No. 22-33

In the Supreme Court of the United States

JONATHAN CORBETT, PETITIONER

v.

TRANSPORTATION SECURITY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Transportation Security Administration was acting within the scope of its statutory authority when it issued a series of security directives, which have all now expired, requiring that masks be worn at airports and on commercial aircraft during the COVID-19 pandemic.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (D.C. Cir.):

Corbett v. *TSA*, No. 21-1074 (Dec. 10, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-29a) is reported at 19 F.4th 478.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2021. A petition for rehearing was denied on February 2, 2022 (Pet. App. 30a-33a). On April 28, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 2, 2022 (a Saturday preceding the federal holiday on Monday, July 4, 2022). The petition was filed on July 5, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "In the wake of the deadly September 11, 2001, terrorist attacks, Congress created [the Transportation

Security Administration (TSA)] to safeguard this country's civil aviation security and safety." Pet. App. 4a. Congress established TSA as a component of the Department of Homeland Security, 49 U.S.C. 114(a), and authorized TSA to "develop policies, strategies, and plans for dealing with threats to transportation security," including by "coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States," 49 U.S.C. 114(f)(3) and (4). Congress also empowered TSA to "oversee the implementation, and ensure the adequacy, of security measures at airports." 49 U.S.C. 114(f)(11).

Congress assigned TSA additional responsibilities and powers "during a national emergency," subject to the direction and control of the Secretary of Homeland Security. 49 U.S.C. 114(g)(1); see 49 U.S.C. 114(g)(3) (providing that the Secretary "shall prescribe the circumstances constituting a national emergency for purposes of" Section 114(g)). Among other things, TSA is charged during such an emergency with "coordinat[ing] domestic transportation, including aviation," and with overseeing "the transportation-related responsibilities of other departments and agencies of the Federal Government." 49 U.S.C. 114(g)(1)(A) and (B). TSA is also responsible during a national emergency for "carry[ing] out such other duties, and exercis[ing] such other powers, relating to transportation * * * as the Secretary * * * shall prescribe." 49 U.S.C. 114(g)(1)(D).

When Congress established TSA, Congress specified that the agency would also inherit certain functions previously exercised by the Federal Aviation Administration. See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 141(b) and (f), 115 Stat. 643-644. The transfer of those functions has given TSA additional

responsibilities to ensure the security of civil aviation. See, *e.g.*, 49 U.S.C. 44901 (screening of passengers and property at airports); 67 Fed. Reg. 8340, 8340-8341 (Feb. 22, 2002) (other civil aviation security rules). As relevant here, TSA regulations require regulated aircraft and airport operators to adopt security programs that provide for "the safety and security of persons and property" traveling on air transportation against specified harms, such as incendiary devices. 49 C.F.R. 1542.101(a)(1) (airports); see 49 C.F.R. 1544.103, 1546.105 (domestic and foreign airlines). The regulations prohibit all persons, including passengers, from circumventing approved security programs. 49 C.F.R. 1540.105(a)(1). The regulations also make clear that TSA may alter the requirements in security programs, including on an emergency basis, if warranted by safety and security considerations. See 49 C.F.R. 1542.105(c)-(d), 1544.105(c)-(d), and 1546.105(c)-(d).

Finally, TSA may issue "Security Directive[s]" that apply to all regulated entities "[w]hen TSA determines that additional security measures are necessary to respond to a threat assessment or to a specific threat against civil aviation." 49 C.F.R. 1542.303(a) (airport operators); see 49 C.F.R. 1544.305(a) (aircraft operators); see also 54 Fed. Reg. 28,982, 28,982 (July 10, 1989) (Federal Aviation Administration rulemaking explaining that such "Security Directives * * * will eliminate the need to amend the air carriers' ongoing security programs"). Each airport and aircraft operator that is required to have an approved security program "must comply with each Security Directive issued." 49 C.F.R. 1542.303(b), 1544.305(b).

2. This case concerns emergency measures adopted by TSA to respond to the COVID-19 pandemic.

According to data collected by the Centers for Disease Control and Prevention (CDC), COVID-19 has killed more than one million people in the United States since the novel coronavirus that causes the disease was first detected in December 2019. See CDC, *COVID Data Tracker*, https://go.usa.gov/xhZjK (last visited Sept. 26, 2022). In 2020, then-President Trump determined that the "COVID-19 outbreak in the United States constitute[d] a national emergency, beginning March 1, 2020." Proclamation No. 9994, 85 Fed. Reg. 15,337, 15,337 (Mar. 18, 2020). That declaration of a national emergency remains in effect. See 86 Fed. Reg. 11,599, 11,599 (Feb. 26, 2021) (notice of continuation); 87 Fed. Reg. 10,289, 10,289 (Feb. 23, 2022) (same).

