Nos. 21-1220, 1221, 1225, 1236, 1237, & 1258

United States Court of Appeals
For the District of Columbia Circuit

LUCAS WALL, LEONARDO McDONNELL, MICHAEL SEKLECKI (on behalf of himself and his minor child M.S.), MICHAEL FARIS, CHARITY ANDERSON, ANGELA BYRD, MICHAEL CLARK, URI MARCUS, LARRY JAMES BONIN JR., ANTHONY EADES, KLEANTHIS ANDREADAKIS, THERESA MULLINS, & AARON ABADI,
Petitioners

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent

Petition for Review of TSA Security Directives & Emergency Amendment

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PETITIONERS' JOINT FINAL OPENING BRIEF

LUCAS WALL *et al.*
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I. PARTIES, RULINGS UNDER REVIEW, & RELATED CASES

1. **PETITIONERS:** Lucas Wall of Washington, D.C., (temporarily residing in The Villages, Florida, due to his inability to travel because of the Federal Transportation Mask Mandate); Leonardo McDonnell of Longwood, Florida; Michael Seklecki (on behalf of himself and his minor child M.S.) of Lake Mary, Florida; Michael Faris of Elizabethtown, Kentucky; Charity Anderson of Toledo, Ohio; Angela Byrd of Batavia, Ohio; Michael Clark of Toledo, Ohio; Uri Marcus of Houston, Texas (also residing in Jerusalem, Israel); Larry James Bonin Jr. of Youngsville, Louisiana; Anthony Eades of Warsaw, Missouri; Kleanthis Andreadakis of Henrico, Virginia; Theresa Mullins of Asheville, North Carolina; and Aaron Abadi of New York, New York
2. **RESPONDENT:** Transportation Security Administration, an agency within the Department of Homeland Security
3. ***AMICI CURIAE*:** None have yet appeared, however both parties have been informed that a large group of airline pilots and flight attendants plan to file an *amicus* brief April 18 in support of petitioners

4. **RULINGS UNDER REVIEW:** TSA SD 1542-21-01D (March 19, 2022; App. 26-30), TSA SD 1544-21-02D (March 19, 2022; App. 31-35), TSA-SD 1582/84-21-01D (March 19, 2022; App. 36-40), & TSA-EA 1546-21-01D (March 19, 2022; App. 41-45)[1]

5. **RELATED CASES:** These six Petitions for Review all originated in other Courts of Appeals and were transferred to the D.C. Circuit at the request of TSA: *Wall v. TSA*, No. 21-13619 (11th Cir.); *Faris v. TSA*, No. 21-3951 (6th Cir.); *Marcus v. TSA*, No. 21-60808 (5th Cir.); *Eades v. TSA*, No. 21-3362 (8th Cir.); *Andreadakis v. TSA*, No. 21-2173 (4th Cir.); and *Abadi v. TSA*, No. 21-2692 (2nd Cir.). This Court ordered March 3, 2022, that the six petitions be consolidated into the lead case *Wall v. TSA* and that petitioners submit briefs jointly.

   Also related is *Corbett v. TSA*, 19 F.4th 478 (D.C. Cir. 2021), which challenged the same Health Directives and Emergency Amendment but is distinguishable from this case because Petitioner Jonathan Corbett raised only one argument and is not disabled like 11 of the 13 petitioners in this consolidated lawsuit.

[1] When these six Petitions for Review were filed Oct. 19, 2021, the TSA orders in effect all ended with the letter "B" but have since been extended an additional two times. The current version ends with the letter "D" and is substantively identical to the directives issued earlier. *See* Letter from TSA filed March 21, 2022. Doc. 1,939,984.

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IV. GLOSSARY OF ABBREVIATIONS

- ACAA = Air Carrier Access Act
- APA = Administrative Procedure Act
- ATSA = Aviation & Transportation Security Act
- CDC = Centers for Disease Control & Prevention, an agency in HHS
- CICA = Convention on International Civil Aviation
- COVID-19 = Coronavirus Disease 2019
- DOT = Department of Transportation
- EUA = Emergency Use Authorization for a medical device issued by FDA under the FDCA
- FDA = Food & Drug Administration, an agency in HHS
- FDCA = Food, Drug, & Cosmetic Act
- FTMM = Federal Transportation Mask Mandate
- HHS = Department of Health & Human Services
- ICAO = International Civil Aviation Organization
- ICCPR = International Covenant on Civil & Political Rights
- Mask Mandate = Federal Transportation Mask Mandate
- OACP = Office of Aviation Consumer Protection, an agency in DOT
- OSHA = Occupational Safety & Health Administration, an agency in the Department of Labor
- PHSA = Public Health Service Act
- TSA = Transportation Security Administration, an agency in the Department of Homeland Security

V. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the four TSA challenged orders, consisting of three "Security Directives"[2] and one Emergency Amendment:

> "a person disclosing a substantial interest in an order issued by the … Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration … in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued." 49 USC § 46110(a).

All six Petitions for Review consolidated into this case were timely filed on the 60th day after the four orders were issued Aug. 20, 2021: TSA Health Directives 1542-21-01B, 1544-21-02B, and 1582/84-21-01B as well as Emergency Amendment 1546-21-01B. The measures – which form the enforcement arm of the Federal Transportation Mask Mandate ("FTMM" or "Mask Mandate") – have since been extended twice by changing the ending letter from "B" to "C" and then "D." The current versions are set to expire April 18, 2022, but since they have been extended four times previously, there is no

[2] TSA's orders are misnamed "Security Directives" but in fact have nothing to do with the agency's statutory mission of ensuring transportation security. Since the orders actually deal with purported public-health matters having nothing whatsoever to do with transportation security, we will refer to them properly as "Health Directives" throughout the remainder of this brief.

guarantee the administration will not keep them in place beyond the 18th. Even if they are allowed to expire, this case would not be moot because TSA could reimpose them at any time.

These six Petitions for Review are from final orders of TSA, giving this Court jurisdiction to review them. The Court has authority to "amend, modify, or set aside any part of the order…" 49 USC § 46110(c). The Administrative Procedure Act ("APA") also provides:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall … (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law…" 5 USC § 706.

VI. STATEMENT OF THE ISSUES

1. Do the challenged Health Directives and Emergency Amendment violate the Air Carrier Access Act ("ACAA") by allowing airlines to discriminate against the disabled who can't tolerate wearing face masks?
2. Does TSA's complete delegation of evaluating medical exemptions to the Mask Mandate to nonfederal entities violate petitioners' Fifth Amendment right to due process?
3. Do the challenged Health Directives and Emergency Amendment violate petitioners' constitutional guarantee of freedom to travel among the states and internationally?
4. Do the challenged Health Directives and Emergency Amendment violate the 10th Amendment by overruling the mask policies and laws of all 50 states and because they commandeer state employees to enforce federal orders?
5. Did TSA issue the three Health Directives and Emergency Amendment in excess of its statutory and regulatory authority to ensure transportation security?
6. Does TSA have authority to enforce an order (the Mask Mandate) of another executive agency (the Centers for Disease Control & Prevention

("CDC")) contained in a different department (Health & Human Services ("HHS")) of the Executive Branch that the other agency issued in excess of its constitutional, statutory, and regulatory authority?

7. Did TSA issue the challenged Health Directives and Emergency Amendment without notice and comment required by the APA?

8. Are the challenged Health Directives and Emergency Amendment arbitrary and capricious because TSA's administrative record contains no evidence that face masks reduce the spread of COVID-19, numerous studies and articles show they not only fail to slow coronavirus transmission but also harm human health in at least 68 documented ways, and TSA neglected to consider lesser alternatives?

9. Do the challenged Health Directives and Emergency Amendment violate petitioners' right under the Food, Drug, & Cosmetic Act ("FDCA") to refuse use of a medical device unauthorized by the Food & Drug Administration ("FDA") or permitted only an Emergency Use Authorization ("EUA")?

10. Do the challenged Health Directives and Emergency Amendment violate petitioners' fundamental human rights under two international treaties the United States has ratified?

VII. STATEMENT OF THE CASE

The four challenged TSA orders make up the enforcement scheme of the government's illegal and unconstitutional Federal Transportation Mask Mandate, put into place by President Joseph Biden by Executive Order 13998, signed Jan. 21, 2021, the day after he was inaugurated. 86 Fed. Reg. 7205 (Jan. 26, 2021). App. 2-7. Under the president's order, the Department of Homeland Security issued Determination 21-130 on Jan. 27, 2021, directing TSA to enforce a requirement that all passengers using any form of public transportation nationwide don face coverings. App. 8-9. CDC, with no statutory or regulatory authority and without giving notice and seeking public comments, issued an order "Requirement for Persons to Wear Masks While on Conveyances & at Transportation Hubs," effective Feb. 1, 2021. 86 Fed. Reg. 8,025 (Feb. 3, 2021); App. 10-15. TSA, also lacking statutory or regulatory authority and without giving notice or soliciting comments, produced Health Directives 1542-21-01, 1544-21-02, and 1582/84-21-01 as well as Emergency Amendment 1546-21-01 dated Jan. 31, 2021, to enforce CDC's *ultra vires* mask mandate. These four orders went into effect Feb. 2, 2021. App. 16-17.

TSA's original four Mask Mandate directives expired May 11, 2021. Again without any statutory or regulatory authority, notice, or public comment,

TSA issued orders April 29, 2021, extending the Mask Mandate enforcement until Sept. 13, 2021, by attaching the letter "A" to the original directives.

When these orders were about to expire Sept. 13, TSA (again without any statutory or regulatory authority, and without giving notice or asking for comments) issued another batch of orders Aug. 20, 2021, extending its Mask Mandate enforcement until Jan. 18, 2022, by substituting the letter "B" for the letter "A." The three Health Directives and one Emergency Amendment were renewed again until March 18, 2022, by substituting the letter "C" and then again until April 18, 2022, by substituting the letter "D."

The four challenged orders require, *inter alia*, that aircraft, transit bus, intercity bus, intercity rail, commuter rail, subway and other heavy rail, light rail, tram, streetcar, rideshare car, ferry, and other commercial conveyance and transportation hub operators: 1) mandate all passengers wear masks at all times unless outdoors; and 2) report noncompliance by passengers to TSA. The administration claims authority to levy fines starting at $500 for passengers who don't muzzle themselves.

The Mask Mandate remains in effect today despite the fact that all 50 states[3] have eliminated their mask requirements (App. 1,204); CDC currently

[3] 10 states never imposed statewide mask mandates at any time during the COVID-19 pandemic since the World Health Organization declared it March 11, 2020. All 40 states that required masks be worn in public spaces at some

recommends that Americans in 99.53% of counties do not don face coverings (App. 114-115); and 228 studies, articles, and videos compiled by petitioners demonstrate that masks do not reduce COVID-19 spread but harm human health in dozens of ways. https://bit.ly/masksarebad; index at App. 846-855.

points during the pandemic have abolished those restrictions. There are at least 14 states that prohibit by statute and/or executive order public entities including airport and transit authorities from requiring that any person cover their face. App. 1,204.

VIII. ARGUMENT SUMMARY

TSA's three Health Directives and one Emergency Amendment enforcing the Mask Mandate should be vacated by this Court – and the agency must be permanently enjoined from ever issuing future mask mandates without clear, unambiguous authorization from Congress – because they violate numerous constitutional, statutory, and regulatory provisions plus international treaties guaranteeing fundamental rights to petitioners. TSA issued the orders in violation of the APA by failing to give notice and solicit comments. The agency may not self-create an "emergency" 10½ months into a global pandemic, when it had plenty of time to follow APA's notice-and-comment procedures from March 2020 to January 2021.

TSA's mask orders exclude millions of Americans (including 11 petitioners) with medical conditions who can't safely wear face coverings from using any mode of the nation's public-transportation system in violation of the Air Carrier Access Act; Americans with Disabilities Act; Rehabilitation Act; Food, Drug, & Cosmetic Act; and other federal laws and international treaties. They also violate our constitutional right to travel and the Fifth and 10th amendments.

