR 1546.105, the foreign air carrier may submit proposed alternative measures and the basis for submitting those measures to its IIR.


Darby LaJoye
Senior Official Performing the Duties of the Administrator



**Transportation
Security
Administration**

U.S. Department of Homeland Security
Transportation Security Administration
6595 Springfield Center Drive
Springfield, Virginia 20598

SECURITY DIRECTIVE

NUMBER SD 1582/84-21-01A

SUBJECT Security Measures – Mask Requirements

EFFECTIVE DATE May 12, 2021

EXPIRATION DATE September 13, 2021

CANCELS AND SUPERSEDES SD 1582/84-21-01

APPLICABILITY Each owner/operator identified in 49 CFR 1582.1(a); each owner/operator identified in 49 CFR 1584.1 that provides fixed-route service as defined in 49 CFR 1500.3

AUTHORITY 49 U.S.C. 114

LOCATION United States

PURPOSE AND GENERAL INFORMATION

Due to the ongoing COVID-19 pandemic and to reduce the spread of the virus, the President issued an Executive Order, *Promoting COVID-19 Safety in Domestic and International Travel*, on January 21, 2021, requiring masks to be worn in **and on** airports, on commercial aircraft, and in various modes of surface transportation.¹ On January 27, 2021, the Acting Secretary of Homeland Security determined a national emergency existed² requiring the Transportation Security Administration (TSA) to issue this Security Directive (SD) to implement the Executive Order and enforce the related Order³ issued by the Centers for Disease Control and Prevention (CDC), pursuant to the authority of 49 U.S.C. section 114. Consistent with these mandates and TSA's authority, TSA is issuing this SD requiring masks to be worn to mitigate the spread of

¹ 86 FR 7205 (published Jan. 26, 2021).

² Acting Secretary David P. Pekoske, *Determination of a National Emergency Requiring Actions to Protect the Safety of Americans Using and Employed by the Transportation System (Jan. 27, 2021)*, available at <https://www.dhs.gov/publication/determination-national-emergency-requiring-actions-protect-safety-americans-using-and> (accessed Feb. 22, 2021). The Acting Secretary's determination directs TSA to take actions consistent with its statutory authorities "to implement the Executive Order to promote safety in and secure the transportation system." In particular, the determination directs TSA to support "the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system, including passengers and employees, from COVID-19 and to mitigate the spread of COVID-19 through the transportation system."

³ See Order Under Section 361 of the Public Health Service Act (42 U.S.C. § 264) and 42 Code of Federal Regulations §§ 70.2, 71.31(B), 71.32(B); Requirement for Persons to Wear Masks While on Conveyances and at Stations, Ports, or Similar Transportation Hubs (January 29, 2021).

COVID-19. The requirements in this SD must be applied to all persons in or on one of the conveyances or a transportation facility used by one of the modes identified above, **including those already vaccinated**. TSA developed these requirements in consultation with the Department of Transportation (including the Federal Railroad Administration, the Federal Transit Administration, and the Federal Motor Carrier Safety Administration) and the CDC.

DEFINITIONS

For the purpose of this SD, the following definitions apply:

Conveyance has the same definition as under 42 CFR 70.1, meaning “an aircraft, train, road vehicle, vessel...or other means of transport, including military.”

Mask means a material covering the nose and mouth of the wearer, excluding face shields.⁴

Transportation hub/facility means any airport, bus terminal, marina, seaport or other port, subway stations, 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.

ACTIONS REQUIRED

- A. Owner/Operators must notify passengers with prominent and adequate notice of the mask requirements to facilitate awareness and compliance.⁵ At a minimum, this notice must inform passengers, at the time tickets are purchased or when otherwise booking transportation *and* at the time the conveyance departs its location after boarding passengers, of the following:
1. Federal law requires wearing a mask while on the conveyance and failure to comply may result in denial of boarding or removal.
 2. Refusing to wear a mask is a violation of federal law; passengers may be subject to penalties under federal law.
- B. Owner/Operators must require that individuals wear a mask, except as described in Sections D., E., or F., as follows:

⁴ A properly worn mask completely covers the nose and mouth of the wearer. A mask should be secured to the head, including with ties or ear loops. A mask should fit snugly but comfortably against the side of the face. Masks do not include face shields. Masks can be either manufactured or homemade and should be a solid piece of material without slits, exhalation valves, or punctures. Medical masks and N-95 respirators fulfill the requirements of this SD. CDC guidance for attributes of acceptable masks in the context of this SD is available at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.