In January 2021, shortly after assuming office, President Biden issued an Executive Order regarding additional COVID-19 safety measures for domestic and international travel. Exec. Order No. 13,998, 86 Fed. Reg. 7205 (Jan. 26, 2021). The President explained that the CDC, the Surgeon General, and the National Institutes of Health had "concluded that mask-wearing, physical distancing, appropriate ventilation, and timely testing can mitigate the risk of travelers spreading COVID-19." *Id.* at 7205. The President determined that additional public health measures should be implemented for travel and ports of entry, designed "to save lives and allow Americans, including the millions of people employed in the transportation industry, to travel and work safely." *Ibid.* Among other things, the President ordered federal officials to "immediately take action, to the extent appropriate and consistent with applicable law, to require masks to be worn in compliance with CDC guidelines" by all persons in airports, on

commercial aircraft, and on certain forms of public transportation. *Ibid.*

In response to the President's directive, the CDC issued an order requiring all persons, with limited exceptions, to "wear masks over the mouth and nose" when "at transportation hubs," such as airports, bus terminals, and subway stations, and when "traveling on conveyances into and within the United States," including when traveling on aircraft. 86 Fed. Reg. 8025, 8026 (Feb. 3, 2021); see *ibid.* (operators must use "best efforts" to ensure compliance). The CDC observed that "[t]he virus that causes COVID-19 spreads very easily and sustainably between people who are in close contact with one another (within about 6 feet) mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks," and that wearing an appropriate mask, along with other preventive measures, "is one of the most effective strategies available for reducing COVID-19 transmission." *Id.* at 8028-8029. The agency further observed that "[t]raveling on multi-person conveyances increases a person's risk of getting and spreading COVID-19 by bringing persons in close contact with others, often for prolonged periods, and exposing them to frequently touched surfaces." *Id.* at 8029. The CDC further explained that those risk factors are particularly acute for air travel, which "often requires spending time in security lines and crowded airport terminals," as well as on aircraft, where "[p]eople may not be able to distance themselves by the recommended 6 feet from individuals seated nearby or those standing in or passing through the aircraft's aisles." *Ibid.*

The CDC's order went into effect on February 2, 2021. See 86 Fed. Reg. at 8030. Although the order became enforceable on that date, the CDC stated that it

"strongly encourage[d] and anticipate[d] widespread voluntary compliance." *Id.* at 8030 n.33. The CDC also stated that it anticipated "support from other federal agencies in implementing additional civil measures," *ibid.*, and specifically that it expected TSA to take a primary enforcement role for airports and air travel under TSA's own "appropriate statutory and regulatory authorities," *id.* at 8030.

In the meantime, on January 27, 2021, the Acting Secretary of Homeland Security had determined that a national emergency existed for purposes of Section 114(g), thus triggering TSA's additional transportation-related coordination and oversight responsibilities during an emergency. 86 Fed. Reg. 8217, 8218 (Feb. 4, 2021); see 49 U.S.C. 114(g)(1) and (3). The Acting Secretary directed TSA to support "the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system, including passengers and employees, from COVID-19 and to mitigate the spread of COVID-19 through the transportation system." 86 Fed. Reg. at 8218-8219.

TSA then issued three security directives to regulated airport operators and air carriers (and others) and an emergency amendment to the security programs of foreign air carriers. C.A. Supp. App. 13-17, 18-21, 22-26, 27-31. Those measures, which the court of appeals referred to collectively as the "Mask Directives," generally required the regulated entities to ensure "that masks be worn in airports, on commercial aircraft, and on surface transportation such as buses and trains." Pet. App. 6a. The mask directives provided for exceptions generally tracking the exceptions in the CDC's separate order, such as for children under the age of two. See *ibid.* As initially issued, the mask directives

were set to expire after 90 days. TSA ultimately extended them multiple times into 2022. *Id.* at 8a-9a; see 86 Fed. Reg. 13,971, 13,971-13,972 (Mar. 12, 2021); 86 Fed. Reg. 26,825, 26,825-26,826 (May 18, 2021).

