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

JONATHAN CORBETT, *Petitioner* v. TRANSPORTATION SECURITY ADMINISTRATION, *and* DAVID P. PEKOSKE, *in his official capacity as Administrator of the Transportation Security Administration*, *Respondents*	**No. 21-1074** **EMERGENCY MOTION FOR STAY PENDING REVIEW AND/OR 49 U.S.C. § 46110(c) RELIEF**

I. Introduction

Petitioner Jonathan Corbett brought this action to challenge orders of the Transportation Security Administration ("TSA") that purport to expand its authority from transportation ***security*** to transportation ***safety***. In particular, TSA has claimed authority to require passengers traveling on commercial airliners (as well as covered bus and train operations) to wear face masks everywhere within the transportation system – from the check-in desk, to the security checkpoint[1], to the airport bathrooms, to the food court, and on airplanes themselves, without regards to social distancing or whether the area is indoors or outdoors.

[1] This petition does not challenge TSA's authority to require masks at its own security checkpoints. It is the application of the rule outside of TSA's own space that is challenge, and which this motion seeks to enjoin.

Petitioner does not challenge the prudence of requiring passengers to wear masks, and what appears to be every airport and airline in the country had already mandated masks many months ago. Rather, Petitioner challenges the authority of the Transportation Security Administration to be the one to create and enforce such rules. A review of the TSA's enabling statute as well as the regulations under which TSA has purported to issue these mask-related orders makes clear that no such authority exists.

Petitioner therefore moves the Court to stay the orders and enjoin Transportation Security Administration from penalizing passengers as described herein under Fed. R. App. P., Rule 18, 28 U.S.C. § 2342, and/or 49 U.S.C. § 46110(c)[2].

II. Jurisdictional Statement

Any person with "a substantial interest" in an order "with respect to [the TSA's] security duties and powers" 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." 49 U.S.C. § 46110(a). The circuit courts have "exclusive

[2] The Court can review this as a traditional motion for stay pending review under Rule 18, or alternatively could view this as a request for "interim relief by staying the order" provided by § 46110(c). It is unclear if the "good cause" standard of § 46110(c) requires a different analysis than the traditional four-factor injunction analysis; Petitioner requests that the Court review under the least exacting standard.

jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the [TSA] to conduct further proceedings." 49 U.S.C. § 46110(c); *Tooley v. Napolitano*, 556 F.3d 836, 840-41 (D.C. Cir. 2009). "After reasonable notice to the [TSA], the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists." 49 U.S.C. § 46110(c).

Petitioner has a substantial interest in the TSA orders at issue in this suit. Petitioner is a frequent flyer, subject to TSA's passenger rules dozens of times annually, and with a currently-booked flight in the near future. Exhibit A, Affirmation of Jonathan Corbett. Passengers who are actually subject to TSA rules are routinely found to have standing to bring a § 46110 challenge. *Gilmore v. Gonzales*, 435 F.3d 1125-26 (9th Cir. 2006) (standing to challenge ID requirement applied to all passengers, but not to challenge watch lists when no evidence that passenger was placed on watch list); *Corbett v. Transp. Sec. Admin.*, No. 15-15717 (11th Cir., July 19th, 2019) (no standing to challenge search procedures relating to watch-listed passengers because no evidence petitioner was on a watch list). As a result of TSA's orders forcing airlines and airport operators to report mask noncompliance by any passenger anywhere in the aviation system, it is a certainty that anyone who is a passenger will be forced to comply[3].

[3] There is also no redressability problem here: although Petitioner would still be subject to local rules requiring mask usage, TSA's rules go far above and beyond local rules, not only in the amount of the penalty, but also in the scope of the

No intra-agency proceedings are available to Petitioner under § 46110, and thus there are no exhaustion requirements. No proceedings in any lower court were available to Petitioner, and thus there is now court below to move for a stay. The petition is timely under § 46110(a) (60 days from date of order).