⁵ Notice may include, if feasible, advance notifications on digital platforms, such as on apps, websites, or email; posted signage in multiple languages with illustrations; printing the requirement on tickets; or other methods as appropriate.

1. Any persons in a public transportation, passenger railroad, or bus conveyance covered by this SD.
 2. Any person in public areas of transportation hubs/facilities controlled by the owner/operator (such as for purposes of purchasing tickets, waiting areas, and platforms for boarding and disembarking) for the duration of travel, boarding, and disembarking.
- C. Owner/Operators must 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, except as described in Sections D., E., or F.
- D. The requirement to wear a mask does not apply under the following circumstances:
1. When necessary to temporarily remove the mask for identity verification purposes.
 2. While eating, drinking, or taking oral medications for brief periods⁶. Prolonged periods of mask removal are not permitted for eating or drinking; the mask must be worn between bites and sips.
 3. While communicating with a person who is deaf or hard of hearing, when the ability to see the mouth is essential for communication.
 4. If unconscious (for reasons other than sleeping), incapacitated, unable to be awakened, or otherwise unable to remove the mask without assistance.⁷
- E. The following conveyances are exempted from wearing masks:
1. Persons in private conveyances operated solely for personal, non-commercial use.
 2. A driver, when operating a commercial motor vehicle as this term is defined in 49 CFR 390.5, if the driver is the sole occupant of the vehicle.

⁶ The CDC has stated that brief periods of close contact without a mask should not exceed 15 minutes. *See* <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>

⁷ Persons who are experiencing difficulty breathing or shortness of breath or are feeling winded may remove the mask temporarily until able to resume normal breathing with the mask. Persons who are vomiting should remove the mask until vomiting ceases. Persons with acute illness may remove the mask if it interferes with necessary medical care such as supplemental oxygen administered via an oxygen mask.

-
- F. This SD exempts the following categories of persons from wearing masks:⁸
1. Children under the age of 2.
 2. People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.).⁹
 3. People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.
- G. Owner/Operators must establish procedures to manage situations with persons who refuse to comply with the requirement to wear a mask. At a minimum, these procedures must ensure that if an individual refuses to comply with an instruction given by the owner/operator with respect to wearing a mask, the owner/operator must:
1. Deny boarding;
 2. Make best efforts to disembark the individual as soon as practicable; or
 3. Make best efforts to remove the individual from the transportation hub/facility.
- H. If an individual's refusal to comply with the mask requirement constitutes a significant security concern, the owner/operator must report the incident to the Transportation Security Operations Center (TSOC) at 1-866-615-5150 or 1-703-563-3240 in accordance with 49 CFR 1570.203.

⁸ Owner/Operators may impose requirements, or conditions of carriage, on persons requesting an exemption from the requirement to wear a mask, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the owner/operator, as well as require evidence that the person does not have COVID-19 such as a negative result from a SAR-CoV-2 viral test or documentation of recovery from COVID-19. CDC definitions for SAR-CoV-2 viral test and documentation of recovery are available in Frequently Asked Questions at: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>. Owners/Operators may also impose additional protective measures that improve the ability of a person eligible for exemption to maintain social distance (separation from others by 6 feet), such as scheduling travel at less crowded times or on less crowded conveyances, or seating or otherwise situating the individual in a less crowded section of the conveyance or transportation hub/facility. Owners/Operators may further require that persons seeking exemption from the requirement to wear a mask request an accommodation in advance.

⁹ This is a narrow exception that includes a person with a disability who cannot wear a mask for reasons related to the disability; who, e.g., do not understand how to remove their mask due to cognitive impairment, cannot remove a mask on their own due to dexterity/mobility impairments, or cannot communicate promptly to ask someone else to remove their mask due to speech impairments or language disorders, or cannot wear a mask because doing so would impede the function of assistive devices/technology. It is not meant to cover persons for whom mask-wearing may only be difficult. **The CDC issued additional guidance on disability exemptions on March 23, 2021, which is available at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.**

PREEMPTION

The requirements in this SD do not preempt any State, local, Tribal, or territorial rule, regulation, order, or standard necessary to eliminate or reduce a local safety hazard, which includes public health measures that are the same or more protective of public health than those required in this SD, if that provision is not incompatible with this SD.