The Supreme Court has issued at least seven emergency orders[4] unequivocally holding that governments may not restrict constitutional rights or disregard clear statutory terms even in the name of fighting a pandemic. Because TSA issued the challenged orders without constitutional, statutory, or regulatory authority, this Court must immediately set aside TSA's enforcement of the Mask Mandate, as numerous tribunals have done in halting similar pandemic measures the Executive Branch dictated without congressional authority. A permanent injunction should also issue prohibiting TSA from ever again forcing travelers to obstruct their breathing unless Congress provides the agency with clear, unambiguous authorization to mandate masks.

[4] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 66 (2020); *Robinson v. Murphy*, 141 S.Ct. 972 (2020); *High Plains Harvest Church v. Polis*, 141 S.Ct. 527 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021); *Tandon v. Newsom*, 141 S.Ct. 1294 (2021); *Alabama Ass'n of Realtors v. HHS,* 141 S.Ct. 2485 (2021); and *NFIB v. Dept. of Labor*, No. 21A244 (U.S. Jan. 13, 2022).

IX. PETITIONERS' STANDING TO SEEK RELIEF

All 13 petitioners have standing[5] to contest the four TSA mask orders because we have "a substantial interest" due to: A) our medical conditions making it impossible for us to tolerate covering our face (11 petitioners plus M.S.); objections to being forced to use an FDA unauthorized or Emergency Use Authorization medical device (all petitioners); and inability to work in the aviation sector as a flight attendant because of objections to being commandeered as the "mask police" by the federal government (one petitioner). 49 USC § 46110 (a). Also, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 USC § 702.

1. Petitioner Lucas Wall was denied boarding an intrastate Southwest Airlines flight June 2, 2021, from Orlando to Fort Lauderdale, Florida, because he can't wear a mask due to his Generalized Anxiety Disorder. App. 156-159. Southwest refused to grant him an exemption and TSA refused

[5] This section is required by D.C. Cir. R. 28(a)(7) and may be "set forth … either in the body of the brief or in an addendum bound with the brief or bound separately." Because this section is required by local rule and not FRAP 28, we do not count this statement of Petitioners' Standing to Seek Relief in the word count established by FRAP 32(a)(7)(B) and modified by this Court's March 3, 2022, order. The local rule's allowance that this section could be included in an addendum, rather than the body, leads us to conclude that the Court does not intend this part to count against the argument word limit.

to allow him through its security checkpoint. App. 174-177. Watch videos of this incident on YouTube at https://bit.ly/LucasMaskLawsuitPL. In addition to aviation, Mr. Wall was prohibited from riding a LYNX transit bus in Orlando because of his inability to mask. Watch video of this incident on YouTube at https://bit.ly/LucasMaskMandate9. As a direct result of the Mask Mandate, Mr. Wall has been stranded at his mother's house in The Villages, Florida, for the past 10 months, unable to return home to Washington, D.C., because TSA forbids him from using any mode of public transportation and he does not own a car to be able to drive himself. His exhibits are at App. 155-236.

2. Petitioner Leonardo McDonnell has been banned from riding Space Coast Transit vehicles in Melbourne, Florida, because of his inability to mask due to several medical conditions. App. 238. He has also suffered harassment several times when flying Delta Air Lines without a mask, including one flight where the attendants constantly berated him for not muzzling even though he has a written mask exemption.
3. Petitioner Michael Seklecki can't wear a mask because of his anxiety disorder. Covering his face makes it uncomfortable for him to breathe. His son, M.S., age 5, also can't tolerate having his breathing blocked. M.S.

struggles with behavioral and developmental delays due to Autism Spectrum Disorder. This disorder prevents M.S. from being able to wear a face mask or shield. App. 240-241. M.S. receives specialized medical treatment at Boston Children's Hospital in Massachusetts for severe gastroenterology disorders that Florida physicians have been unable to diagnose and treat. Mr. Seklecki and M.S. need to fly from Orlando to Boston often for medical care. They have been banned by Frontier Airlines solely because M.S. can't wear a mask. App. 249-254. Other airlines have harassed and demeaned the family. App. 285-288 & 316-317. Being denied the right to fly because they can't wear masks jeopardizes M.S.' life as it's not practical for them to make the lengthy drive to and from Boston every time he has a medical appointment. Their exhibits are at App. 239-322.

4. Petitioner Michael Faris is a maintenance supervisor on helicopters that are used in the western part of the United States to suppress wildfires and perform power-line construction. He must travel on commercial airlines every 12 days for work. He is medically exempt by a neurologist from wearing a mask due to Generalized Anxiety Disorder (App. 324), but the airlines refuse to grant him a mask exception because of the Mask Mandate. App. 392-435. American Airlines banned Mr. Faris in October 2021 for simply asking for a medical waiver at check-in. App. 446-449. Forced

masking on long flights causes Mr. Faris extreme anguish. While muzzled because of the Mask Mandate, he has fainted twice, once aboard a plane (smashing his face into a galley cart) and once in a jetway about to board an aircraft, causing injury to his elbows and knees. App. 436-445. His exhibits are at App. 323-462.

5. The Mask Mandate has caused many traumas for Petitioner Charity Anderson. She has been illegally restrained, harassed, and denied access to public transportation even though she has a medical exemption from face coverings due to her permanent disabilities. She is forced to endure many obstacles in attempts to get medical exemptions. Many times her requests are denied by transportation providers who are not licensed to practice medicine and have no capability of evaluating her conditions. TSA's mask orders have caused Ms. Anderson undue stress in her professional and personal life by greatly restricting her transportation options. She was denied access to mass transit twice last year in Memphis, Tennessee. Prohibited from flying because she can't wear a mask, she must drive to every out-of-state event, resulting in additional costs and wasted time. If her car were to break down, she would have no means to move around her own city on buses because of the Mask Mandate. Being permanently disabled,

Ms. Anderson is unable to ride a bike or walk long distances. Ms. Anderson recently booked a flight for a business trip and was bombarded with numerous illegal obstacles and intrusive procedures she must succumb to just to take an important work trip. Southwest Airlines then denied her medical waiver, with no opportunity to appeal to TSA or any other federal agency. The Mask Mandate places extreme burdens on her, restraining her freedom of movement.

6. Petitioner Angela Byrd has been unable to fly since the Mask Mandate took effect Feb. 1, 2021, because she can't wear a face mask. She objects to forced muzzling because moisture builds up inside a mask, which becomes a hotbed for bacteria and pathogens. Ms. Byrd has battled an anxiety disorder for most of her life. When she covers her nose and mouth, she feels like she can't breathe. This makes her extremely nervous, which produces a sweat response, which moistens the mask and hurts her health. She also suffers from Chronic Obstructive Pulmonary Disorder and has lost a third of her lung capacity. She easily gets short of breath without a mask. When she dons a face covering, she doesn't get good air circulation and is forced to remove the mask to breathe. Ms. Byrd also has tachycardia. Her resting pulse will, at times, be greater than 100 beats per minute. When she gets anxious and feels as if she can't breathe, her pulse

goes even higher. She is already nervous when flying. Because of the Mask Mandate, she will not put herself in a situation where she can't breathe freely as it would be dangerous to her health. Like so many millions of other disabled Americans, the Mask Mandate means Ms. Byrd is precluded from using the nation's aviation and transit systems.

7. Petitioner Michael Clark has encountered harassment and intimidation as well as been denied access to public transportation due to the Mask Mandate even though he has a mask exemption from his doctor. He does not own a car and in the past used public transportation regularly. TSA's Mask Mandate has limited his ability to function on a day-to-day basis. He is unable to do simple things such as going to the doctor or college in person. The Mask Mandate represents an attack on the disabled, especially working-class citizens such as Mr. Clark who do not have expendable income to travel privately in their own automobile.
8. Petitioner Uri Marcus is a dual citizen of the United States and Israel, residing most of the year in Jerusalem. He suffers from Hyperactive Airways Disease (a sensory processing disorder), respiratory distress (shortly after donning a mask), and anxiety. These conditions place him at risk of losing consciousness if his breathing is blocked. Covering his nose and mouth can also trigger breakouts of Basal Cell Carcinoma (skin cancer) as well as

skin lesions and/or infections (from prolonged skin contact with the mask), as was the case with his wife. All of these conditions are documented in his and his wife's medical records. App. 464-466. He can't comply with the Mask Mandate, and most airlines and other transportation providers are not granting him exemptions (the only ones that approve do so with several illegal conditions that are unacceptable. App. 470-481, 486-495, 498-506, 508-518, 522-527, & 535-541. Covering his nose and mouth instantly produces life-threatening circumstances for Mr. Marcus, which further exacerbates his medical disabilities – especially when menacing announcements are made by airline and transit workers warning him of dire consequences should he remove his mask to be able to breathe freely. Mr. Marcus does not own a vehicle and therefore is fully reliant upon public transportation, which he has been banned from using in the United States since Feb. 1, 2021, because of the Mask Mandate. TSA's orders negatively impact him by endangering his mental, physical, emotional, and psychological health. For Mr. Marcus to travel from his residence in Israel to his principal place of business in Texas for the nonprofit organization for which he serves as president, or to visit family and conduct business in his original home state of California, he must fly 12-14 hours across the Atlantic Ocean. Because of the Mask Mandate and his

medical conditions, he hasn't been able to travel to the United States for more than 14 months. Moreover, after Mr. Marcus filed this Petition for Review, the agency retaliated by banning him from Pre-Check eligibility indefinitely. App. 542. His exhibits are at App. 463-590.

9. Petitioner Larry James Bonin Jr. is a lead mechanic for a helicopter company that is performs wildland firefighting and power-line construction in the western United States. He is required to travel by commercial aircraft every 12 days for work. He has a full beard that extends six inches below his chin. Wearing a mask over his nose and under his chin is not physically possible. Mr. Bonin purchased a mask that is sold and marketed as a face covering for men with beards that extends well past his chin. The mask is called a "beard tarp." The airlines refuse to allow him to travel with this mask and demand that he adds a surgical mask (unauthorized by FDA or approved only as an Emergency Use Authorization experimental medical device) under it. Mr. Bonin objects to forced muzzling as it does nothing to reduce the transmission of COVID-19 but endangers human health. Unauthorized and Emergency Use Authorization surgical masks (typically light blue in color) that TSA and airlines provide to passengers to comply with the Mask Mandate do not provide any protection against an airborne virus. Mr. Bonin wants to exercise his legal

right under the Food, Drug, & Cosmetic Act to refuse administration of any unauthorized or Emergency Use Authorization medical device.

10. Petitioner Anthony Eades has medical conditions making it impossible for him to tolerate covering his face. App. 592-596. Being shot in 2003 in Iraq while serving in the U.S. military caused some of his disabling conditions. His upper-respiratory distress limits his ability to breathe. Even without an experimental medical device obstructing Mr. Eades' oxygen intake, he has asthma that flares up with no notice. He suffers from Traumatic Brain Injury and Post-Traumatic Stress Disorder, which cause Mr. Eades to suffer severe anxiety and claustrophobia. When something is on his face, his anxiety level kicks into high gear. Mr. Eades was denied the ability to fly by TSA and Southwest Airlines from Phoenix, Arizona, home to Kansas City, Missouri, on March 14, 2021, solely because he can't wear a face covering. He was thrown off a flight before takeoff because he pulled his mask off his face so he could get some breaths. TSA revoked his Pre-Check membership for a year for needing to breathe, and then after Mr. Eades filed this Petition for Review, the agency retaliated by banning him from Pre-Check indefinitely. App. 661. After this horrible harassment, Mr. Eades has yet to fly again and will not until the Mask Mandate is struck down or repealed. This has caused him to miss spending holidays with his

15-year-old from a prior marriage who lives in another state. His exhibits are at App. 591-662.

