NO. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a pandemic-related public health mandate within the statutory authority granted by Congress to the U.S. Transportation Security Administration?

2. Has this controversy become moot as a result of TSA's announcement that it will not presently enforce its mandate and, if so, should the opinion of the court below be vacated?

PARTIES TO THE PROCEEDING

Petitioner is Jonathan Corbett, a member of the Bar of this Court appearing Court *pro se*.

Respondent is the U.S. Transportation Security Administration, a sub-agency of the U.S. Department of Homeland Security.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

OPINIONS BELOW

This case began as a petition to the Court of Appeals for review of an order of the Transportation Security Administration, pursuant to 49 U.S.C. § 46110(a). There were therefore no District Court proceedings and Petitioner was neither entitled to nor received any proceedings in front of the agency.

The opinion of the D.C. Circuit dismissing Petitioner's original petition is attached as Appendix A. The opinion of the same denying a petition for rehearing and rehearing *en banc* is attached as Appendices B & C. The case number below was 21-1074.

JURISDICTION

The Court of Appeals denied a timely petition for rehearing and rehearing *en banc* on February 2nd, 2022. Jurisdiction was proper in the Court of Appeals pursuant to 49 U.S.C. § 46110(a).

On April 23rd, 2022, Petitioner filed a timely application to extend the time to file a petition for a writ of certiorari. The application was assigned number 21A652 and was granted on April 28th, 2022, extending the time to file until July 2nd, 2022. By operation of S. Ct. R. 30.1 and a holiday weekend, this petition is timely if filed by July 5th, 2022.

This Court has jurisdiction under 28 U.S.C. § 1254(1) .

STATUTORY PROVISIONS INVOLVED

All statutes found in the Table of Authorities are reproduced in Appendix D.

STATEMENT OF THE CASE

A. Factual Background

In the days after the attacks of September 11th, 2001, Congress created Respondent U.S. Transportation Security Administration and granted the agency broad authority in the realm of transportation security. Since 2002, TSA has been the familiar face of airport security, conducting passenger screening on approximately two million people daily, as well as baggage and cargo screening, maintenance of trusted and restricted traveler databases, the Federal Air Marshal Service, and certain security functions on other interstate modes of transportation.

Both by law and in practice, TSA's role has always been limited to *security* issues, *i.e.*, preventing intentional attack on our transportation system, and until mid-2018 described its vision as to "[p]rovide the most effective transportation security in the most efficient way as a high performing counterterrorism organization[1]." The preeminent goal of the agency is to prevent another 9/11. TSA has never been granted authority or funding to conduct a general *safety* mission – *i.e.*, preventing accidents from happening – much less a *public health* mission. There are other agencies who do have this power; most notably, the

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[1] *See* Archive of TSA's Mission Statement, Saved April 5th, 2018: https://web.archive.org/web/20180405122757/https://www.tsa.gov/about/tsa-mission

Federal Aviation Administration has general safety authority with regards to air transportation (or for non-aviation modes of transit, other components of the Department of Transportation), while the Centers for Disease Control and Prevention has general public health authority (including within the transportation system). These agencies regularly use this authority to protect health and safety. *See*, *e.g.*, 49 U.S.C. § 41706 (airplane smoking ban passed in FAA's authorization); 86 FR 8025 (CDC enacts its own airplane mask mandate).

Notwithstanding, in the advent of the coronavirus pandemic, TSA has claimed the authority to issue public health mandates binding on the general public whenever they are within the aviation system. In particular, TSA has required air passengers (and the employees serving them) to wear masks throughout all airports and on all airplanes at all times with limited exceptions (hereafter, the "mask mandate")[2].

TSA has extended and/or re-issued this mandate multiple times. However, on April 18th, 2022, the CDC's airplane mask mandate was enjoined in *Health Freedom Defense Fund v. Biden*, 8:20-CV-1693 (M.D. Fla, April 18th, 2022). The initial government response appeared to be to abandon all of its travel-related mask mandates: TSA announced that same

[2] This case presented no challenge to the prudence of the mask mandate; the sole challenge was to whether TSA has the statutory authority to promulgate it.

day that it would "no longer enforce" its mask mandate as a result of that court decision and that it "will also rescind" the next extension of its mask mandate[3]. However, the government apparently reconsidered its position: an appeal was filed in the CDC's case[4], and while TSA has not appeared to have enforced its mandate since April, it has never formally rescinded its mandate in any public forum[5].