PROCEDURES FOR SECURITY DIRECTIVES

- A. The owner/operator must immediately provide written confirmation of receipt of this SD via email to TSA at TSA-Surface@tsa.dhs.gov.
- B. The owner/operator must immediately disseminate the information and measures in this SD to corporate senior management, security management representatives, and any personnel having responsibilities in implementing the provisions in this directive. The owner/operator may widely share this SD with anyone subject to the provisions of this directive to include, but not limited to, federal, state, and local government personnel; direct owner/operator employees; tenants; contractors; transport personnel; taxi drivers; law enforcement; etc.
- C. All individuals responsible for implementing this SD must be briefed by the owner/operator. If the owner/operator is unable to implement the measures in this SD, the owner/operator must submit proposed alternative measures and the basis for submitting the alternative measures to TSA for approval.
- D. The owner/operator may comment on this SD by submitting data, views, or arguments in writing to TSA via email at TSA-Surface@tsa.dhs.gov. TSA may amend the SD based on comments received. Submission of a comment does not delay the effective date of the SD.

APPROVAL OF ALTERNATIVE MEASURES

The owner/operator must immediately notify TSA via email at TSA-Surface@tsa.dhs.gov if unable to implement any of the measures in this SD. The owner/operator may submit proposed alternative measures and a justification for adopting those measures to the email addresses above.



Darby LaJoye

Senior Official Performing the Duties of the Administrator



**Transportation
Security
Administration**

U.S. Department of Homeland Security
Transportation Security Administration
6595 Springfield Center Drive
Springfield, Virginia 20598

SECURITY DIRECTIVE

NUMBER **SD 1544-21-02A**

SUBJECT Security Measures – Mask Requirements

EFFECTIVE DATE **May 12, 2021**

EXPIRATION DATE **September 13, 2021**

CANCELS AND SUPERSEDES **SD 1544-21-02**

APPLICABILITY Aircraft operators regulated under 49 CFR 1544.101

AUTHORITY 49 U.S.C. 114, 44902, and 44903; 49 CFR 1544.305

LOCATION(S) All Locations

PURPOSE AND GENERAL INFORMATION

Due to the ongoing COVID-19 pandemic and to reduce the spread of the virus, the President issued an Executive Order, *Promoting COVID-19 Safety in Domestic and International Travel*, on January 21, 2021, requiring masks to be worn in **and on** airports, on commercial aircraft, and in various modes of surface transportation.¹ On January 27, 2021, the Acting Secretary of Homeland Security determined a national emergency existed² requiring the Transportation Security Administration (TSA) to issue this Security Directive (SD) to implement the Executive Order and enforce the related Order³ issued by the Centers for Disease Control and Prevention (CDC), pursuant to the authority of 49 U.S.C. sections 114, 44902, and 44903. Consistent with these mandates and TSA's authority, TSA is issuing this SD requiring masks to be worn to mitigate the spread of COVID-19 during air travel. The requirements in this SD must be applied

¹ 86 FR 7205 (published Jan. 26, 2021).

² Acting Secretary David P. Pekoske, *Determination of a National Emergency Requiring Actions to Protect the Safety of Americans Using and Employed by the Transportation System (Jan. 27, 2021)*, available at <https://www.dhs.gov/publication/determination-national-emergency-requiring-actions-protect-safety-americans-using-and> (accessed Feb. 22, 2021). The Acting Secretary's determination directs TSA to take actions consistent with its statutory authorities "to implement the Executive Order to promote safety in and secure the transportation system." In particular, the determination directs TSA to support "the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system, including passengers and employees, from COVID-19 and to mitigate the spread of COVID-19 through the transportation system."

³ See Order Under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 Code of Federal Regulations (CFR) §§ 70.2, 71.31(B), 71.32(B); Requirement for Persons to Wear Masks While on Conveyances and at Stations, Ports, or Similar Transportation Hubs (January 29, 2021)

to all persons onboard a commercial aircraft operated by a U.S. aircraft operator, including passengers and crewmembers, **including those already vaccinated**. TSA developed these requirements in consultation with the Federal Aviation Administration and CDC.

DEFINITIONS

For the purposes of this SD, the following definitions apply:

Conveyance has the same definition as under 42 CFR 70.1, meaning “an aircraft, train, road vehicle, vessel...or other means of transport, including military.”

