No. 22-33

In The

Supreme Court of the United States

Jonathan Corbett,

Petitioner

v.

Transportation Security Administration, David P. Pekoske, *in his official capacity as administrator of the transportation security administration.*

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY TO OPPOSITION

I. The Government's Argument Requires the Court to Accept that TSA's "Security" Mandate Includes "Public Health" Matters

Petitioner and Respondent both acknowledge that TSA's enabling statute occasionally uses the word "safety."

Respondent's position is that Congress' occasional use of the word "safety" in a statute that clearly articulates "security" – terrorists, explosives, *etc.* – as its primary purpose, indicates Congress' intent to assign a general safety role to the agency as well. Opp. at 12.

Petitioner's position is that use of the word "safety" half a dozen times or so within an entire enabling act carves out narrow duties relating to safety and does not mandate a general public safety – let alone public *health* – mission. Pet. At 12, 13. And none of those narrow duties are applicable here.

Respondent would have TSA granted near all-encompassing authority using the "wafer-thin reed on which to rest such sweeping power" the Court warned us about last year. *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021). Peppering a statute with a few instances of a word does not create a statutory mission to broadly regulate as to that topic; if it did, the vast majority of agencies would find themselves with public health authority.

The Court is also asked to accept, as the court below did, that a duty to "coordinate" with other agencies essentially operates as a temporary grant of authority to TSA of the regulatory powers of the agency it coordinates with. Opp., pp. 2, 6, 11, 12. Of course, not a single case is cited in the Opposition to support this prospect.

This lawsuit is not about whether CDC, FAA, or any other agency had the authority to impose a mask mandate on the general public. It is about whether TSA did. Even during an emergency, TSA cannot assume the powers of another agency and regulate the environment, the stock market, the mail, the public health, or any other non-transportation security matter, even if that agency asks them to so assume, and even if doing so might tend to improve the "operational viability" of the transportation system.

II. Respondent Fails to Distinguish NFIB v. OSHA *from the Present Matter*

Petitioner and Respondent also have a very different understanding of *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*, 142 S. Ct. 661 (2022). The opposition laments that "Petitioner would apparently read the *OSHA* decision to stand for the proposition that 'general public health measures' are not within the purview of agencies authorized to regulate only the safety or security of a

workplace, including airports and airlines." Opp., p. 16.

Petitioner *does* read *OSHA* for that proposition, because that is exactly what *OSHA* says. OSHA at 665 ("The Act empowers the Secretary to set workplace safety standards, not broad public health measures.").

The government attempts to nuance its argument by explaining that "this Court emphasized that its holding was limited to the particular statute and rule before it and did not call into question even OSHA's own authority 'to regulate occupation-specific risks related to COVID-19.'" Opp., p. 16.

True as this may be, it does not help TSA here because the court below did not base its holding on a finding that a special risk to transportation existed; it found broadly that if coronavirus affected the "operational viability" of the transportation system, then TSA could regulate around it. App'x, A20. Nor could it have: TSA's regulation is not limited to circumstances unique to transportation; the mask mandate applies equally to the airplane as it does to the food court. *OHSA* at 666 ("OSHA's indiscriminate approach fails to account for this crucial distinction" between workplace and everyday risk). This directly conflicts with *OSHA*, as coronavirus certainly affects the "operational viability" of the workplace, but that is wholly insufficient to convey regulatory powers.

CONCLUSION

The remainder of Respondent's contentions merely downplay the significance of a regulation that burdened hundreds of millions of travelers and transit workers, as well as the significance of a court ruling allowing the same; Petitioner's original petition, and common sense, dispense with these arguments.

The D.C. Circuit's broad expansion of agency authority *contra* to the commands of this Court is a boulder on the scale measuring a case for worthiness of *certiorari*. The Court's time would be well-spent on this matter.

Respectfully,

/s/Jonathan Corbett

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