B. Proceedings in the Court of Appeals

Petitioner filed his original proceeding in U.S. Court of Appeals for the District of Columbia Circuit on February 26th, 2021. The case was filed directly in the Court of Appeals because the policy was created by the issuance of TSA "security directives," which constitutes an "order" subject to 49 U.S.C. § 46110(a), a statute that channels review directly to that court.

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[3] TSA. "Statement regarding face mask use on public transportation." April 18th, 2022. https://www.tsa.gov/news/press/statements/2022/04/18/statement-regarding-face-mask-use-public-transportation

[4] 11th Cir. Case No. 22-11287.

[5] The undersigned counsel represents that he attempted to confer with the government's counsel shortly after the CDC injunction to determine if TSA had non-publicly rescinded, or would soon publicly rescind; government counsel was unable or unwilling to confirm.

Respondent's brief was filed on June 9th, 2021, which in sum made the following arguments: 1) that Petitioner lacked standing, 2) that TSA was merely supporting CDC[6], or that its rule overlaps a similar rule of CDC such that overturning TSA's rule without also overturning CDC's would provide Petitioner no relief, 3) that TSA's mission includes both safety and security components, 4) that coronavirus does threaten the "security" of transportation, and 5) that TSA's emergency powers allow for the mandate even if under non-emergency circumstances, TSA would lack such authority.

The case was fully briefed on July 1st, 2021, and decided, without oral arguments, by a panel on December 10th, 2021. The decision was 2-1 in favor of denying the petition, although the "dissenting" judge also would have denied the petition on other grounds. The opinion was published as *Corbett v. Transp. Sec. Admin.*, 19 F.4th 478 (D.C. Cir. 2021) and is attached in Appendix A.

The majority rejected TSA's argument that Petitioner did not have standing. App'x 11a ("As a directly regulated party, Corbett plainly has standing to pursue his claims in this case."). It also rejected TSA's argument that the court could afford no relief

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[6] TSA is allowed to "coordinate" and "oversee" transportation-related duties of other agencies during emergencies, *see* 49 U.S.C. § 114(g)(1)(B), but not to issue its own regulations.

on account of CDC's similar rule because TSA's "Mask Directives are not a one-for-one fit with the CDC Order as far as scope … and they indisputably carry new and distinct penalties." *Id.*, pp. 12a-13a.

However, the majority was skeptical of Petitioner's argument that Congress intended for TSA's security powers to exclude safety matters, and ultimately found that it was unimportant to distinguish because "TSA has established that COVID-19 qualifies as a threat to both safety and security." *Id.*, p. 33. It also found that TSA's emergency powers "cannot seriously be doubted" to include the mask directives. *Id.* The Court called out the familiar standard called for by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but did not appear to actually apply the test called for by that case and its progeny in its reasoning, instead essentially finding TSA's authority to be sufficiently obvious as to not require going through the process.

The dissenting judge agreed that TSA has authority but would have disposed of the case by denying standing. App'x 27a-29a.

A timely motion for rehearing and rehearing *en banc* was filed January 24th, 2022, bringing the court below's attention to *NFIB v. OSHA*, 595 U. S. ___, No. 21A244 (Jan. 13th, 2022), a decision of this Court issued after the merits panel ruled in this case, that clarified how courts should address agencies that issue emergency coronavirus mandates that are

outside of their traditional sphere of operation. The court below denied both rehearing and rehearing *en banc* on February 2nd, 2022. App'x 30a-33a.

REASONS FOR GRANTING THE PETITION

I. The Rules Set By NFIB v. OSHA *Conflict With That Used By the Court Below*

The general thrust of the Court's decision in *NFIB* was that the Occupational Safety and Health Administration was charged by Congress with occupational safety- and health-related matters, and that general public health measures are outside of that scope. *NFIB* at *6. In other words, a public health matter that affects the general public at all times, whether or not they are at work, is not an "occupational" matter just because it also affects them at work.