11. Petitioner Kleanthis Andreadakis is a dual citizen of the United States and Greece. He generally travels via air domestically 3-4 times a year and internationally at least once annually. Most airlines have denied him the ability to fly since Feb. 1, 2021, because of TSA's Mask Mandate enforcement despite the fact Mr. Andreadakis has a doctor's note advising against the wearing of a mask. App. 664-665. Covering his nose and mouth inhibits his natural ability to breath, causes ongoing pain and discomfort, interferes with his ability to communicate, exacerbates his medical conditions, and could result in serious long-term health harms. Mr. Andreadakis was denied the ability to fly by JetBlue Airways and Southwest Airlines from Richmond, Virginia, to Boston, Massachusetts, to help his son move solely because he can't wear a face covering. Although the Department of Transportation ("DOT") has sustained two of his complaints, finding that JetBlue and Southwest indeed violated the law by denying his medical waivers, the agency imposed no penalty. App. 779-790. Many airlines continue refusing to grant him exemptions to the Mask Mandate and he has no recourse to appeal to TSA or any other federal agency. After being refused air transportation, Mr. Andreadakis had to drive to Massachusetts

and pay $250 to rent a trailer to attach to the back of his son's moving truck to ferry his car back to Virginia. Even during the few times an airline has granted Mr. Andreadakis a mask exemption, he's been routinely harassed by TSA officers at security checkpoints as well as by airport police officers who feel they are supposed to enforce the mandate (but it's not a criminal matter), resulting in travel delays and anxiety. His exhibits are at App. 663-790.

12. Petitioner Theresa Mullins resigned from her job as a flight attendant for Allegiant Air on Jan 31, 2021, because she refused to enforce the Mask Mandate, which took effect the next day. Ms. Mullins worked as a flight attendant for 13 years. She had planned on working for Allegiant until retirement. When Allegiant became the last major U.S. airline to mandate masks in July 2020, she was repulsed. Ms. Mullins believes cloth and surgical masks – which FDA classifies as unauthorized or Emergency Use Authorization medical devices – do nothing to prevent viral transmission. She quit her job because she refused to be commandeered by TSA to tell passengers that they must wear a mask. Her creed is that it's morally wrong to be forced to mandate anyone obstruct their breathing. She is unable to return to work in the aviation industry until the Mask Mandate is struck down or abolished.

13. Petitioner Aaron Abadi suffers from Sensory Processing Disorder, which means he can't wear a mask as it creates a sensory overload and can cause major discomfort. App. 792. His multiple attempts to fly on planes, ride on trains and buses, and use rideshare car services have been almost completely unsuccessful since the Mask Mandate took effect Feb. 1, 2021. Mr. Abadi's employment for 30 years has been in waste management, requiring him to travel extensively both domestically and abroad. He's currently unemployed – and effectively unemployable – until the Mask Mandate is vacated or repealed so he may fly again to pursue business opportunities domestically and abroad. Despite his medical records, he has been denied mask exemptions by numerous airlines. App. 793-844. His exhibits are at App. 791-844.

X. ARGUMENT

A. The Mask Mandate must be vacated because it violates the Air Carrier Access Act.

Health experts say tens of millions of Americans with a variety of medical conditions can't safely wear a mask. App. 1,115-1,133. CDC agrees, noting

> "that a person who has trouble breathing or is unconscious, incapacitated, or otherwise unable to remove the face mask without assistance should not wear a face mask or cloth face covering. … Additionally, people with post-traumatic stress disorder, severe anxiety, claustrophobia, autism, or cerebral palsy may have difficulty wearing a face mask." App. 106.

TSA's mask mandate blatantly discriminates against all of us with medical conditions who can't wear masks in violation of the Air Carrier Access Act. 49 USC § 41705(a). TSA may not issue a directive that is contrary to statute.

Petitioners include a 5-year-old autistic boy, an Army veteran shot while serving this country in Iraq, a man with Tourette Syndrome, and a man who has fainted twice while muzzled on planes and suffered injuries.

Numerous DOT regulations illustrate how the Mask Mandate is illegal. DOT, violating its own regulations, has allowed airlines to prohibit all passengers with disabilities who can't wear face masks from flying and/or impose numerous onerous requirements to obtain an exemption. DOT, four days after the Mask Mandate took effect, actually issued guidance to airlines that they are free to break the law! App. 18-25. But information provided to

passengers by DOT contradicts its Feb. 5, 2021, Notice of Enforcement Policy. In a document "New Horizons: Information for the Air Traveler with a Disability," DOT informs flyers, *inter alia*, that "Airlines may not require passengers with disabilities to provide advance notice of their intent to travel or of their disability…" App. 50-57.

> "If a person who seeks passage ***has*** an infection or disease that would be transmittable during the normal course of a flight, and that has been ***deemed so*** by a federal public health authority knowledgeable about the disease or infection, then the carrier may: … Impose on the person a condition or requirement not imposed on other passengers (e.g., wearing a mask)." *Id*. (emphasis added).

DOT publishes a 190-page handbook "What Airline Employees, Airline Contractors, & Air Travelers with Disabilities Need to Know About Access to Air Travel for Persons with Disabilities: A Guide to the Air Carrier Access Act (ACAA) and Its Implementing Regulations…" Relevant excerpts of this handbook are at App. 58-88. "If, in your estimation, a passenger ***with a communicable disease or infection*** poses a direct threat to the health or safety of other passengers, you may … (iii) impose on that passenger a special condition or restriction (e.g., wearing a mask)." *Id*.

TSA falsely claims that the Mask Mandate doesn't unlawfully bar those with medical conditions who can't wear masks from traveling. The Health

Directives purport to allow the disabled to get mask exemptions, but the reality is TSA has permitted the airlines to make it nearly impossible. 11 of us have qualified disabilities but can't get exemptions. App. 155-844.

TSA's contention that we may request an exemption from the relevant airline is disingenuous because we've already done so many times and been refused. *Id.* This despite documentation of our medical conditions have been provided to airlines. App. 156-159, 238, 240-241, 324, 464-465, 592-596, 664-665, & 792. We have filed more than 100 complaints with DOT regarding the airlines' discrimination (a sample are at App. 155-844), but the department has only investigated two of those complaints. Outrageously it agreed with us that airlines broke the law, but imposed no penalty. App. 779-790.

The Mask Mandate violates the Air Carrier Access Act in at least eight ways. Here's an excerpt of TSA Health Directive SD 1544-21-02D with illegal sections highlighted in bold underline and corresponding DOT regulations placed in brackets:

> "Aircraft operators **may impose requirements, or conditions of carriage, on persons requesting an exemption from the requirement to wear a mask [1]**, including **medical consultation by a third party [2], medical documentation by a licensed medical provider [3], and/or other information as determined by the aircraft operator [4]**, 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 [5].** … 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 [6], or seating or otherwise situating the individual in a less crowded section of the conveyance [7]** or airport. Aircraft operators may further require that persons seeking exemption from the requirement to wear a mask **request an accommodation in advance [8]**." App. 33.

Air Carrier Access Act regulations violated:

1. "[Y]ou must not refuse to provide transportation to a passenger with a disability on the basis of his or her disability…" 14 CFR § 382.19(a).
2. Since airlines may not require a medical certificate for a passenger unless he/she has a communicable disease (14 CFR § 382.23(a)), they may also not require a third-party medical consultation. 14 CFR § 382.23(d).
3. "[Y]ou must not require a passenger with a disability to have a medical certificate as a condition for being provided transportation…" 14 CFR § 382.23(a). "You may … require a medical certificate for a passenger if he or she ***has*** a communicable disease or condition that could pose a direct threat to the health or safety of others on the flight." 14 CFR § 382.23(c)(1) (emphasis added).

4. Airlines are prohibited from requiring that a passenger wear a face covering or refuse him/her transportation unless they determine that the passenger "has" a communicable disease and poses a "direct threat" to other passengers and the flight crew. 14 CFR § 382.21. "In determining whether an individual poses a direct threat, you must make an ***individualized assessment***." 14 CFR § 382.19(c)(1) (emphasis added).
5. No provision of the Air Carrier Access Act or its accompanying regulations permits TSA to allow airlines to require that passengers submit a negative test for any communicable disease. Mandating disabled flyers needing a mask exemption submit a COVID-19 test before checking in but not requiring the same of nondisabled travelers is illegal discrimination. "[Y]ou must not subject passengers with a disability to restrictions that do not apply to other passengers…" 14 CFR § 382.33(a).
6. "[Y]ou must not limit the number of passengers with a disability who travel on a flight." 14 CFR § 382.17.
7. "[Y]ou must not exclude any passenger with a disability from any seat or require that a passenger with a disability sit in any particular seat, on the basis of disability…" 14 CFR § 382.87(a).
8. "[Y]ou must not require a passenger with a disability to provide advance notice of the fact that he or she is traveling on a flight." 14 CFR §

382.25.

Although TSA is not an air carrier, its orders can't violate provisions of federal law enacted by Congress (unlike the Mask Mandate, which never was) that protect the disabled from discrimination. TSA's directives allow airlines to violate numerous federal regulations prohibiting discrimination against the disabled. The 13 of us speak to this Court on behalf of the millions of Americans whose lives are being destroyed by the Mask Mandate because they must choose whether to endanger their health by covering their face or forgo use of all public transportation. This is a severe burden on the disabled, who already face many disadvantages in life because of our medical disorders.

> "The Navy provides a religious accommodation process, but by all accounts, it is theater. … It merely rubber stamps each denial. … Religious exemptions to the vaccine requirement are virtually non-existent. … the record indicates the denial of each request is predetermined. As a result, Plaintiffs need not wait for the Navy to engage in an empty formality. … The Court finds that exhaustion is futile and will not provide complete relief… In essence, the Plaintiffs' requests are denied the moment they begin. *U.S. Navy SEALs 1-26 v. Biden*, No. 4:21-cv-1236 (N.D. Tex. Jan. 3, 2022) (enjoining Navy's vaccine mandate).

Just like the Navy's automatic denial of requests for vaccine exemptions, TSA's Mask Mandate allows airlines and other transportation providers to rubber-stamp nearly every demand for a mask waiver "DENIED," as has occurred to 11 of us on dozens of occasions. Unlike with the Navy's vaccine

mandate, the Mask Mandate doesn't even provide the disabled any process for seeking a medical waiver from the government agency. TSA instead gives private companies the power to "consider" mask exemptions, virtually all of which are refused, making it a futile gesture to seek a nonexistent exemption.

> "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

TSA is not entitled to *Chevron* deference because it does not administer the Air Carrier Access Act, and therefore it has no authority to issue orders that over-ride a statute enacted by Congress and regulations duly promulgated by DOT. *Chevron* deference "is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity." *Turner v. Bristol*, 2021 U.S. Dist. LEXIS 178062 at *21 (M.D. Fla. Sept. 20, 2021). The scope of TSA's authority is not ambiguous. The agency may not issue directives that violate laws codified in the U.S. Code and rules published in the Code of Federal Regulations.

As this Court held just last month: "*Chevron* deference does not apply when an agency interprets a statute 'in a way that limits the work of a second statute' that a different agency administers. *Epic Systems*, 138 S. Ct. at 1629.

Here, the CDC administers § 265, but the Department of Homeland Security administers § 1158, as well as the two types of relief under § 1231…" *Huisha-Huisha v. Mayorkas*, No. 21-5200 (D.C. Cir. March 4, 2022) (partially enjoining CDC's Migrant Expulsion Order due to COVID-19).

When courts review the legal interpretations of an agency such as TSA regarding its compliance with statutes it does not administer, "such review can be more stringent: Courts sometimes review such matters *de novo*, or without any deference at all to the agency's interpretation." *Freeman v. DirecTV*, 457 F.3rd 1001, 1004 (9th Cir. 2006).

It's not enough for TSA to claim that its Mask Mandate directives claim to exempt those with disabilities from the requirement to wear masks. The actual language includes eight illegal provisions, therefore the three challenged Health Directives and one Emergency Amendment must be declared *ultra vires*.

It's especially troubling that DOT, the agency assigned by Congress to protect the rights of disabled flyers by enforcing the Air Carrier Access Act, has totally abdicated its statutory duty because of the Mask Mandate. The Office of Aviation Consumer Protection ("OACP"), a unit within DOT's Office of the General Counsel, issued a Notice of Enforcement Policy on Feb. 5, 2021, "to remind U.S. and foreign air carriers of their legal obligation to accommodate

the needs of passengers with disabilities when developing procedures to implement the Federal mandate on the use of masks to mitigate the public health risks associated with the Coronavirus Disease 2019 (COVID-19)." App. 18-25.