Mask means a material covering the nose and mouth of the wearer, excluding face shields.⁴

ACTIONS REQUIRED

- A. The aircraft operator must provide passengers with prominent and adequate notice of the mask requirements to facilitate awareness and compliance.⁵ At a minimum, this notice must inform passengers, at or before check-in and as a pre-flight announcement, of the following:
1. Federal law requires each person to wear a mask at all times throughout the flight, including during boarding and deplaning.
 2. Refusing to wear a mask is a violation of federal law and may result in denial of boarding, removal from the aircraft, and/or penalties under federal law.
 3. If wearing oxygen masks is needed because of loss of cabin pressure or other event affecting aircraft ventilation, masks should be removed to accommodate oxygen masks.
- B. The aircraft operator must not board any person who is not wearing a mask, except as described in Sections D., E., and F.
- C. The aircraft operator must ensure that direct employees and authorized representatives wear a mask at all times while on an aircraft or in an airport location under the control of the aircraft operator, except as described in Sections D., E., and F.
- D. The requirement to wear a mask does not apply under the following circumstances:
1. When necessary to temporarily remove the mask for identity verification purposes.

⁴ A properly worn mask completely covers the nose and mouth of the wearer. A mask should be secured to the head, including with ties or ear loops. A mask should fit snugly but comfortably against the side of the face. Masks do not include face shields. Masks can be either manufactured or homemade and should be a solid piece of material without slits, exhalation valves, or punctures. Medical masks and N-95 respirators fulfill the requirements of this SD. CDC guidance for attributes of acceptable masks in the context of this SD is available at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.

⁵ Notice may include, if feasible, advance notifications on digital platforms, such as on apps, websites, or email; posted signage in multiple languages with illustrations; printing the requirement on boarding passes; or other methods as appropriate.

2. While eating, drinking, or taking oral medications for brief periods.⁶ Prolonged periods of mask removal are not permitted for eating or drinking; the mask must be worn between bites and sips.
3. While communicating with a person who is deaf or hard of hearing, when the ability to see the mouth is essential for communication.
4. If wearing oxygen masks is needed because of loss of cabin pressure or other event affecting aircraft ventilation.
5. If unconscious (for reasons other than sleeping), incapacitated, unable to be awakened, or otherwise unable to remove the mask without assistance, or otherwise unable to remove the mask without assistance.⁷

E. The following conveyances are exempted from this SD:

1. Persons in private conveyances operated solely for personal, non-commercial use.
2. A driver, when operating a commercial motor vehicle as this term is defined in 49 CFR 390.5, if the driver is the sole occupant of the vehicle.

F. This SD exempts the following categories of persons from wearing masks:⁸

1. Children under the age of 2.
2. People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.).⁹

⁶ The CDC has stated that brief periods of close contact without a face mask should not exceed 15 minutes. See <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>

⁷ Persons who are experiencing difficulty breathing or shortness of breath or are feeling winded may remove the mask temporarily until able to resume normal breathing with the mask. Persons who are vomiting should remove the mask until vomiting ceases. Persons with acute illness may remove the mask if it interferes with necessary medical care such as supplemental oxygen administered via an oxygen mask.

⁸ Aircraft operators may impose requirements, or conditions of carriage, on persons requesting an exemption from the requirement to wear a mask, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the aircraft operator, as well as require evidence that the person does not have COVID-19 such as a negative result from a SAR-CoV-2 viral test or documentation of recovery from COVID-19. CDC definitions for SAR-CoV-2 viral test and documentation of recovery are available in Frequently Asked Questions at: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>. Aircraft operators may also impose additional protective measures that improve the ability of a person eligible for exemption to maintain social distance (separation from others by 6 feet), such as scheduling travel at less crowded times or on less crowded conveyances, or seating or otherwise situating the individual in a less crowded section of the conveyance or airport. Aircraft operators may further require that persons seeking exemption from the requirement to wear a mask request an accommodation in advance.

⁹ This is a narrow exception that includes a person with a disability who cannot wear a mask for reasons related to the disability; who, e.g., do not understand how to remove their mask due to cognitive impairment, cannot remove a mask on their own due to dexterity/mobility impairments, or cannot communicate promptly to ask someone else to

3. People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.
- G. If a passenger refuses to comply with an instruction given by a crew member with respect to wearing a mask, the aircraft operator must:
1. Make best efforts to disembark the person who refuses to comply as soon as practicable; and
 2. Follow incident reporting procedures in accordance with its TSA-approved standard security program and provide the following information, if available:
 - a. Date and flight number;
 - b. Passenger's full name and contact information;
 - c. Passenger's seat number on the flight;
 - d. Name and contact information for any crew members involved in the incident; and
 - e. The circumstances related to the refusal to comply.

PREEMPTION

The requirements in this SD do not preempt any State, local, Tribal, or territorial rule, regulation, order, or standard necessary to eliminate or reduce a local safety hazard, which includes public health measures that are the same or more protective of public health than those required in this SD, if that provision is not incompatible with this SD.