The general thrust of Petitioner's argument in the court below was that the Transportation Security Administration was charged by Congress with transportation security, and general public health measures are outside of that scope. In other words, a public health matter that affects the general public at all times, whether or not they are in the transportation system, is not a "transportation security" matter just because it also happens while engaged in transportation – and further, it is not a "security" matter whatsoever: security and public health are simply two different things.

NFIB looked at the high-level intent of Congress, starting with the name of the agency and continuing to the basic powers assigned to the agency and its head in the enabling act. "The Act empowers the

Secretary to set workplace safety standards, not broad public health measures. See 29 U.S.C. § 655(b) (directing the Secretary to set '*occupational* safety and health standards' (emphasis added)); § 655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect 'employees' from grave danger in the workplace)." *NFIB* at *6.

In the court below, Petitioner urged the panel to do the same. TSA's enabling act provides that "The Administrator shall be responsible for *security* in all modes of transportation, including — (1) carrying out chapter 449, relating to civil aviation *security*, and related research and development activities; and (2) *security* responsibilities over other modes of transportation that are exercised by the Department of Transportation." 49 U.S.C. § 114(d) (*emphasis added*). A review of 49 U.S.C., Chapter 449, makes clear Congress's mandate 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.

The court below declined to take this approach. It instead found that anything that "poses a threat to the operational viability of the transportation system" is transportation-security related. App'x 20a. This simply misses the mark. Even pre-*NFIB*[7], no one

[7] And even pre-*NFIB*, the Court's approach in *NFIB* was not subtly foreshadowed in *Alabama Association*

would say that rising jet fuel prices, weather incidents, or airport/aircraft maintenance issues are transportation security issues, even though they clearly tend to affect the "operational viability of the transportation system." But *NFIB* makes clear that a general public health matter's tangential effect on something within an agency's purview simply does not give the agency the authority to regulate the public health. There is no doubt that coronavirus has affected the "operational viability" of many workplaces – certainly, there are millions of businesses that closed, temporarily or permanently, due to the pandemic – but that did not give OSHA the authority to regulate on the matter, and obviously, TSA's mandate here does not fall under the same umbrella as does its customary passenger screening, cargo inspection, air marshals, and the like. This standard directly conflicts with the standard used by

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of Realtors v. Dept. of Health and Human Svcs., ___ U.S. ___, 141 S. Ct. 2485, No. 21A23 (Aug. 26th, 2021). The court below distinguished this case by finding that the mandate fit within both "transportation 'security' and 'safety.'" App'x a20. *NFIB* makes clear, to the extent that *Alabama Ass'n* was not, that public health mandates cannot be squeezed into these buckets.

this court in *NFIB*.[8]

The court below also failed to apply the skepticism traditionally applied when an agency "discovers" newly-found powers. For nearly 20 years, TSA has stayed in its lane and regulated only security issues. A review of the agency's regulations makes this clear. *See* 49 C.F.R. § 1542.101(a)(1) (must prevent "an act of criminal violence, aircraft piracy, and the introduction of an unauthorized weapon, explosive, or incendiary into an aircraft."); § 1542.201(b) (prevent unauthorized persons) § 1542.221 (piracy attempt recordkeeping); *etc.* Congress has likewise been exceptionally clear, and the few times that TSA-related statutes use the word "safety" all either make clear that the word was inartfully used and meant to

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[8] One may reasonably argue that the mandate in *NFIB* was more onerous and consequential than the one here, as *NFIB* addressed a job-threatening vaccination requirement. Petitioner is not arguing that the mandates are "equal," but one should consider that: 1) the *NFIB* mandate allowed a test-and-mask opt-out that was perhaps less intrusive than vaccination, 2) there are many pilots, flight attendants, and others who have indeed lost their jobs over unwillingness or inability to comply with TSA's mandate, and hundreds of travelers (or more) have been fined, lost their PreCheck status, and/or been ejected from flights, and 3) regardless of how onerous mandate compliance may be, we are still left with an agency that has forayed into public health, affecting billions in commerce, when its statutory mission simply does not contemplate the same.

speak of security, *e.g.*, 49 U.S.C. § 44901(h)(1) (allowing armed law enforcement for "passenger safety and national security"), or meant to impose a special limited duty on TSA, *e.g.* 49 U.S.C. § 44903(b)(3)(A) (TSA must keep passengers safe *while searching them*).