With the Mask Mandate and this DOT notice in hand, every commercial airline in the nation continues to violate the Air Carrier Access Act because TSA has told them in its Health Directives and Emergency Amendment that it's okay. DOT failed to advise airlines that the disability-exemption procedures contained in TSA's Mask Mandate directives are unlawful. The department even went so far as to inform airlines they may break the law. The Court must not sanction the Executive Branch's coordinated assault on passengers with disabilities.

B. The Mask Mandate must be vacated because it violates the Fifth Amendment right to due process.

The medical-waiver provisions of the Mask Mandate violate not only the Air Carrier Access Act but also the Constitution. "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. 5. Because the restriction of a citizen's movement from state to state may infringe upon that person's liberty, the Supreme Court has held that such restrictions are subject to the protections of the Fifth Amendment's Due

Process Clause.

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Ralls Corp. v. CFIUS*, 758 F.3rd 296, 315 (D.C. Cir. 2014). Due process means that before the government deprives an American of liberty such as the freedom to travel, the government must give notice, an opportunity to be heard, and the ability to object to the deprivation. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). TSA provides no such process when transportation providers refuse our medical exemptions.

The Mask Mandate deprives travelers of due process by assigning determinations on mask-exemption requests to private companies such as airlines and transit operators with no opportunity to appeal a denial to a neutral federal decisionmaker. Many of us have qualified disabilities (App. 156-159, 238, 240-241, 324, 464-465, 592-596, 664-665, & 792) but can't get exemptions (App. 155-844). When we receive denials from conveyance operators, there's no procedure to appeal to TSA or any other federal agency.

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. ... Freedom of movement is basic in our scheme of values. *See Crandall v. Nevada*, 6 Wall. 35, 44; *Williams v. Fears*, 179 U.S. 270, 274; *Edwards v. California*, 314 U.S. 160. ... Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary ... unbridled discretion to

grant or withhold it." *Kent v. Dulles*, 357 U.S. 116 (1958).

If TSA mandates masks and claims to allow disability exceptions, TSA itself constitutionally must provide due process in the form of a rapid pre-deprivation hearing to determine whether an airline or other transport provider wrongly applied the Health Directives in denying a disabled person a medical waiver.

> "Although the Air Force claims to provide a religious accommodation process, it proved to be nothing more than a quixotic quest for Plaintiff because it was 'by all accounts, … theater.' … Like every other religious-based request and appeal filtering its way through the Air Force's accommodation process, it was, save for the nine approved in the last two weeks, rubber-stamped with disapproval and denial. … With such a marked record disfavoring … accommodation requests, the Court easily finds that the Air Force's process to protect … rights is both illusory and insincere." *Air Force Officer v. Austin*, No. 5:22-cv-9 (M.D. Ga. Feb. 15, 2022).

Furthermore, the decision whether or not to obstruct the nose and mouth, a human's only two sources of breathing – an activity fundamental to the preservation of life – is a private determination for the individual, not the government. The Supreme Court has long recognized a person's right to privacy, which should include the ability to decide whether to cover the face. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear

and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

C. The Mask Mandate must be vacated because it violates the constitutional guarantee of freedom to travel.

TSA's mask directives restrict the free movement of disabled Americans such as ourselves who can't wear face masks as well as those who choose not to obstruct their natural breathing, causing dozens of documented health harms. https://bit.ly/masksarebad. The right to travel includes more than the ability to drive one's own car. Mr. Clark, Mr. Marcus, and Mr. Wall don't even own cars. They rely solely on public transportation to travel interstate and internationally. "The constitutional right to travel from one State to another, and necessarily to use the highways ***and other instrumentalities of interstate commerce*** in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757 (1966) (emphasis added). *See also Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972). "Other instrumentalities of interstate commerce" include airplanes, buses, trains, ferries, etc. – all of which are subject to the Mask Mandate.

Agency rules affecting constitutional rights must be drawn with precision. *NAACP v. Button*, 371 U.S. 415, 438 (1963); *United States v. Robel*, 389 U.S.

258, 265 (1967). They must be "tailored" to serve legitimate objectives. But the Mask Mandate violates the constitutional freedom to travel without undue governmental interference. "It is a familiar and basic principle, recently reaffirmed in *NAACP v. Alabama*, 377 U.S. 288, 307 ... that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). "[T]he 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence. ... the right is so important that it is 'assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all.'" *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

The Supreme Court elevated the right to travel to a sacrosanct level in American jurisprudence: a fundamental right. *United States v. Wheeler*, 254 U.S. 281 (1920). As a result, the high court consistently applies strict scrutiny to restrictions on the right to interstate and foreign travel. It has long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v.*

Thompson, 394 U.S. 618, 629 (1969). *See also Chicago v. Morales*, 527 U.S. 41, 53-54 (1999) (identifying "the right to move 'to whatsoever place one's own inclination may direct'").

Strict scrutiny is appropriate if the challenged order burdens the exercise of a fundamental right (freedom to travel, due process, 10th Amendment). *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Artway v. Att'y Gen.*, 81 F.3rd 1235, 1267 (3rd Cir. 1996).

Congress affirmed the constitutional right to fly for disabled Americans by enshrining it into statute:

> "A citizen of the United States has a public ***right*** of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board … before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals." 49 USC § 40103 (emphasis added).

Our constitutional right to freedom of movement can't be restricted when there is no evidence that airplanes or other modes of transit have contributed to the spread of COVID-19. And there are less restrictive rules that could be adopted to minimize the risk to public health such as using CDC and TSA systems called "Do Not Board" and "Lookout" to alert airlines to bar passengers who have tested positive for a communicable disease. App. 89-93.

> "To make one choose between flying to one's destination and exercising one's constitutional right appears to us, as to the Eighth Circuit, *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973), in many situations a form of coercion, however subtle. ... While it may be argued there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all." *United States v. Albarado*, 495 F.2nd 799 (2nd Cir. 1974).

Our free movement isn't restricted to driving cars on highways. The large distances covered rapidly by airplanes aren't feasible by ground transportation. To drive from Orlando to Boston for M.S.'s critical medical care would take about 20 grueling hours each way, not counting stops to eat, get gas, use the bathroom, and sleep.

> "The impact on a citizen who cannot use a commercial aircraft is profound. He is restricted in his practical ability to travel substantial distances within a short period of time, and the inability to fly to a significant extent defines the geographical area in which he may live his life. ... An inability to travel by air also restricts one's ability to associate more generally, and effectively limits educational, employment, and professional opportunities." *Mohamed v. Holder*, 2014 WL 243115 at *6 (E.D. Va. Jan. 22, 2014).

Mr. Wall can't use any mode of transportation other than airplane to visit his brother in Germany, dual citizen Mr. Marcus can only travel between Israel and the United States by plane, and the same holds true for dual citizen Mr. Andreadakis' trips between the USA and Greece. The Mask Mandate is a

deprivation of fundamental rights under the Constitution blocking our freedom of movement. "At the very least, even if the statutory language were susceptible to OSHA's broad reading – which it is not –these serious constitutional concerns would counsel this court's rejection of that reading. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018)." *BST Holdings v. OSHA*, No. 21-60845 (5th Cir. Nov. 12, 2021).

TSA's mask mandate compels us to choose between protecting our health or exercising our right to travel. Such coercion is constitutionally impermissible. "It might be suggested that a prospective airline passenger will not actually be deprived of his right to travel because there are alternative means of travel available. We do not find this argument persuasive 'since, in many situations, flying may be the only practical means of transportation.'" *United States v. Kroll*, 481 F.2nd 884 (8th Cir. 1973).

"Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. *Fisher v. University of Texas*, 570 U.S. 297, 310 (2013). Specifically, the government must establish that a mandate is "justified by a compelling governmental interest and … narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-532 (1993). The Mask Mandate fails strict scrutiny because there are far less restrictive options available to advance the federal government's

asserted interest in combatting the spread of COVID-19, such as using Do Not Board and Lookout. App. 89-93.

If there are other reasonable ways to achieve an agency's goal with a lesser burden on constitutionally protected activity, it may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *see also Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

Strict scrutiny must apply in this case because TSA, through enforcement of the unlawful Mask Mandate, disparately impacts the right to due process and the freedom of movement compared to analogous activities that are not constitutionally protected.

> "In cases implicating this form of 'strict scrutiny,' courts nearly always face an individual's claim of constitutional right pitted against the government's claim of special expertise in a matter of high importance involving public health or safety. It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard. ... Even in times of crisis – perhaps especially in times of crisis – we have a duty to hold governments to the Constitution." *South Bay United Pentecostal Church v. Newson*, 136 S.Ct. 716 (U.S. Feb. 5, 2021) (Gorsuch, Thomas, and Alito, JJ., concurring).

Here we have CDC and TSA requiring masks in no sector of the nation

except transportation, without showing a single scientific study identifying this only sector as being more vulnerable to coronavirus spread.

> "[T]he government has the burden to establish that the challenged law satisfies strict scrutiny. … [N]arrow tailoring requires the government to show that measures less restrictive of the [constitutionally protected] activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the [constitutionally protected] exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for [constitutionally protected] exercise too." *Tandon v. Newsom*, 141 S.Ct. 1294 (2021).

Here there's no evidence that TSA is using Do Not Board and Lookout to stop passengers who have tested positive for COVID-19 from embarking. App. 89-93. Targeting travelers who are a genuine threat to public health – those who are infected – can be done without infringing on the freedom to travel for everyone else.

The government doesn't control when citizens may travel, for what purpose, or using what mode. This right is reserved to the people by the Constitution. *Guest* at 757. Courts are "tasked with upholding the Constitution and redressing fundamental rights because – no matter how dire the crisis – constitutional protections remain commandments, not suggestions. … just because COVID-19 continues to linger, that is not an invitation to 'slacken … enforcement of constitutional liberties.'" *Air Force Officer*.

D. The Mask Mandate must be vacated because it runs afoul of the 10th Amendment.

Although coronavirus is still circulating at low levels in the United States – as it likely always will – the public-health system is not under any strain. Mask decisions must be left up to states, all 50 of which have decided face coverings are unnecessary. App. 1,204.

The Mask Mandate violates the 10th Amendment because TSA's directives apply to intrastate travel, including taking a rideshare car or transit bus just one mile, during which there is no nexus to interstate commerce. Requiring individuals to wear a mask compels them to engage in an activity that is not even commercial in nature. Intrastate travel "is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function." *Johnson v. Cincinnati*, 310 F.3rd 484, 498 (6th Cir. 2002).

TSA can't overrule state mask rules such as those in 14 states that ***prohibit*** public entities from requiring face coverings. App. 1,204. TSA may not rely "on only a conclusory and dubious but self-serving generalization that non-federal measures are inherently insufficient to protect public health and safety." *Florida v. Becerra*, No. 8:21-cv-839 (M.D. Fla. June 18, 2021) (enjoining CDC's Conditional Sailing Order for cruiseships); aff'd No. 21-12243 (11th Cir. July 23, 2021).

22 states are suing to strike down the Mask Mandate. *Van Duyne v. CDC*,

No. 4:22-cv-122 (N.D. Tex.); *Florida v. Walensky*, No. 8:22-cv-718 (M.D. Fla.). As 21 of them argued in filing a challenge to the Mask Mandate last month, the mask mandate

> "harms Plaintiffs' sovereign interests. Many Plaintiffs have laws or policies prohibiting or discouraging mask requirements in contexts where the mask mandate applies. … the mask mandate harms the Plaintiffs' quasi-sovereign interests in the health, safety, and welfare of their citizens. Forced masking … causes a variety of negative health consequences, including psychological harms, reduced oxygenation, reduced sanitation, and delayed speech development." Complaint, *Florida v. Walensky*.

CDC's eviction "moratorium intrudes into an area that is the particular domain of state law … 'Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power…'" *Alabama Ass'n of Realtors v. HHS,* 141 S.Ct. 2485 (2021).