ACKNOWLEDGMENT OF RECEIPT

The aircraft operator must immediately provide written confirmation of receipt of this SD to its Principal Security Inspector (PSI) or International Industry Representative (IIR), as appropriate.

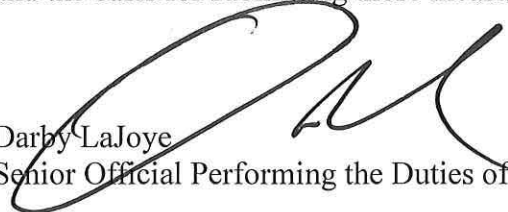
DISSEMINATION REQUIRED

The aircraft operator must immediately pass the information and measures set forth in this SD to any personnel having responsibilities in implementing the provisions of this directive. The aircraft operator may share this SD with anyone subject to the provisions of this directive to include but not limited to: federal, state, and local government personnel; authorized representatives; catering personnel; vendors; airline club staff; contractors; etc.

remove their mask due to speech impairments or language disorders, or cannot wear a mask because doing so would impede the function of assistive devices/technology. It is not meant to cover persons for whom mask-wearing may only be difficult. **The CDC issued additional guidance on disability exemptions on March 23, 2021, which is available at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.**

APPROVAL OF ALTERNATIVE MEASURES

In accordance with 49 CFR 1544.305(d), the aircraft operator must immediately notify its PSI or IIR, as appropriate, if unable to implement any of the measures in this SD, or in any TSA-approved alternative measure. The aircraft operator may submit proposed alternative measures and the basis for submitting those measures to its PSI or IIR.



Darby LaJoye
Senior Official Performing the Duties of the Administrator



**Transportation
Security
Administration**

U.S. Department of Homeland Security
Transportation Security Administration
6595 Springfield Center Drive
Springfield, Virginia 20598

SECURITY DIRECTIVE

NUMBER **SD 1542-21-01A**

SUBJECT Security Measures – Mask Requirements

EFFECTIVE DATE **May 12, 2021**

EXPIRATION DATE **September 13, 2021**

CANCELS AND SUPERSEDES **SD 1542-21-01**

APPLICABILITY Airport operators regulated under 49 CFR 1542.103 and airlines that have exclusive area agreements under 49 CFR 1542.111

AUTHORITY 49 U.S.C. 114 and 44903; 49 CFR 1542.303

LOCATION Airports within the United States

PURPOSE AND GENERAL INFORMATION

Due to the ongoing COVID-19 pandemic and to reduce the spread of the virus, the President issued an Executive Order, *Promoting COVID-19 Safety in Domestic and International Travel*, on January 21, 2021, requiring masks to be worn in **and on** airports, on commercial aircraft, and in various modes of surface transportation.¹ On January 27, 2021, the Acting Secretary of Homeland Security determined a national emergency existed² requiring the Transportation Security Administration (TSA) to issue this Security Directive (SD) to implement the Executive Order and enforce the related Order³ issued by the Centers for Disease Control and Prevention (CDC), pursuant to the authority of 49 U.S.C. sections 114 and 44903. Consistent with these

¹ 86 FR 7205 (published Jan. 26, 2021).

² Acting Secretary David P. Pekoske, *Determination of a National Emergency Requiring Actions to Protect the Safety of Americans Using and Employed by the Transportation System (Jan. 27, 2021)*, available at <https://www.dhs.gov/publication/determination-national-emergency-requiring-actions-protect-safety-americans-using-and> (accessed Feb. 22, 2021). The Acting Secretary's determination directs TSA to take actions consistent with its statutory authorities "to implement the Executive Order to promote safety in and secure the transportation system." In particular, the determination directs TSA to support "the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system, including passengers and employees, from COVID-19 and to mitigate the spread of COVID-19 through the transportation system."

³ See Order Under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 Code of Federal Regulations (CFR) §§ 70.2, 71.31(B), 71.32(B); Requirement for Persons to Wear Masks While on Conveyances and at Stations, Ports, or Similar Transportation Hubs (January 29, 2021)

mandates and TSA's authority, TSA is issuing this SD requiring masks to be worn to mitigate the spread of COVID-19 during air travel. TSA developed these requirements in consultation with the Federal Aviation Administration and CDC. **The requirements in this directive apply to all individuals, including those already vaccinated.**

DEFINITIONS

For the purposes of this SD, the following definitions apply:

Conveyance has the same definition as under 42 CFR 70.1, meaning "an aircraft, train, road vehicle, vessel...or other means of transport, including military."