III. Standard of Review

The D.C. Circuit, as most circuits, applies the standard for district court preliminary injunctions to motions for injunction/stays pending appeal/review under the appellate rules: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (*citation and quotations omitted*).

However, in this instance, interim relief is also available by statute. 49 U.S.C. § 46110(c) ("After reasonable notice to [TSA], the court may grant interim

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rules. For example, TSA explicitly requires those seated at a table, eating a meal, even if socially-distant, to wear masks "between bites and sips" of food and drink. *See* Petition, Exhibit A, SD 1532-21-01, p. 3. TSA's rules also make no exceptions for outdoor areas or socially-distant settings, while local rules often do. As such, even if Petitioner would not be immediately free to eschew masks while traveling *entirely*, an injunction here would at least allow Petitioner to eat a meal without having federal agents swoop in to make sure that he did not hesitate for too long in replacing his mask after each bite.

relief by staying the order or taking other appropriate action when good cause for its action exists."). Surprisingly, it appears it may be an issue of first impression as to whether this "good cause" standard is more lenient than the traditional four-factor test for Rule 8 and 18 motions. While the exact contours of "good cause" may not be clear, Petitioner submits that "the agency lacks authority" would certainly be a reason supporting "good cause."

IV. Argument

A. Petitioner is Likely to Succeed On The Merits

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

When it comes to aviation safety, including air traffic control, pilot standards, aircraft standards, and passenger safety requirements, the U.S. Department of Transportation, typically through the well-known Federal Aviation

Administration (FAA) sub-agency, has been assigned plenary authority over these matters. 49 U.S.C., Chapter 401. It is FAA rules that prohibit you from tampering with the lavatory smoke detector, interfering with a flight crew, or getting up when the "Fasten Seatbelt" sign is on – not TSA rules. Other federal agencies, such as the Centers for Disease Control and Prevention (CDC), likely have concurrent jurisdiction with the FAA over matters relating to the general public health.

Nowhere in any statute has TSA ever been assigned responsibility for aviation **safety** matters or for any public health-related matter whatsoever. Congress has been entirely clear that **security** matters are separate from **safety** matters, a distinction which makes perfect sense given that the two missions require very different focuses and skill sets. In other words, preventing an accident is an entirely different world from preventing an intentional attack. Before January 2021, TSA had never attempted to extend its jurisdiction from security matters into general safety matters. Thus, TSA greatly disturbs the status quo with its new foray into non-security aviation matters.

Given that no statute even hints at authority to delve into public health regulations, the challenged orders are *ultra vires*, and an analysis could stop there. But, the orders challenged are even more insidious, because they were not the result of formal agency rulemaking, as would be required by the Administrative Procedures Act, but rather they were issued under existing federal statutes and

regulations that allow TSA to publish "security directives." For example, Security Directive 1542-21-01 states on its face that it was issued under the authority of "49 U.S.C. 114 and 44903; 49 CFR 1542.303." Petition for Review, Exhibit A. 49 U.S.C. § 114, in subsection (l)(2), simply allows the issuance of security directives "to protect transportation security." 49 U.S.C. § 44903 is a section titled "Air transportation security" and does not discuss "security directives" at all. 49 C.F.R. § 1542.303 is the actual authority that details compliance requirements for security directives, but makes clear that authority is only granted when "additional security measures are necessary to respond to a threat assessment or to a specific threat against civil aviation."

Neglecting the fact that Congress declined to grant TSA the authority for these rules for a moment, TSA's own regulations simply do not even arguably allow for the promulgation of a "security directive" to address a public health concern. They would, continuing to neglect that fact for the moment, need to follow the procedures set out in the Administrative Procedures Act for traditional rulemaking. 5 U.S.C. § 553 (publish in Federal Register and provide opportunity for public comment). These challenged TSA policies are not "emergency" rules that may have a means of avoiding this processs, given that coronavirus reached the United States a full year ago, and given that airports and airlines already required masks.