There is no language in the U.S. Code indicating Congress' intent to invade the traditionally state-controlled realms of intrastate transportation and public health by forcing all passengers and workers to wear a mask. The Court requires "a clear indication" from Congress that it meant to "override[] the usual constitutional balance of federal and state powers" before interpreting a statute "in a way that intrudes on the police power of the States." *Bond v. United States*, 572 U.S. 844, 858, 860 (2014). The Mask Mandate

> "intrudes into an area traditionally and principally reserved to

> the states. … The federal government is one of limited, enumerated powers. … This principle is implicit in both the structure and text of the Constitution and was made express by the 10th Amendment. … [States have the] power to prohibit vaccination from being compelled. Consistent with that authority, Arizona has enacted laws prohibiting State and local government entities from imposing vaccine mandates." *Brnovich v. Biden*, No. 21-cv-1568 (D. Ariz. Jan. 27, 2022) (enjoining vaccine mandate for federal contractors).

Congressional intent has been clear throughout the pandemic: It has left decisionmaking about masks, lockdowns, business closures and restrictions, school shutdowns, limits on the size of public gatherings, and other mitigation measures up to the states. The only vote taken by either chamber of Congress on masks was the Senate's 57-40 decision March 15, 2022, to terminate the Mask Mandate. App 110-113.

> "'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' … if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that [the federal government] is without power to regulate. … To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *United States v. Lopez*, 514 U.S. 549 (1995)

If we use public transportation such as a bus in Toledo or Orlando or a subway in Washington or New York City to visit a friend, that's a purely non-economic intrastate activity not subject to federal regulation pursuant to the

10th Amendment. The

> "Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power. A person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity. Cf. *NFIB v. Sebelius*, 567 U.S. 519, 522 (2012) (Roberts, C.J., concurring); *see also Id.* at 652–53 (Scalia, J., dissenting). And to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power. *Zucht v. King*, 260 U.S. 174, 176 (1922)..." *BST Holdings*.

Furthermore, the Mask Mandate requires states and their political subdivisions that operate transit systems, airports, train stations, etc. to enforce federal orders mandating masks – even when those federal orders directly conflict with the laws and policies of all 50 sovereign states.

> "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States. ... [T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs..." *Printz v. United States*, 521 U.S. 898, 919-920 (1997).

TSA's Health Directives apply not only to travelers, but all employees working in the transportation sector – most of whom never cross state lines and many of whom work for state governments and their subdivisions. But the Constitution does not permit TSA's commandeering the states to enforce its policies. "The Federal Government ... may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992).

> "[E]ven if the law could be interpreted as … the United States suggest[s], it would still violate the anticommandeering principle … The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).
>
> "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. … even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness. … The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz.*

In Florida, for example, it's illegal for any government agency to require any person wear a mask. "Whether Congress could enact such a sweeping mandate under its interstate commerce power would pose a hard question. … Whether OSHA can do so does not. *BST Holdings* (Duncan, J., concurring).

If Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*,

531 U.S. 159, 172-73 (2001). There is no "unmistakably clear" language in any statute indicating Congress' intent for TSA to invade the traditionally state-operated arena of public health and intrastate transportation by forcing travelers and employees to don masks.

> "Our reading of the statute's text accords with the principle that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. That principle has yet greater force when the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power" such as public health and intrastate transportation. "Agencies cannot discover in a broadly worded statute authority to supersede state … law. Instead, Congress must 'enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power…" *Tiger Lily v. HUD*, 5 F.4th 666 (6th Cir. 2021).

The decision to impose a nationwide mask mandate on all forms of transportation is one of vast economic and political significance. The Mask Mandate impacts about 2 million airline passengers per day and an estimated 66 million Americans (about 20% of the population) that use surface public transportation and/or work in the transport sector each day. It's hard to think of any federal agency's directives that directly affect more people every single day than the Mask Mandate.

Mask mandates have been the subject of "earnest and profound debate across the country." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). There have been statewide mask mandates put into place at some point during the

pandemic by 40 states. App. 1,204. However, every state has ended those requirements. *Id.*

> "[T]he Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. ... Accordingly, the Federal Government may act only where the Constitution authorizes it to do so. ... The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority." *Printz* at 936-937 (Thomas, J., concurring).

"Where the federal government seeks to preempt state law in an area that the States have traditionally occupied, there is a strong presumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." *Brnovich* (cleaned up), citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). "A power not delegated [to the federal government] includes the state's police power, which 'is defined as the authority to provide for the public health, safety, and morals' of the state's population." *Florida v. Nelson*, No. 8:21-cv-2524 (M.D. Fla. Dec. 22, 2021) (enjoining vaccine mandate for federal contractors), quoting *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991). "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230." *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 720 (1985).

Even if masks were effective at reducing COVID-19 spread,

> "People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures – joined with the similar failures of others – can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act. That is not the country the Framers of our Constitution envisioned." *NFIB v. Sebelius*, 567 U.S. 519, 554 (2012).

And here the Court reviews not an act of Congress, but orders of executive agencies, which must be given even less weight when considering encroachment on powers the 10th Amendment reserves to the states and to the people. The Supreme Court held just three months ago that OSHA's mask-or-vaccine policy is unconstitutional because states possess the general police power to regulate public health. Likewise, the Mask Mandate pre-empts the laws of all 50 states that don't require face coverings – an issue this Court's panel did not address in *Corbett*.

"[T]he emergency regulation purports to pre-empt state laws to the contrary." *NFIB v. Dept. of Labor*, No. 21A244 (U.S. Jan. 13, 2022).

> "This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land. … There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the 'general power of governing,' including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. … The federal government's powers, however, are not general but limited and divided. … Historically, such matters have been regulated at the state level by authorities who

> enjoy broader and more general governmental powers." *Id*. (Gorsuch, Thomas, & Alito, JJ., concurring).

E. The Mask Mandate must be vacated because the challenged mandates exceed TSA's statutory and regulatory authority.

TSA doesn't have any authority from Congress to mandate what travelers must place on our faces. TSA isn't assigned the job of health inspector or disease preventer. Its mission is transportation security, period. Congress named respondent the Transportation ***Security*** Administration, not the Transportation ***Health & Disease Control*** Administration. TSA, trying to become THDCA, has massively exceeded its statutory authority by, for the first time, claiming authority to regulate nonsecurity matters such as face masks.

Congress created TSA after the terrorist attacks of Sept. 11, 2001, the Aviation & Transportation Security Act ("ATSA"), to address "security in all modes of transportation." 49 USC § 114(d). TSA's function is limited to address ***security threats***. Health measures are outside its scope. Nowhere in TSA's enabling legislation does Congress confer upon it the power to try to control pandemics. The regulations under which TSA's Health Directives and Emergency Amendment were issued clearly state they are to be used for security threats, not public health. "When TSA determines that additional security measures are necessary to respond to a ***threat assessment or to a***

specific threat against civil aviation, TSA issues a Security Directive setting forth mandatory measures." 49 CFR § 1542.303(a) (emphasis added). TSA's own regulations simply do not allow for the promulgation of a "security directive" to address a public-health concern. "[C]ourts ***must*** overturn agency actions which do not ***scrupulously*** follow the regulations and procedures promulgated by the agency itself." *Sierra Club v. Martin*, 168 F.3rd 1, 4 (11th Cir. 1999) (emphases added).

The line between security (TSA's mission) and safety (not its purpose) 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."

> "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance. … An agency has no power to tailor legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. … We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (citations and quotation marks omitted).

Unfortunately a panel of this Court got it wrong when it concluded in *Corbett* that Congress did authorize in the Aviation & Transportation Security Act a transportation security agency to transform itself into the health police.[6] Given the Supreme Court's decision a month later in *NFIB*, *Corbett* is no longer valid caselaw. In *NFIB*, the Supreme Court made it clear (again) that Executive Branch agencies may not dictate COVID-19 mitigation measures without clear authorization from Congress:

> "The only exception is for workers who … wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here. … Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. … The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. … It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes." *NFIB*.

"Congress has chosen not to afford OSHA – or any federal agency – the authority to issue a vaccine mandate. … The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not

[6] The decision in *Corbett* addressed only the issue of TSA's statutory and regulatory authority to mandate masks. Even if the Court sustains the reasoning of *Corbett* in this case, we present an additional nine lines of argument against the Mask Mandate that were not discussed in *Corbett*. These nine arguments are issues of first impression nationwide.

clearly authorize OSHA's mandate." *Id.* (Gorsuch, Thomas, & Alito, JJ., concurring).

The panel's decision in *Corbett* is an aberration when reviewing numerous other cases that challenged COVID-19 restrictions unauthorized by Congress that the Biden Administration issued. Every significant Executive Branch pandemic mandate has been blocked in the courts except for three: The Federal Transportation Mask Mandate, CDC's International Traveler Testing Requirement,[7] and HHS' requirement that all healthcare workers at facilities accepting Medicare and Medicaid get inoculated. Notably the Mask Mandate is the administration's only mask dictate that a court has not yet enjoined or stayed. The Court should take care of that anomaly now. "[B]efore deferring to an administrative agency's statutory interpretation, courts 'must first exhaust the traditional tools of statutory interpretation and reject administrative constructions' that are contrary to the clear meaning of the statute." *Black v. Pension Benefit Guar. Corp.*, 983 F.3rd 858, 863 (6th Cir. 2020).

Several interpretive canons counsel in favor of reading TSA's enabling statute not to authorize the mask mandate including the major questions doctrine, the federalism canon, *noscitur a sociis*, *ejusdem generis*, the rule

[7] There are at least four challenges to the International Traveler Testing Requirement in federal district courts, three filed by Petitioners Andreadakis, Marcus, and Wall. None have been decided yet.

against surplusage, and constitutional avoidance. *See Alabama Ass'n of Realtors; Canton Police Benevolent Ass'n of Canton v. United States*, 844 F.2nd 1231, 1236 (6th Cir. 1988); *Parker v. Metro. Life Ins. Co.*, 121 F.3rd 1006, 1014 (6th Cir. 1997).

Courts have concluded in nearly every COVID-19 case similar to this one that "the record in this action presents only a threadbare and conclusory rationalization that is incommensurate with the boundless expansiveness of the executive order's application, with the invasiveness of the executive order's requirement, and with the intrusion of the executive order into a state prerogative with which even Congress likely cannot interfere…" *Florida v. Nelson*.

The panel in *Corbett* erred in finding that "The COVID-19 global pandemic poses one of the greatest threats to the operational viability of the transportation system and the lives of those on it seen in decades." If that were actually true, then why has the travel industry been urging the Biden Administration *since last summer* to abolish the Mask Mandate? App. 1,172-1,203.

Given the government's own data, how are we to believe that masks have been effective in TSA's goal of reducing COVID-19 transmission when the

agency itself admits that 22,812 of its employees (35% of its workforce) [8] – all of whom must wear masks – have tested positive for COVID-19? App. 116. There's no way the agency can conclude that masking is effective when likely 70% of its own muzzled workforce has been infected.

During December 2021 and January 2022, as the mild Omicron variant spread across the United States, masks did nothing to stop it. This is evidenced by the tens of thousands of flights that were canceled during the winter holidays because airline crews – who are forced to mask due to the Mask Mandate – became infected in enormous numbers. App. 1,147-1,171.

The ineffectiveness of masks is confirmed by hundreds of scientific studies and medical articles. https://bit.ly/masksarebad. Airlines, the travel industry, flight attendants, pilots, and the nation's largest business organization disagree with the *Corbett* panel that masks do anything to reduce "threats" to the transportation system. App 1,172-1,203.

An agency may not be afforded *Chevron* deference under the major ques-

[8] Because so many COVID-19 cases are mild, health authorities estimate only half of infections are confirmed by testing. This means it's quite likely an astounding **70%** of TSA's 65,000 employees have been infected with coronavirus. Due to the Mask Mandate, they have all been wearing masks for more than 14 months. So how exactly do face coverings prevent the transmission of COVID-19?

tions doctrine. CDC and TSA admit the Mask Mandate is a "major rule" having a substantial impact on the U.S. economy. For an "agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must … expressly and specifically delegate to the agency the authority both to decide the major policy question…" *Paul v. United States*, 140 S.Ct. 342 (2019). Only Congress may decide whether masking is needed to combat COVID-19. It has determined it is not.