Mask means a material covering the nose and mouth of the wearer, excluding face shields.⁴

ACTIONS REQUIRED

Except at locations under the control of an aircraft operator, foreign air carrier, or a federal government agency or their contractors, the airport operator must apply the following measures:

- A. The airport operator must make best efforts to provide individuals with prominent and adequate notice of the mask requirements to facilitate awareness and compliance.⁵ This notice must also inform individuals of the following:
 1. Federal law requires wearing a mask at all times in and on the airport and failure to comply may result in removal and denial of re-entry.
 2. Refusing to wear a mask in or on the airport is a violation of federal law; individuals may be subject to penalties under federal law.
- B. The airport operator must require that individuals in or on the airport wear a mask, except as described in Sections D., E., and F.
 1. If individuals are not wearing masks, ask them to put a mask on.
 2. If individuals refuse to wear a mask in or on the airport, escort them from the airport.
- C. The airport operator must ensure direct employees, authorized representatives, tenants, and vendors wear a mask at all times in or on the airport, except as described in Sections D., E., and F.

⁴ A properly worn mask completely covers the nose and mouth of the wearer. A mask should be secured to the head, including with ties or ear loops. A mask should fit snugly but comfortably against the side of the face. Masks do not include face shields. Masks can be either manufactured or homemade and should be a solid piece of material without slits, exhalation valves, or punctures. Medical masks and N-95 respirators fulfill the requirements of this SD. CDC guidance for attributes of acceptable masks in the context of this SD is available at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.

⁵ Notice may include, if feasible, advance notifications on digital platforms, such as on apps, websites, or email; posted signage in multiple languages with illustrations; or other methods as appropriate.

D. The requirement to wear a mask does not apply under the following circumstances:

1. When necessary to temporarily remove the mask for identity verification purposes.
2. While eating, drinking, or taking oral medications for brief periods.⁶ Prolonged periods of mask removal are not permitted for eating or drinking; the mask must be worn between bites and sips.
3. While communicating with a person who is deaf or hard of hearing, when the ability to see the mouth is essential for communication.
4. If unconscious (for reasons other than sleeping), incapacitated, unable to be awakened, or otherwise unable to remove the mask without assistance.⁷

E. The following conveyances are exempted from this SD:

1. Persons in private conveyances operated solely for personal, non-commercial use.
2. A driver, when operating a commercial motor vehicle as this term is defined in 49 CFR 390.5, if the driver is the sole occupant of the vehicle.

F. This SD exempts the following categories of persons from wearing masks:⁸

1. Children under the age of 2.

⁶ The CDC has stated that brief periods of close contact without a mask should not exceed 15 minutes. See <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>

⁷ Persons who are experiencing difficulty breathing or shortness of breath or are feeling winded may remove the mask temporarily until able to resume normal breathing with the mask. Persons who are vomiting should remove the mask until vomiting ceases. Persons with acute illness may remove the mask if it interferes with necessary medical care such as supplemental oxygen administered via an oxygen mask.

⁸ Airport operators may impose requirements, or conditions of carriage, on persons requesting an exemption from the requirement to wear a mask, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the airport operator, as well as require evidence that the person does not have COVID-19 such as a negative result from a SAR-CoV-2 viral test or documentation of recovery from COVID-19. CDC definitions for SAR-CoV-2 viral test and documentation of recovery are available in Frequently Asked Questions at: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>. Airport operators may also impose additional protective measures that improve the ability of a person eligible for exemption to maintain social distance (separation from others by 6 feet), such as scheduling travel at less crowded times or on less crowded conveyances, or seating or otherwise situating the individual in a less crowded section of the conveyance or airport. Airport operators may further require that persons seeking exemption from the requirement to wear a mask request an accommodation in advance.

2. People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.).⁹
 3. People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.
- G. If an individual refuses to comply with mask requirements, follow incident reporting procedures in accordance with the Airport Security Program and provide the following information, if available:
1. Date and airport code;
 2. Individual's full name and contact information;
 3. Name and contact information for any direct airport employees or authorized representatives involved in the incident; and
 4. The circumstances related to the refusal to comply.

PREEMPTION

The requirements in this SD do not preempt any State, local, Tribal, or territorial rule, regulation, order, or standard necessary to eliminate or reduce a local safety hazard, which includes public health measures that are the same or more protective of public health than those required in this SD, if that provision is not incompatible with this SD.

ACKNOWLEDGMENT OF RECEIPT

The airport operator must immediately provide written confirmation of receipt of this SD to the Federal Security Director (FSD).