B. Petitioner and the Public Will Be Irreparably Injured Without a Stay

"No person shall … be deprived of life, liberty, or property, without due process of law." U.S. CONST., AMEND. V. Petitioner has a liberty interest in not being forced to wear something that he does not want to wear (or alternatively be barred from commercial aviation). Abridged liberty cannot be merely compensated with cash, especially in this case where it is highly unlikely that there is any avenue in which monetary damages could be pursued by Petitioner or any of the other millions of individuals subject to TSA's *ultra vires* rule[4]. This is unchanged even if the rule implicates only a modest or slight liberty interest: the question is whether the harm is irreparable, not whether it is severe.

The Court has also rejected attempts to argue that "no injunction should issue [when a party] stands to suffer only a procedural harm." *Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020). Here, we are speaking of a rule created without legal authority, and without following the due process requirements demanded by the APA – in turn likely violating Petitioner's procedural due process rights under the Fifth Amendment. A "prospective violation of a constitutional right constitutes irreparable injury for these purposes." *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013) (*citing Davis v. District of Columbia*, 158 F.3d 1342, 1346

[4] *Bivens* remedies are certainly not available against high-level officials like Respondent Pekoske, and it is highly unlikely a tort could be properly alleged under the Federal Tort Claims Act. Injunction is the only remedy possible here.

(D.C. Cir. 1998)) (holding threat of penalties for not paying challenged tax sufficient to show irreparable harm). There would seem to be no reason not to apply the same logic to perspective violations of *statutory* rights even if no constitutional right is implicated.

Likewise, the other one million people who currently travel through TSA checkpoints in the United States on a daily basis also deserve to be subject only to constitutional, lawfully created rules, and they too would be subject to the same injury. Should the Court not enjoin the TSA from enforcing its new illegal rule, 12 people who enter an airport *every second* will be subject to it, not to mention what is surely a substantial number of people who use covered bus and train operators and are affected. Thus, it is also in the public interest to enjoin the rule.

C. Respondent Will Not Be Injured By a Stay

TSA cannot have an interest in taking actions that are outside of its authority. TSA therefore cannot claim to have any cognizable "injury" as a result of the issuance of a stay. Further, since airports and airlines across the country uniformly require masks independent of TSA's orders, in practice there will be little change to public behavior, except in the lowest-risk cases (*e.g.*, while seated at a table) that TSA attempts to regulate but local rules may not.

V. Conclusion

If TSA is permitted to begin to legislate general safety matters in airports and on airplanes, there will simply no longer be any limit to their powers with civil aviation and the transportation system as a whole. There is no distinction between the authority they claim to stop a virus and the authority that would be required to set crew sleep requirements, maintenance requirements for the escalator between arrivals and departures, or the speed limit on the roads entering the parking garage.

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

to mask-wearing, where the incident happens at any location other that a TSA checkpoint or other TSA property, until the resolution of this petition[5].

Dated: Washington, D.C.
February 26th, 2021

Respectfully submitted,

_____/s/Jonathan Corbett_____

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[5] In the alternative, Petitioner requests the Court set an extremely expedited briefing schedule to bring this case to a rapid ultimate resolution.

CERTIFICATE OF COMPLIANCE

This document complies with the type volume limit of Fed. R. App P. 27(d)(2)(A) because it contains approximately 2,500 words. This document complies with the type face and style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it uses a 14-point proportionally spaced font.

Dated: Washington, D.C.
February 26th, 2021

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/s/Jonathan Corbett

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JONATHAN CORBETT, *Petitioner* v. TRANSPORTATION SECURITY ADMINISTRATION, *and* DAVID P. PEKOSKE, *in his official capacity as Administrator of the Transportation Security Administration*, *Respondents*	**No. 21-1074** **AFFIRMATION OF JONATHAN CORBETT**

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

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

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

Dated: Washington, D.C.
February 26th, 2021

Respectfully submitted,

/s/Jonathan Corbett

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