"It is telling that, since the pandemic began, Congress has passed no legislation mandating vaccination despite enacting several other significant pandemic-related measures." *Brnovich*. Although Congress might have authority to compel masking in the transport industry – although this would still raise severe constitutional concerns – "there is no indication that it intended to do so…" *Id.*, citing *Solid Waste Agency*. There is no legitimate argument that the Aviation & Transportation Security Act presents "a clear indication that Congress intended that result" of forced masking nor that the Legislative Branch authorized the Executive Branch's "federal encroachment upon a traditional state power." *Solid Waste Agency*.

Dr. Leana Wen, one of the nation's most forceful and prominent mask advocates, conceded late last year that "Cloth masks are little more than facial decorations. There's no place for them in light of omicron." App 856-858.

Many others who previously believed in mask efficacy, including a former FDA chief, have come to the same conclusion. App 878-880.

New studies, articles, and expert testimony come out each month adding to the large and growing body of scientific data illustrating that masks have not stopped the spread of COVID-19 but are harmful to human health. For some examples, *see* App. 845-1,112. "[O]rdering masks to stop Covid-19 is like putting up chain-link fencing to keep out mosquitos." *Ridgeway Properties v. Beshear*, No. 20-CI-678 (Ky. Cir. June 8, 2021).

> "Furthermore, even for a good cause, including a cause that is intended to slow the spread of Covid-19, Defendants cannot go beyond the authority authorized by Congress. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2488-89; *see also Missouri v. Biden*, Case No. 4:21-cv-1329, at *3-4 (E.D. Mo. Nov. 29, 2021) (holding that Congress must provide clear authorization if delegating the exercise of powers of 'vast economic and political significance,' if the authority would 'significantly alter the balance between federal and state power,' or if the 'administrative interpretation of a statute invokes the outer limits of Congress' power'). Accordingly, the Court finds that the president exceeded his authority…" *Kentucky v. Biden*, No. 3:21-cv-55 (E.D. Ky. Nov. 30, 2021) (enjoining vaccine mandate for federal contractors). *See also Georgia v. Biden*, No. 1:21-cv-163 (S.D. Ga. Dec. 7, 2021) (same).
>
> "Congress could have spoken directly to the issue of vaccination, masking, or other precautions in the last year when passing other COVID-19-related legislation, but it did not and has not. … The plain language of defendants' cited authority, the statutory context, and the existing regulations all confirm that the Secretary's interpretation … is not a permissible construction of the statute. … the identified sources of authority cannot fairly be construed so broadly as to include an unprecedented, nationwide requirement of a medical procedure or universal masking." *Texas v.*

> *Becerra*, No. 5:21-cv-300 (N.D. Tex. Dec. 31, 2021) (enjoining HHS' mask-and-vaccine mandate for Head Start).
>
> "Neither the plain language of § 7301 nor any traditional notion of personal liberty would tolerate such a sweeping grant of power. … no arm of the federal government has ever asserted such power. … A lack of historical precedent tends to be the most telling indication that no authority exists. … The government has offered no answer – no limiting principle to the reach of the power they insist the President enjoys. For its part, this court will say only this: however extensive that power is, the federal-worker mandate exceeds it." *Feds for Medical Freedom v. Biden*, No. 3:21-cv-356 (S.D. Tex. Jan. 21, 2022) (enjoining the president's vaccine mandate for federal employees).
>
> "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' … "[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. … Courts must be guided by a degree of common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 151 (2000).

Never did Congress imagine a transportation ***security*** agency focused on ensuring planes aren't hijacked or blown up would get involved in ***health*** enforcement. TSA's attempt to shoehorn an airborne virus into the equivalent of protecting the transportation sector from security threats is beyond absurd. This Court should have never upheld that power. The International Civil Aviation Organization defines "security equipment" as "Devices of a

specialized nature for use, individually or as part of a system, in the prevention or detection of acts of unlawful interference with civil aviation and its facilities." App. 131. Notably a face mask is not considered security equipment.

TSA may only deny boarding to "a passenger who does not consent to a search." 49 USC § 44902(a). It can't stop someone not wearing a mask from embarking. TSA's mission is to prevent "violence and piracy," not a disease. 49 USC § 44903. Allowing TSA to regulate public health distracts the agency from its security mission. Face masks make it harder for TSA to identify dangerous people, harming transportation security. There's a reason Congress assigned TSA a narrow, specific mission: Veering off into spheres unrelated to security makes our nation's transportation system more vulnerable to attack.

OSHA's Vaccine or Mask/Test Mandate, like the Mask Mandate,

> "involves broad medical considerations that lie outside of OSHA's core competencies, and purports to definitively resolve one of today's most hotly debated political issues. *Cf. MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) … There is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority, and this court will not infer one." *BST Holdings*.

The mask mandate ***negatively*** impacts transportation security because

it has created chaos in the sky with thousands of reports to TSA and the Federal Aviation Administration of oxygen-starved passengers taking their masks off to breathe and being assaulted and/or harassed by flight attendants and other passengers. App. 107-109. For these reasons, groups of flight attendants and pilots filed suit last month to block CDC's Mask Mandate. *Trocano v CDC*, No. 22-cv-727 (D. Colo.); *Carlin v. CDC*, No. 22-cv-800 (D.D.C.)

"[H]ealth agencies do not make housing policy, and occupational safety administrations do not make health policy. … In seeking to do so here, OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty." *BST Holdings*.

Never did Congress imagine that TSA could fine passengers starting at $500 for refusing to obstruct their breathing. "It is incumbent on the courts to ensure decisions are made according to the rule of law, not hysteria … One hopes that this great principle – essential to any free society, including ours – will not itself become yet another casualty of COVID-19." *Dept. of Health & Human Services v. Manke*, No. 20-4700-CZ (Mich. 2020) (Viviano, J., concurring).

A respiratory virus does not infect infrastructure and thus can't possibly

pose a "grave threat" to transportation security. During a national "emergency," TSA has statutory power to coordinate and provide notice about threats to transportation. But a disease is not a "threat to transportation" and we are far removed from the "emergency" COVID-19 created in 2020. COVID-19 does not shut down airplane engines. Trains do not stop running if they encounter COVID-19. A disease is a threat to human beings, not transportation.

> "On the other side of the scales is the Executive's questionable claim that COVID-19's spread is slowed in a meaningful way by the CDC's § 265 Order… But this is March 2022, not March 2020. The CDC's § 265 order looks in certain respects like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty. … The evidence of the difference between then and now is considerable. … We cannot blindly defer to the CDC in these circumstances." *Huisha-Huisha*.

F. The Mask Mandate must be vacated because the challenged TSA directives, issued at the direction of CDC, exceed CDC's statutory authority under the Public Health Service Act.

Because the challenged TSA directives were issued solely at the instruction of CDC, the Court has to take note of the illegality of CDC's action. Congress never gave CDC the staggering amount of power it has claimed during this pandemic, a fact the Supreme Court forcefully opined on last year in terminating the agency's Eviction Moratorium.

> "It would be one thing if Congress had specifically authorized the

> action that the CDC has taken. But that has not happened. Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts. … the sheer scope of the CDC's claimed authority under [PHSA § 264](a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast 'economic and political significance." … That is exactly the kind of power that the CDC claims here. … the Government's read of § [264](a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach…" *Alabama Ass'n of Realtors*.

Just like the Eviction Moratorium, the Mask Mandate was issued by CDC claiming nonexistent authority under 42 USC § 264(a). Because CDC has no authority to adopt a nationwide mask mandate, and TSA's four orders attacked here radiate from the CDC order, the TSA directives must be declared *ultra vires*. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends. … [(]even the Government's belief that its action 'was necessary to avert a national catastrophe' could not overcome a lack of congressional authorization). It is up to Congress, not the CDC, to decide whether the public interest merits further action here." *Id.*

An agency's exercise of rulemaking power is rooted in the grant of such power from Congress, and cannot be greater than that delegated to it. *Lyng v. Payne*, 476 U.S. 926 (1986). Masking indisputably is not a "sanitation" measure. CDC and TSA's argument to the contrary "suggests a ruse, a mere

contrivance, superficially attempting to justify a sweeping, invasive, and unprecedented public health requirement imposed unilaterally by President Biden." *Florida v. Nelson*.

And nowhere in the Mask Mandate orders do CDC or TSA define a face covering as a "sanitation" measure. In fact, the words "sanitation" and "sanitary" do not appear in either CDC's or TSA's Mask Mandate directives. App. 10-15 & 26-45.

Many courts have strongly disagreed with CDC's broad reading of its power under the Public Health Service Act. "CDC claims authority to impose nationwide any measure, unrestrained by the second sentence of Section 264(a), to reduce to 'zero' the risk of transmission of a disease – all based only on the director's discretionary finding of 'necessity.' That is a breathtaking, unprecedented, and acutely and singularly authoritarian claim." *Florida v. Becerra*.

TSA falsely claims that CDC's Mask Mandate Order, which it is enforcing, is based on scientific evidence that the wearing of masks help to prevent the spread of COVID-19. That's quite ludicrous considering TSA's administrative record doesn't provide the an iota of evidence demonstrating that masks reduce the spread of a virus. Whereas we have offered 228 documents posted to https://bit.ly/masksarebad (App. 846-855) showing the opposite.

If this Court allows CDC and TSA to force masks over the mouths and noses of all transportation passengers and workers, the two agencies' sweeping view of their domain would, if left unchecked, allow them to adopt future regulations governing nearly all aspects of national life in the name of public health. "[I]f CDC promulgates regulations the director finds 'necessary to prevent' the interstate or international transmission of a disease, the enforcement measures must resemble or remain akin to 'inspection, fumigation, disinfection, sanitation, pest extermination, [or the] destruction of infected animals or articles.'" *Florida v. Becerra*. Just like regulating what cruiseships must do before sailing again, forcing humans to wear masks is not allowed under the Public Health Service Act (42 USC § 264) or TSA's governing laws. Notably the Mask Mandate applies to all travelers and workers, regardless of whether they are vaccinated, have naturally immunity, or are infected with coronavirus.

> "Congress directed the actions set forth in Section 361 to certain ***animals or articles***, those so infected as to be a dangerous source of infection to people. On the face of the statute, ***the agency must direct other measures to specific targets 'found' to be sources of infection – not to amorphous disease spread*** but, for example, to actually infected animals, or at least those likely to be…" *Skyworks v. CDC*, No. 5:20-cv-2407 (N.D. Ohio March 10, 2021) (emphasis added).

G. The Mask Mandate must be vacated because it was issued without notice and comment required by the Administrative Procedure Act.

TSA's Health Directives and Emergency Amendment were issued without following APA procedures including notice and comment. "Legislative rules have the 'force and effect of law' and may be promulgated only after public notice and comment. *INS v. Chadha*, 462 U.S. 919, 986…" *Nat'l Mining Ass'n v. McCarthy*, 758 F.3rd 243, 250 (D.C. Cir. 2014). A court must "hold unlawful and set aside agency action … found to be … without observance of procedure required by law." 5 USC § 706(2)(D). The APA requires notice of, and comment on, agency rules that "affect individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979). These procedures are congressionally mandated "to assure due deliberation" when an agency promulgates rules having the force of law. *Smiley v. Citibank*, 517 U.S. 735, 741 (1996).

The Mask Mandate is a legislative rule with the "force and effect of law" because it prohibits anyone from using public transportation who can't or won't don a face covering, subject to the threat of large fines. The mask mandate is not an interpretive rule or policy statement that can evade public comment. CDC's Conditional Sailing order was enjoined because it

> "carries identifiable legal consequences, such as the prospect of criminal penalties, substantial fines, and suspension of sailing. …

> [CSO] carries the force of law and bears all of the qualities of a legislative rule. Accordingly, the [CSO]'s prospective, generalized application invites the conclusion that the order is a 'rule.' In plain words, if it reads like a rule, is filed like a rule, is treated like a rule, and imposes the consequences of a rule, it's probably a rule. Because the [CSO] is a rule, CDC was obligated to follow the procedures applying to the promulgation of a rule…" *Florida v. Becerra*.