DISSEMINATION REQUIRED

The airport operator must immediately pass the information and measures set forth in this SD to any personnel having responsibilities in implementing the provisions of this directive. The airport operator may share this SD with anyone subject to the provisions of this directive to include but not limited to: federal, state, and local government personnel; direct airport employees or authorized representatives; vendors; tenants; exclusive area agreement holders; contractors; transport personnel; taxi drivers; law enforcement; etc.

⁹ This is a narrow exception that includes a person with a disability who cannot wear a mask for reasons related to the disability; who, e.g., do not understand how to remove their mask due to cognitive impairment, cannot remove a mask on their own due to dexterity/mobility impairments, or cannot communicate promptly to ask someone else to remove their mask due to speech impairments or language disorders, or cannot wear a mask because doing so would impede the function of assistive devices/technology. It is not meant to cover persons for whom mask-wearing may only be difficult. **The CDC issued additional guidance on disability exemptions on March 23, 2021, which is available at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.**

APPROVAL OF ALTERNATIVE MEASURES

The operator must immediately notify the FSD whenever any action required by this SD or a TSA-approved alternative measure cannot be carried out. In accordance with 49 CFR 1542.303(d), the airport operator may submit proposed alternative measures and the basis for submitting those measures in writing to the Assistant Administrator for Policy, Plans, and Engagement through the FSD.



Darby LaJoye

Senior Official Performing the Duties of the Administrator

**United States Court Of Appeals
for the District of Columbia Circuit**

No. 21-1074

JONATHAN CORBETT,
Petitioner

v.

TRANSPORTATION SECURITY ADMINISTRATION
AND
DAVID P. PEKOSKE,
*IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR
OF THE TRANSPORTATION SECURITY ADMINISTRATION,
Respondents*

Petition for Review of Agency Orders Under 49 U.S.C § 46110

REPLY BRIEF OF PETITIONER JONATHAN CORBETT

JONATHAN CORBETT, ESQ.
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INTRODUCTION

The government defends its position in this challenge to whether TSA has authority to promulgate and enforce public health measures, on the following bases:

- 1) That Petitioner does not have the requisite constitutional standing or statutory “substantial interest” either because a) the public health measures do not “originate” with TSA, b) other sources of law independently prohibit the same conduct, or c) there is no genuine threat of enforcement (Respondent’s Brief, pp. 36 – 42);
- 2) That TSA’s “security” powers include the power to regulate the public health (Respondent’s Brief, pp. 44 – 50); and
- 3) That even if TSA’s everyday authority does not include public health matters, its emergency powers allow it to act as it has done here (Respondent’s Brief, pp. 50 – 52).

For the reasons discussed *infra*, each of these arguments is specious and the petition should be granted.

ARGUMENT

I. TSA's Novel Understanding of "Injury-In-Fact" Is Unsupported, Illogical, and Inapplicable

The government asserts that Petitioner lacks standing (or alternatively, the “substantial interest” required by 49 U.S.C. § 46110), because he cannot demonstrate an injury-in-fact. Respondent’s Brief, pp. 36 – 42. This, they say, is for three reasons.

First, TSA argues that “[t]he obligation to wear a mask in transportation hubs and on conveyances originates” not with TSA, but with CDC or local law. This argument borders on frivolous. TSA issued *its own* mandate that it alleges it is authorized to do under *its own* statutory authority. Just because the CDC created a similar law first and nudged TSA to do the same does not mean that TSA’s order did not “originate” at TSA.

Second, TSA argues that regardless of whether or not the law “originated” at TSA, because other sources of law prohibit the same conduct, there is no injury to Petitioner. Effectively, TSA’s view is that when multiple sources of law prohibit the same conduct, they all must be challenged at the same time. The government cites no authority to support its proposition, and at least one circuit court has been unwilling to accept it. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th

Cir. 2012) (“not required to solve all roadblocks simultaneously and is entitled to tackle one roadblock at a time”). The government’s argument is further undercut by its concession that other sources of law vary in their scope, applicability, and enforcement. Respondent’s Brief, p. 55 (arguing TSA’s version of the mask mandate is necessary, despite other sources of law, because “some [are] more stringent than others”). TSA’s mandate is not a one-for-one fit with the CDC’s order as far as its scope, *see* Motion for Stay Pending Review, pp. 3, 4, fn 3., and it indisputably creates new and distinct penalties. Setting aside TSA’s order will provide Petitioner some relief, and a path to more relief, and thus there is an injury that the Court can redress.