Although the court below did not have the benefit of it either during initial hearing or when considering rehearing and rehearing *en banc*, the Court reiterated this point last week: when claimed authority is novel to the "history and the breadth of the authority that [the agency] has asserted," and the significance of allowing the new authority is considerable, there is a "'reason to hesitate before concluding' that Congress' meant to confer such authority." *West Virginia v. EPA*, 597 U. S. ____ (2022), at *17. The Court went through two pages of examples where despite "a colorable textual basis" for claimed authority, it was simply obvious that the claimed authority was not what Congress meant and thus the Court rejected the agency's overreach. *Id.* at *17, 18.

The same skepticism that applied in *NFIB* when OSHA claimed newly-found authority to wade into public health regulation, and in *West Virginia v. EPA* and the collection of cases found therein, should have been applied with equal force to TSA's newly-found authority. It is clear that the court below applied no such skepticism and instead eagerly granted new authority too heavy to be supported by the "wafer-thin reed" allegedly provided by Congress.

II. The Opinion Below Stands To Grant TSA And Countless Other Agencies Powers Beyond Those Authorized By Congress

The Court should grant this petition and review the ruling of the court below because it stands not just to allow TSA to create a mask policy, but to grant deference to any agency's action in a manner far beyond even the highly deferential standard of *Chevron* that would apply even if the major questions doctrine did not dominate the analysis.

The D.C. Circuit mentioned *Chevron* in the "standard of review" section of its opinion, and then in its analysis mentions *Chevron* again but *one time* to share that "'the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not.'" App'x 22a, *citing City of Arlington v. FCC*, 569 U.S. 290, 301 (2013). It may be true that the *Chevron* test is aimed at answering that question, but foregoing an actual application of a tried-and-true test in favor of simply looking at the goal of the test and summarily concluding that the goal is met does not get the job done.

To be clear, *Chevron* may not even be the correct test, in light of *NFIB* and in an instance where the major questions doctrine may resolve the question without reaching *Chevron*. But, assuming that *Chevron* and the major questions doctrine harmonize together to produce a result here, or even in the instance that *Chevron* alone does the job, the court

below did not just "misapply" the *Chevron* test; it failed to apply it at all.

The result is that loose standards like "threatens operational viability" will now be the only hurdle an agency has to overcome in order to satisfy "Step 1" and/or "Step 2" of the *Chevron* test[9]. Given that coronavirus threatens the "operational viability" of the post office, the IRS, the General Services Administration, and virtually every other agency, we are left with a standard by which any and all agencies are allowed to promulgate any and all coronavirus regulations. Clearly this would not even stop with pandemics: does global warming not affect the "operational viability" of the post office? And if people cannot send mail, have we not threatened the operational viability of the IRS as well? And with less taxpayer money, how can GSA operate? And so on and so forth.

The actual application of a principled test is required here. The court below did not even touch the considerations presented by *NFIB* – refusing rehearing after the case was brought to its attention – and it did nothing to actually apply *Chevron* either. The result was a mistaken judgment here and a door open to further mistakes in the future, and the Court

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[9] Since the court below did not actually apply the *Chevron* test, it is unclear where exactly the D.C. Circuit would terminate the test; notwithstanding, both steps require far more precision.

will eventually need to correct the court below, whether it does so now or in a future case where the stakes may be even higher. This is doubly-so given the D.C. Circuit's prominence in agency review actions (thus reducing the likelihood of other circuits considering the matter and assisting in developing the law) and that circuit's refusal of *en banc* review. The Court should take the time to correct this matter before more cases are wrongly decided.

III. This Case Is An Excellent Candidate For A Grant, Vacate, Remand Order

Regardless of whether *NFIB* – decided after the panel opinion in this case but before the motion for rehearing – represents a change in the law or simply a clarification of how the law is applied in a scenario that was substantially similar to the one presented here, it is clear from *NFIB* that the court below took a different approach to analyzing the merits than this Court did.