TSA claims that if it determines a "security directive" must be issued immediately, notice and comment are waived. Because the Mask Mandate is a health measure, not a security policy, the mask mandate does not fall under this exemption. Agencies may not "avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar v. Allina Health Servs.*, 139 S.Ct. 1804, 1812 (2019). To the contrary, "courts have long looked to the contents of the agency's action, not the agency's self-serving label, when deciding whether statutory notice-and-comment demands apply." *Id.*

Notice improves the quality of the rulemaking by ensuring agency regulations will be tested by exposure to diverse public opinion. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2nd 506 (D.C. Cir. 1983). Notice and the opportunity to be heard are essential components of fairness to affected parties. *Id.* The notice must provide sufficient factual detail and rationale for the rule to permit interested persons to comment meaningfully. *Chemical Waste Mgmt. v. EPA*, 976 F.2nd 2 (D.C. Cir. 1992).

COVID-19 began in December 2019 and was declared a global pandemic

in March 2020. TSA had nearly 11 months to put the Mask Mandate through APA's required notice-and-comment procedures,[9] but failed to do so. "Good cause cannot arise as a result of the agency's own delay…" *NRDC v. NHTSA*, 894 F.3rd 95, 114 (2nd Cir. 2018). "[C]ertainly neither 'good cause' nor 'urgent and compelling circumstances' exists to justify summary disregard of the requirements of administrative law and rulemaking." *Florida v. Nelson*.

> "Precedent demonstrates how infrequently the exception should receive acceptance. *See, e.g., Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981) ('[A]dministrative agencies should remain conscious that such emergency situations are indeed rare.'); *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) (explaining that the circumstances permitting reliance on the 'good

[9] Had TSA put its mask directives through the required APA notice-and-comment period, we would have submitted the following concerns: 1) data shows states without mask mandates suffered fewer deaths per capita than states that imposed such requirements; 2) the Mask Mandate is out of step with the current policies of every state that don't require anyone to cover their face; 3) requiring masks in the transportation sector leads to widespread chaos in the skies and on the ground, endangering aviation and transit safety; 4) the Mask Mandate unlawfully discriminates against travelers who can't wear a face covering due to a disability; 5) the gargantuan amount of scientific and medical evidence showing that masks have proven to be totally ineffective in reducing COVID-19 spread and deaths (*see* 228 scientific studies, medical articles, and videos at https://lucas.travel/masksarebad); 6) scientists have known for a long time that masks aren't effective in reducing transmission of respiratory viruses (*Id.*); 7) masks pose serious health risks to humans forced to wear them (*Id.*); 8) many experts consider forcing kids to wear masks child abuse; 9) people who have recovered from COVID-19 have long-lasting immunity and don't need to don a mask; and 10) airplane cabins pose little risk for coronavirus spread and there have been few, if any, reports of coronavirus transmission on aircraft.

> cause' exception are exceedingly 'rare'). ... The 'good cause' exception, 'narrowly construed and only reluctantly countenanced,' *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)), excuses the APA's notice-and-comment procedures in an 'emergency situation.' *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)." *Florida v. Becerra*.

"[B]ald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice-and-comment procedures." *Action on Smoking & Health v. Civil Aeronautics Bd.,* 713 F.2nd 795, 800 (D.C. Cir. 1983).

The Mask Mandate is a rule within the meaning of the APA because it is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 USC § 551(4). CDC and TSA issued the Mask Mandate without engaging in the notice-and-comment process. 5 USC § 553. Good cause does not excuse CDC's failure to comply with the notice-and-comment procedures. 5 USC § 553(b)(3)(B). "The situation was not so urgent that notice and comment were not required. ... Notice and comment would have allowed others to comment upon the need for such drastic action." *Louisiana v. Becerra*, No. 3:21-cv-4370 (W.D. La. Jan. 1, 2022) (enjoining HHS' mask-and-vaccine mandate for Head Start).

Moreover, the Mask Mandate has now been in effect for 14 months, including four extensions ordered by TSA. Yet the agency still hasn't submitted it for public comment; it just keeps renewing it every few months without hearing how devastating it is for the disabled and airline industry, among many others. The Supreme Court drew this distinction in narrowly upholding an HHS *interim* mandate for healthcare workers at facilities that accept Medicare and Medicaid to get vaccinated against COVD-19 while the agency immediately provided notice and solicited comments as it works on a *final rule*. *Biden v. Missouri*, 142 S.Ct. 647 (2022).

Also, OSHA issued the interim healthcare worker mandate soon after FDA licensed the first fully approved COVID vaccine Aug. 23, 2021. It did not delay nearly a year like CDC and TSA, then declare "good cause" to issue the Mask Mandate without notice and comment only days after a new president ordered the mask mandate for purely political reasons.

TSA's failure to provide notice and comment on the Mask Mandate was not harmless. When an agency utterly fails to allow public feedback, "even a minimal showing of prejudice may suffice to defeat a claim of harmless error." *Mid Continent Nail Corp. v. United States*, 846 F.3rd 1364, 1383 (Fed. Cir. 2017). Courts "should be hesitant to conclude that complete failure to comply with § 553's requirements is harmless." *United States v. Reynolds*,

710 F.3rd 498, 518 (3rd Cir. 2013).

The travel industry has spoken loudly that the mask mandate and other Executive Branch travel restrictions unauthorized by Congress have resulted in "devastating" consequences including a 50% drop in business travel and a 78% drop in foreign travel. App. 1,190-1,191. *See also* other industry letters demanding immediate Mask Mandate abolition. App. 1,192-1,203. The agency's failure to take public comment certainly affected its decisionmaking and the outcome.

"Violation of the conditional sailing order triggers a serious consequence... The conditional sailing order is a rule ... The APA therefore obligates CDC to ... provide notice and comment. ... CDC lacked 'good cause' to evade the statutory duty of notice and comment." *Florida v. Becerra*.

This Court must "hold unlawful and set aside agency action ... found to be ... without observance of procedure required by law." 5 USC § 706(2)(D).

H. The Mask Mandate must be vacated because it is arbitrary and capricious in violation of the APA.

TSA's mandate forcing us to wear a mask (even though our medical conditions prohibit it) as a condition of using any form of public transportation is the perfect example of executive policies that the law demands be stopped. A court must "hold unlawful and set aside agency action ... found to be ...

arbitrary, capricious, [or] an abuse of discretion." 5 USC § 706(2)(A).

TSA's Health Directives are so onerous they apply to people who are not traveling interstate, employees working at facilities and on conveyances that only serve intrastate travelers, people at a transportation hubs for purposes other than traveling interstate (i.e. working, buying tickets for future travel, waiting on a train platform for a family member to arrive, etc.), and so on.

CDC data indicate that as of March 31, 2022, 95% of U.S. counties have low transmission of COVID-19. App. 115. In all these locations, CDC has advised since Feb. 25, 2022, to "Wear a mask based on your personal preference…" Only in 17 counties (0.53%) does CDC recommend that everyone "Wear a well-fitting mask indoors in public…" Yet the Mask Mandate requires masks be worn by everyone on all forms of public transportation in every single county despite 99.47% of them not being at high risk for coronavirus infection. This is the utter definition of arbitrary and capricious.

> "[T]he extent of any … problem, past or future, attributable to COVID-19 is undemonstrated and is merely a hastily manufactured but unproven hypothesis about recent history and a contrived speculation about the future. Obviously, no massive extension and expansion of presidential power is necessary to cure a non-existent problem… the executive order results in an application of dizzying expansiveness." *Florida v. Nelson*.

A court must "not defer to the agency's conclusory or unsupported suppositions." *Texas v. Biden*, 10 F.4th 538, 555 (5th Cir. 2021). But in a conclusory

fashion, the Mask Mandate asserts that "[a]ppropriately worn masks reduce the spread of COVID-19…" But the mandate does not acknowledge, much less discuss, hundreds of studies reaching different conclusions. https://bit.ly/masksarebad. CDC's own data shows no evidence that the Mask Mandate has done anything to reduce COVID spread. "Stopping the spread of COVID-19 will not be achieved by overbroad policies like the federal-worker mandate." *Feds for Medical Freedom*.

TSA failed to take into account that airplanes are among the safest places you can be during the pandemic due to high-efficiency filters that bring fresh air into the cabin every 3-4 minutes. Aircraft cabins have more sterile air than many hospital operating rooms. App. 1,205-1,229. TSA has not offered any evidence, let alone any substantial evidence, to support its determination that masks are necessary to reduce the transmission of COVID-19.

"Airplanes are already equipped with advanced air filtration systems, and airports have made large investments in air filtration, sanitation, and layouts. COVID-19 hospitalization rates have decreased significantly and ***the mask mandate should be lifted*** to reflect the improved public health environment," according to Airlines for America. App. 1,191 (emphasis added).

CDC's "conditional sailing order likely is by definition capricious. … An

agency decision issued without adherence to its own regulations must be overturned as arbitrary and capricious…" *Florida v. Becerra*. Likewise, the Mask Mandate is by definition capricious for failing to consider vaccination, natural immunity, and community infection levels, among other factors. The Mask Mandate "therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil,' cf. *Cantwell v. Connecticut*, 310 U.S. 307." *Aptheker*.

TSA claim that every single traveler is a direct "threat" to transportation security is beyond absurd and is scientifically impossible.

> "[R]ather than a delicately handled scalpel, the Mandate is a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces (and workers) that have more than a little bearing on workers' varying degrees of susceptibility to the supposedly 'grave danger' the Mandate purports to address. … it is generally 'arbitrary or capricious' to 'depart from a prior policy *sub silentio*,' agencies must typically provide a 'detailed explanation' for contradicting a prior policy… Such shortcomings are all hallmarks of unlawful agency actions." *BST Holdings*.

The Mask Mandate was issued for purely political reasons by a new president who make a national mask mandate a key campaign promise despite acknowledging it was likely unconstitutional. App. 1,134-1,146. President Biden issued E.O. 13998 one day after he was inaugurated. Just 11 days later, CDC and TSA issued the Mask Mandate *solely* because of political considerations – needing to placate a new boss in the White House.

What triggered the mask mandate? Not any scientific research or pandemic developments, but the executive order of a president who took office *the day before he signed it*. If the Mask Mandate were truly based in science, CDC and TSA had 10½ months to issue a Notice of Proposed Rulemaking, solicit public comment, respond to those comments, and then publish in the Federal Register a Notice of Final Rulemaking. The fact the Mask Mandate was rushed into effect without public notice and comment due to the order of a new president demonstrates how it was not based in science or any health need, but purely on political considerations. An agency policy created due to politics and not reasoned science is arbitrary and capricious. *Midwater Trawlers Coop. v. Dep't of Commerce*, 282 F.3rd 710, 720 (9th Cir. 2002).

An agency decision likewise meets this standard if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view…" *Motor Vehicle Manufacturers Ass'n v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). All three factors are in play here with the Mask Mandate. CDC's and TSA's determination that transportation poses a greater risk than numerous other activities is arbitrary and capricious. There's no evidence that airplane

cabins pose a special risk of respiratory virus transmission. The opposite is true. App. 1,205-1,229. There's a simple conclusion from real-world data: Masks don't reduce COVID-19 transmission. "[T]he winter surge in COVID-19 cases coincided with high levels of mask-wearing, which undermines the evidence of masks' effectiveness." App. 863. Dr. Mark Gendreau is among many aviation health specialists to say when the pandemic began that masks "won't work against contracting a virus in flight" and "they don't stop someone from breathing in a virus droplet."

An agency "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Encino Motorcars v. Navarro*, 136 S.Ct. 2117, 2125 (2016). Here, TSA failed to articulate why the Mask Mandate was needed, what specific state measures were inadequate, and why it is not using Do Not Board and Lookout to flag infected travelers. An agency decision that doesn't consider "less restrictive, yet easily administered" regulatory alternatives (especially systems that already exist) fails the arbitrary-and-capricious test. *Cin. Bell Tel. Co. v. FCC*, 69 F.3rd 752, 761 (6th Cir. 1995).

CDC and TSA put the Mask Mandate into place because of the president's political desires, not any finding the agencies made regarding scientific data. The administrative record shows that CDC and TSA did not consider a single

one of the 228 scientific studies, medical articles, and videos we have compiled. https://bit.ly/masksarebad. Nor the hundreds of others that have been published but are not in this collection. Masks have totally failed to contain COVID-19, as is obvious by the multiple massive surges that have occurred globally every few months regardless of whether countries/states had masking rules in place or not.