Third, TSA argues that there is no “credible threat” of enforcement against Petitioner and that there is no reason to think TSA will “aggressively enforce” its policies against him. Respondent’s Brief, pp. 39, 40. But “aggressive enforcement” has never been required to achieve standing, and Petitioner has alleged that he would engage in conduct prohibited by the order but for the order. *See* Mot. for Stay Pending Review, Ex. A, ¶ 4. The sole case cited by the government in support of this, *Matthew A. Goldstein, PLLC v. U.S. Dep’t of State*, 851 F.3d 1 (D.C. Cir. 2017) is easily distinguished, as the plaintiff did not intend to engage in such conduct.

The government is telling Petitioner that he may not do what he regularly does and otherwise would do. Petitioner therefore has an injury, and partial redress plus the clearing of a roadblock on the path to further redress each mean that there is sufficient redressability and Petitioner has both standing and substantial interest.

II. TSA's Feigned Inability to Distinguish "Security" from Safety is Disingenuous

The government argues that there is no "principled means to discern the difference between issues of 'safety' and those of 'security.'" Respondent's Brief, p. 44. The line is simple: "security" is protection against intentional attack, while "safety" is protection against natural or accidental causes.

No one would get a coronavirus vaccine and describe it as a "security measure." No one wears a mask and says, "I just put on my security equipment." No one practices social distancing and says, "I keep back for my security." These are things that one does to keep themselves *safe*.

Likewise, no one hires a "safety guard" to protect their property from theft or their person from assault. No one uses a "safety alarm" to avoid burglary. The government does not describe its counterterrorism measures as "safety efforts."

We hire *security* guards, install *security* alarms, and create the Transportation *Security* Administration to protect us from crime, terrorism, and the like¹.

TSA argues that Petitioner’s cogent distinction “finds no purchase in the statutory text.” Respondent’s Brief, p. 44. But Petitioner indeed goes through the text of TSA’s enabling statute and demonstrates that overwhelmingly, TSA is tasked with items that only logically apply to protection from intentional attacks. Petitioner’s Brief, pp. 11 – 13. TSA’s ability to find the word “safety” in several sections of statute *that are not at all relevant to the issuing of the security directives at issue here* does not change the fact that paragraph after paragraph of TSA-related statute speaks strictly of keeping weapons and terrorists off of airplanes.

Contrary to the government’s assertion, it is not in any way a “remarkable position that Congress has not provided the TSA with authority to address the threat that a global pandemic ... poses to the nation’s transportation system.” Respondent’s Brief, p. 13. It simply gave that authority to other agencies, such as the FAA and CDC.

¹ In some contexts, it may be that that “security” is a *subset* of “safety.” That is, “safety” is to be free from harm generally. But virtually never do we – and more importantly, does Congress – use “security” as encompassing general safety matters, or as an exact synonym for security.

III. TSA Emergency Powers Do Not Allow Unilateral Regulation

TSA may play supporting roles to other agencies, such as the FAA and CDC, when those agencies act during an emergency. 49 U.S.C. § 114(g). However, TSA apparently needs to learn the difference between supporting, or coordinating with, other agencies, and going off on its own detour.

Respondent brings up the “Do Not Board” program, during which the CDC and TSA coordinated to prevent known infectious people from boarding airplanes. Respondent’s Brief, pp 49, 50, see also 80 Fed. Reg. 16400. What they fail to mention is that the CDC did the *entirety* of the regulating. It was CDC who published in the Federal Register. It was CDC who determined who was on the list and why. CDC simply asked TSA to deny boarding to those on the list, and TSA agreed. In contrast, here we have TSA issuing *its own orders* that have the force of law and threaten the public and the industry with large fines for non-compliance. Had the CDC created a civil penalty and asked TSA to write tickets on their behalf, we may not be here today.

But that is not what happened here. TSA used not its authority to coordinate, but its alleged authority to regulate. And despite there being an “emergency,” TSA does not have any authority to create its own law during an emergency. Congress could have given TSA that power, but it did not.

CONCLUSION

The government's brief does much to describe the pandemic and its rationale behind a mask policy, but does nothing to counter Petitioner's assertion that it simply lacks the authority to create and enforce such a policy. TSA may not enlarge the scope of its authority just because it wants to be helpful. The Court must set aside these *ultra vires* orders.

Dated: Washington, D.C.
June 30th, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type volume limit of Fed. R. App P. 27(d)(2)(A) because it contains approximately 1,750 words. This document complies with the type face and style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it uses a 14-point proportionally spaced font.

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CERTIFICATE OF SERVICE

I, Jonathan Corbett, certify that on June 30th, 2021, I effected service of this brief upon all respondents by using the CM/ECF system.

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June 30th, 2021

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