3. In February 2021, petitioner "filed a timely petition for review of the TSA Mask Directives pursuant to 49 U.S.C. § 46110(a)" in the D.C. Circuit. Pet. App. 7a. Section 46110(a) provides for direct review of certain TSA actions in the court of appeals at the behest of an aggrieved party with a "substantial interest" in the agency action. 49 U.S.C. 46110(a). Petitioner maintained that he had a substantial interest in the mask directives, and standing to challenge them, because he is a frequent flyer and purportedly planned to fly again "in the near future." Pet. App. 8a (citation omitted). Petitioner challenged only the mask directives issued by TSA, not the separate CDC order. *Id.* at 9a. And with respect to the mask directives, petitioner argued only that TSA lacked statutory authority to issue them. See *id.* at 3a, 15a. Petitioner did not "contend that TSA's determinations regarding the seriousness of the threats posed by COVID-19 [were] unreasonable," nor did he invoke "the arbitrary-and-capricious standard" of review to challenge the TSA directives. *Id.* at 15a; see 5 U.S.C. 706(2)(A).

The court of appeals denied the petition for review. Pet. App. 2a-26a. The court held "that the Mask Directives [were] reasonable and permissible regulations adopted by TSA to promote safety and security in the transportation system against threats posed by COVID-19." *Id.* at 26a. In light of "the scale of death wrought by COVID-19, its established adverse effects on our nation's economy, its specific tendency to spread at high rates in transportation areas, and its threats to

persons employed to operate transportation services (as well as to people who use those services)," the court found that the COVID-19 pandemic constituted "a clear threat to transportation security and safety." *Id.* at 21a. Indeed, the court observed that the COVID-19 pandemic posed "one of the greatest threats to the operational viability of the transportation system and the lives of those on it seen in decades." *Id.* at 4a. Petitioner principally contended that TSA has statutory authority to protect the transportation system only against threats to security (narrowly construed), not safety, and that taking steps to address COVID-19 "falls outside the agency's limited mandate to secure the transportation system against violent attack." *Id.* at 16a. The court rejected that contention, explaining that the statutory scheme "does not limit TSA's authority to 'security' concerns," and that, in any event, the COVID-19 pandemic qualifies "as a threat to both safety *and* security." *Id.* at 17a (emphasis added).

Judge Henderson issued a brief dissent expressing her view that the petition for review should have been dismissed for lack of standing, rather than denied. Pet. App. 27a-29a. But Judge Henderson made clear that she otherwise agreed with the majority's bottom-line view of the merits, describing the petition as "a slam dunk loser" and stating that "[o]f course [TSA] * * * can require individuals in airports and on airplanes to wear the partial face masks we are all familiar with as a result of the coronavirus scourge." *Id.* at 27a.

4. The court of appeals issued its decision, and denied rehearing, while the mask directives were still in effect. See Pet. App. 2a, 30a-33a. On April 13, 2022, TSA announced that it would further extend the mask directives through May 3, 2022. Statement, TSA, *TSA*

extends face mask requirement through May 3, 2022 (Apr. 13, 2022), https://go.usa.gov/xhZtp. Several days later, however, a district court in Florida vacated the CDC's order requiring masking at transportation hubs and in airplanes and other conveyances. See *Health Freedom Def. Fund, Inc.* v. *Biden*, No. 21-cv-1693, 2022 WL 1134138, at *20-*22 (M.D. Fla. Apr. 18, 2022), appeal pending, No. 22-11287 (11th Cir. docketed Apr. 21, 2022). TSA later announced that, in light of the Florida district court's vacatur of the CDC order, TSA would not proceed with its planned extension of its mask directives, and the directives expired on April 18, 2022. See Statement, TSA, *Statement regarding face mask use on public transportation* (Apr. 18, 2022), https://go.usa.gov/xhZze.

ARGUMENT

Petitioner contends (Pet. 9-15) that TSA lacked statutory authority to require that masks be worn in airports and on commercial aircraft in order to protect the Nation's air-transportation system from the threats posed by COVID-19. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioner alternatively contends (Pet. 16-19) that the decision below should be vacated without plenary review by this Court—either for reconsideration by the court of appeals or under the doctrine of *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Those requests should be rejected. Petitioner fails to demonstrate that any intervening developments would warrant the vacatur that he seeks. Accordingly, the petition for a writ of certiorari should be denied.

1. The decision below is correct. As the court of appeals recognized, the mask directives at issue here were

"well within TSA's delegated authority" and were "reasonably designed to address the 'threats to transportation' posed by COVID-19." Pet. App. 25a (quoting 49 U.S.C. 114(f)(2)).

a. Congress conferred on TSA "'broad authority to assess potential risks to aviation and national security' and respond to those risks." Pet. App. 17a (quoting *Olivares* v. *TSA*, 819 F.3d 454, 466 (D.C. Cir.), cert. denied, 137 S. Ct. 282 (2016)). Among other things, Congress vested TSA with express authority to "assess threats to transportation" and to "develop policies, strategies, and plans for dealing with" such threats, including through rulemaking and security program agreements with airlines and airport operators. 49 U.S.C. 114(f)(2) and (3); see 49 U.S.C. 114(f)(4) (charging TSA with duty to make "plans related to transportation security"); 49 U.S.C. 114(*l*) (authorizing rulemaking).