In light of the fact that the approach used by the Court of Appeals in this case cannot be harmonized with that used in *NFIB*, the court below should have granted the petition for rehearing that Petitioner filed immediately after *NFIB* was announced. A grant, vacate, and remand order from this Court would essentially direct the Court of Appeals to do what it should have done in the first place: recognize that the Court has set forth a new applicable framework and

apply it. Given the advent of new law, it may be appropriate for the Court to guide the Court of Appeals toward taking a new look.

IV. Alternatively, If The Issue is Moot, the Court Should Vacate The Decision Below

The issue of mootness is raised by the government's pronouncement that it will no longer enforce the mask mandate. There are several reasons for the Court to find that the issue is still live.

First, the government has declined to formally rescind the security directives. An agency statement that it will not (presently) enforce a mandate is operative only at the pleasure of the agency's leader. It takes no rulemaking or additional authorization to resume enforcement; only the whim of Respondent Pekoske.

Second, the government's suspension of the mandate was not entirely voluntary, but based on a court decision that it has decided to appeal. Should the appeal be successful, there is substantial likelihood that the mandate could be resumed either immediately or upon the next "strain" of coronavirus becoming popular.

Third, the executive has signaled strong support for mask mandates and for TSA, in particular, to implement them. TSA was initially brought into this

issue at the written direction of the President himself immediately following inauguration[10]. The government continues to recommend that all non-infant travelers wear masks while traveling[11]. The government has never conceded any scientific or legal impropriety with its mandate, and especially given the frequency that "new strains" of the virus appear, Petitioner has reasonable fear that the mandate's return is forthcoming.

Finally, coronavirus has shown itself capable of coming and going on a repeated basis. The regulations have followed, and will continue to follow, suit. Just as the ephermal nature of pregnancy made regulations on the same "capable of repetition, yet evading review," the same doctrine applies to coronavirus restrictions. *Roe v. Wade*, 410 U.S. 113, 125 (1973) (*overruled on other grounds*).

In the event that the Court concludes that this is no longer a live controversy, however, the Court

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[10] TSA. "TSA to implement Executive Order regarding face masks at airport security checkpoints and throughout the transportation network." Jan. 31st, 2021. https://www.tsa.gov/news/press/releases/2021/01/31/tsa-implement-executive-order-regarding-face-masks-airport-security

[11] CDC. "Wearing Masks in Travel and Public Transportation Settings." Updated May 13th, 2022. https://www.cdc.gov/coronavirus/2019-ncov/travelers/masks-public-transportation.html

should vacate the decision of the Court of Appeals pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.*

"Because this practice is rooted in equity, the decision whether to vacate turns on the conditions and circumstances of the particular case. One clear example where vacatur is in order is when mootness occurs through the unilateral action of the party who prevailed in the lower court." *Azar v. Garza*, 584 U.S. ____, 138 S. Ct. 1790, 1792 (2018) (*overruled on other grounds*) (*cleaned up*).

Here, any mootness was entirely out of control of the party requesting vacatur: TSA voluntarily discontinued its mask mandate, even if out of fear that a court may give it the same treatment as CDC's mask mandate, and regardless of whether TSA or a court is "responsible," it is certainly not Petitioner.

Given the importance of ensuring that the court below's near blank check is cancelled, vacatur is a worthy exercise of the Court's time. As described *supra* in subsection II, allowing that holding to stand will assuredly result in the improper endorsement of agency action that will quickly become a burden on this Court and the parties affected.

CONCLUSION

There are many who would consider the imposition of mask-wearing to be a mere "trifle." But this case is not about whether TSA has created an intolerable burden. It is about whether a federal agency may substantially deviate from the authority granted to it by Congress, regardless of whether its reasons for doing so are pure.

Just as OSHA strayed too far with its vaccination requirement, and CDC too far with its eviction moratorium, TSA has meandered past the boundaries of its enabling act with its mask mandate and the Court of Appeals has green-lit this detour when this Court has clearly signaled yellow, if not red. For the reasons above, this petition for *certiorari* should be granted.

Respectfully,

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