Tens of thousands of epidemiologists, scientists, doctors, industrial hygienists, and other experts strongly disagree with numerous CDC and TSA statements about masks. "CDC is doing enormous damage to science and scientists by ***allowing politics to dictate public health policy rather than actual science***. Increasingly, and for good reason as we have illustrated, the public does not trust the CDC and its science; this must change." App. 1,098. (emphasis added).

CDC and TSA have not reasonably considered the relevant issues and reasonably explained the decision. The agencies failed to consider lesser alternatives, such as relying on the Do Not Board and Lookout lists. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-14 (2020). An agency must "explain the rejection of an alternative that was within the ambit of the existing Standard and shown to be effective." *Clinton Mem'l Hosp. v. Shalala*, 10 F.3rd 854, 859 (D.C. Cir. 1993). TSA has never explained why masks are

more effective than using an existing system to stop those travelers *known* to be infected with a communicable disease from boarding a plane.

I. The Mask Mandate must be vacated because it violates the Food, Drug, & Cosmetic Act.

TSA's Mask Mandate must be declared illegal because it violates federal law prohibiting the mandatory use of any medical device approved under an Emergency Use Authorization by FDA. Face masks are authorized by FDA during COVID-19 under an EUA. App. 94-100. Individuals to whom any EUA product is offered must be informed "of the option to accept ***or refuse administration of the product***..." 21 USC § 360bbb-3(e)(1)(A)(ii)(III) (emphasis added). TSA can't force travelers to use EUA products such as masks. TSA may only *recommend* masks and advise passengers if they refuse to wear a mask, the consequence *might* be a higher risk for contracting COVID-19 (although this is greatly disputed).

Congress specifically carved out only one exception for when an individual would not have the option to accept or refuse administration of the product and it only applies to the military:

> "In the case of the administration of a product authorized for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act to members of the armed forces, the condition described ... designed to ensure that individuals are informed of an option to accept or refuse administration of a product, may be

> waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security." 10 USC § 1107a.

See Doe v. Rumsfeld, 297 F. Supp. 2nd 119 (D.D.C. 2003); 341 F. Supp. 2nd 1 (D.D.C. 2004).

TSA is not allowed *Chevron* deference because yet again, the Mask Mandate violates a statute that is administered by another agency in another department (FDA in HHS). TSA admits the agency itself provides masks to passengers that are only approved by FDA for emergency use. App. 46. By supplying surgical masks[10] to passengers at its airport checkpoints, TSA is a distributor of Emergency Use Authorization medical devices and is subject to the Food, Drug, & Cosmetic Act restrictions that any person may refuse administration of the product. But when, for example, Mr. Wall refused the offer of a surgical mask June 2, 2021, from a TSA worker at Orlando airport, he was denied passage through the checkpoint and deprived of the ability to board an intrastate flight to Fort Lauderdale. App. 174-177.

By distributing Emergency Use Authorization masks, TSA is carrying out an activity "for which an authorization … is issued" under the Food, Drug, &

[10] Masks forced upon passengers by TSA include disclaimers and warnings such as "These masks are not personal protective equipment and are not intended as replacements or substitutes for personal protective equipment. These products are not intended for medical use or to prevent any disease or illness." App. 1,114.

Cosmetic Act. However, FDA regulations state that no human shall participate in trials of uncertified/EUA medical devices unless "the investigator has obtained the legally effective informed consent of the subject…" 21 CFR § 50.20. We do not consent.

The law is clear that TSA can't force travelers to use Emergency Use Authorization products including masks. There's good reason for the law prohibiting forced use of EUA medical devices. Requirements for Emergency Use Authorization products are waived for, among other things, "current good manufacturing practice otherwise applicable to the manufacture, processing, packing … of products subject to regulation under this chapter…" 21 USC § 360bbb-3(e)(3)(A). The Food, Drug, & Cosmetic Act is consistent with HHS regulations requiring that participants in trials of experimental medical devices must be informed that "participation is voluntary, refusal to participate will involve no penalty…" 45 CFR § 46.116(a)(8).

Most masks being used by Americans to comply with the Mask Mandate – including those provided by TSA – meet the legal definition of an Emergency Use Authorization "eligible product" that is "intended for use to prevent … a disease…" 21 USC § 360bbb-3(a). FDA regulates most face masks under Emergency Use Authorizations. FDA's website confirms our argument that face masks are worthless. Masks must not be

> "labeled in such a manner that would misrepresent the product's intended use; for example, the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or related uses or is for use such as infection prevention or reduction… No printed matter, including advertising or promotional materials, relating to the use of the authorized face mask ***may represent or suggest that such product is safe or effective for the prevention or treatment of patients during the COVID-19 pandemic***." App. 99 (emphasis added).

Even a well-informed consumer would find it nearly impossible to understand what types and brands of face masks have been authorized and which – if any – are regarded as safe to use for extended periods of time by CDC's National Institute for Occupational Safety & Health. The administrative record shows no indication TSA considered these issues.

J. The Mask Mandate must be vacated because it violates two international treaties.

Finally, the Mask Mandate is an abuse of discretion because it violates the Convention on International Civil Aviation ("CICA") (App. 117-144) and the International Covenant on Civil & Political Rights ("ICCPR")[11] (App. 145-154). Congress requires these treaties be enforced. In carrying out all federal aviation laws, the Executive Branch "shall act consistently with obligations of the United States Government under an international agreement." 49 USC § 40105(b)(1)(A).

[11] Treaty Doc. 95-20 (ratified by the Senate April 2, 1992)

The protection of the rights of the disabled is of international concern. "[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights…" App. 145.

TSA can't force us to use emergency medical devices such as masks that aren't licensed. "[N]o one shall be subjected without his free consent to medical or scientific experimentation." ICCPR Art. 7.

International human-rights law guarantees the right to liberty of movement: "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement … 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law… 4. No one shall be arbitrarily deprived of the right to enter his own country." ICCPR Art. 12.

By banning the disabled who can't don masks from flying, TSA violates our rights under international law to liberty of movement, freedom to leave any country, and ability to enter our own country. Congress has not passed any law allowing TSA to restrict a person's movement based on their inability

(or unwillingness) to impede their breathing.

Even if it did, it's quite possible Congress lack authority to pass a mask mandate. "[T]he Commerce Clause does not empower Congress 'to regulate individuals precisely because they are doing nothing.' ... it suggests that a broad mandate (e.g., one that generally requires individuals to wear masks) may be particularly susceptible to challenge because such a mandate could be construed as compelling individuals who are 'doing nothing' to engage in an activity – mask wearing – that is not even a commercial activity," according to Congressional Research Service. App. 101-104.

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy ... 2. Everyone has the right to the protection of the law against such interference or attacks." ICCPR Art. 17. But TSA allows airlines to impose numerous onerous requirements for the disabled to obtain a mask exemption, arbitrarily and unlawfully interfering with our privacy by forcing us to disclose sensitive medical information to airline employees who are not our physicians.

Next, we look Convention on International Civil Aviation,[12] which the United States ratified Aug. 9, 1946. Pursuant to CICA Art. 37, the International Civil Aviation Organization has adopted, *inter alia*, Annex 9, which

[12] This treaty is also known as the "Chicago Convention"

contains provisions on facilitation of air transport, including the transport of passengers requiring special assistance. The 15th Edition of Annex 9 to the Convention on International Civil Aviation became applicable Feb. 23, 2018. App. 124-139. Annex 9 to Convention on International Civil Aviation is binding in this country as part of the treaty.

"Contracting States shall take the necessary steps to ensure that persons with disabilities have equivalent access to air services." CICA Annex 9 § 8.34.

"[P]ersons with disabilities should be permitted to travel ***without the requirement for a medical clearance***. Aircraft operators should only be permitted to require persons with disabilities to obtain a medical clearance in cases of a medical condition where it is not clear that they are fit to travel and could compromise their safety or well-being…" CICA Annex 9 § 8.39. But the Mask Mandate, in violation of Convention on International Civil Aviation and 14 CFR § 382.23(a), allows airlines to require a medical clearance/certificate to request a mask exemption. This violates international standards set by the International Civil Aviation Organization. App. 139-154.

XI. CONCLUSION & PRAYER FOR RELIEF

Petitioners request the Court declare the three challenged Health Directives and one Emergency Amendment *ultra vires*, set them aside in their entirety, and permanently enjoin TSA from requiring masks be worn on any form of transportation unless Congress enacts specific authority for the agency to do so.

Equitable principles favor worldwide *vacatur* and a permanent injunction as "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, the Mask Mandate is effective worldwide, including on flights to the United States that are thousands of miles from U.S. airspace. Thus, the illegal agency action is worldwide, and the *vacatur* and injunction should be too to promote the uniform enforcement of federal law. *See Texas v. United States*, 787 F.3rd 733, 768-69 (5th Cir. 2015). It would make little sense if this Court, having found that the Mask Mandate is unconstitutional and/or unlawful, merely set aside and enjoined its application to the 13 of us while allowing TSA to continue enforcing the *ultra vires* mask mandate against the tens of millions of other Americans who use and/or work in the transportation sector every day.

The plain text of the APA states a court must "hold unlawful and set aside

agency action" that is "not in accordance with law." 5 USC § 706(2). There is no option to set aside agency action for just 13 petitioners (14 including M.S.). If the Mask Mandate is held to be *ultra vires*, the Court must vacate it, meaning TSA can't enforce the directives worldwide on anyone. This was the result of the Supreme Court decisions doing away with CDC's Eviction Moratorium and OSHA's Vaccine or Mask/Test Mandate.

Worldwide *vacatur* and a permanent injunction banning TSA from ever reissuing mask orders are needed because these are the only ways to guarantee the government doesn't again engage in this unlawful and unconstitutional conduct. Universal injunctions against agency actions are appropriate when "the public interest would be ill-served .... by requiring simultaneous litigation of this narrow question of law in countless jurisdictions." *Chicago v. Sessions*, 888 F.3rd 272, 292 (7th Cir. 2018). Constitutional violations support a worldwide injunction. "[T]he executive's usurpation of the legislature's power ... implicates an interest that is fundamental to our government and essential to the protection against tyranny." *Chicago v. Barr*, 961 F.3rd 882, 919 (7th Cir. 2020).

Universal *vacatur* is the precedent in this circuit. 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.3rd 1399, 1409 (D.C. Cir. 1998). "[R]ecently, the Supreme Court confirmed that 'our system does not permit agencies to act unlawfully even in pursuit of desirable ends.' *Alabama Ass'n of Realtors…*; *see also NFIB v. Dept. of Labor*, 142 S. Ct. 661, 666 (2022)." *Huisha-Huisha*.

WHEREFORE, we request this Court issue a judgment granting us the following relief:

1. TSA's three Health Directives and one Emergency Amendment challenged in these six Petitions for Review are hereby VACATED in their entirety;
2. TSA is hereby PERMANENTLY ENJOINED from enforcing the Federal Transportation Mask Mandate worldwide;
3. TSA is ORDERED to immediately remove all signs from airports stating masks are required and to scrub its website and publications of any mention of mandatory face coverings;
4. TSA is PERMANENTLY ENJOINED from issuing any similar orders mandating the wearing of masks unless Congress enacts specific authority into the U.S. Code; and
5. Because all airlines and other transportation providers worldwide who are subject to the Mask Mandate's enforcement provisions are in active

concert or participation with the enjoined federal agency in enforcing the mask mandate, all airlines and other transportation providers worldwide that are subject to U.S. laws are also hereby PERMANENTLY ENJOINED from requiring that any passenger wear a face covering unless such a such a restriction is imposed by valid state or local law.

Respectfully submitted this 11th day of April 2022 and finalized this 19th day of April 2022.

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XII. CERTIFICATE OF COMPLIANCE

We hereby certify that this brief complies with FRAP and the Court's March 3, 2022, order permitting our joint opening brief not to exceed 15,500 words because it has been prepared in 14-point Georgia, a proportionally spaced font, and this document contains 15,493 words in sections that count toward the word limit.