The court of appeals examined those provisions and correctly concluded that they provided TSA with ample authority to adopt the mask directives. The court explained that COVID-19 "pose[d] a threat to the operational viability of the transportation system and thus transportation security and safety," because the "uncontrolled spread of COVID-19 among passengers and [transportation] workers [could] lead to cuts in service that threaten the essential movement of people and goods, and, consequently, our national supply chains, the economy, and national security." Pet. App. 20a. Adopting measures to address such threats was "in line with [TSA's] core mission." *Ibid.*

As the court of appeals further explained, TSA also properly relied on the additional authorities available to it "once the Secretary of Homeland Security declared a national emergency" under Section 114(g). Pet. App.

25a; see p. 6, *supra*. Section 114(g) specifies that TSA is responsible during an emergency for coordinating and overseeing "the transportation-related responsibilities of other departments and agencies of the Federal Government," and for carrying out "such other duties, and exercis[ing] such other powers, relating to transportation during a national emergency as the Secretary of Homeland Security shall prescribe." 49 U.S.C. 114(g)(1)(B) and (D).

Here, when the Acting Secretary declared a national emergency related to the COVID-19 pandemic, he invoked Section 114(g) and directed TSA to "take actions consistent with [its] authorities" to support "the CDC in the enforcement of any orders or other requirements necessary to protect the transportation system * * * from COVID-19." 86 Fed. Reg. at 8218-8219. The Acting Secretary "expressly authorized" TSA to support the CDC, Pet. App. 26a, and the mask directives were designed to carry out the Acting Secretary's directive. Accordingly, the mask directives were independently supported by TSA's additional statutory authority under Section 114(g) during an emergency. See *ibid.*

b. Petitioner argued below that the mask directives were *ultra vires* on the theory that TSA lacks statutory authority to address threats to "'safety'" and may instead address only threats to "'security'"—a term that petitioner proposed to read narrowly to refer only to "protection against intentional attack." Pet. App. 16a (citation omitted). Petitioner briefly reprises that theory (Pet. 9, 12), but he fails to develop it at any length or to demonstrate any error in the decision below. In fact, the court of appeals correctly rejected petitioner's theory on multiple grounds.

First, the court of appeals explained that petitioner is simply mistaken in his premise that TSA's statutory authority is limited to addressing threats to "security." See Pet. App. 17a. Congress explicitly and repeatedly prescribed a role for TSA in ensuring both "security" *and* "safety." See, *e.g.*, 49 U.S.C. 114(f)(13) (authorizing TSA to coordinate with the Federal Aviation Administration "with respect to any actions or activities that may affect aviation safety").[1] Petitioner suggests (Pet. 12-13) that those repeated references to "'safety'" in the statutory scheme are merely "inartful[]" ways of referring to his narrow conception of "security," but he offers no persuasive basis for disregarding the plain import of the statutory text.

Second, the court of appeals explained that petitioner's "extraordinarily narrow" understanding of the term "security" is "belied by the text of the Act," which makes clear that Congress used that term to encompass more than merely protection against intentional attacks. Pet. App. 16a. Thus, even if TSA were limited to addressing threats to security (which it is not),

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[1] See also, *e.g.*, 49 U.S.C. 44901(h) (authorizing TSA to deploy law enforcement personnel at airport security checkpoints "to ensure passenger safety"); 49 U.S.C. 44902(b) (permitting carriers to refuse transportation, subject to TSA regulation, to passengers or property "inimical to safety"); 49 U.S.C. 44903(b)(3)(A) (directing TSA to issue regulations for screening passengers to "ensure * * * their safety"); 49 U.S.C. 44903(h)(4)(C)(i) (requiring TSA to "establish procedures to ensure the safety" of "all persons providing services with respect to aircraft"); 49 U.S.C. 44905(b) (empowering TSA to cancel a flight if a threat to "the safety of passengers and crew of a particular flight" cannot be mitigated); 49 U.S.C. 46111(a) (authorizing TSA to determine that an individual holding a Federal Aviation Authority certificate presents "a risk of * * * terrorism or a threat to airline or passenger safety").

petitioner's challenge would still fail because "TSA has established that COVID-19 qualifies as a threat to * * * security." *Id.* at 17a. The court observed that, "[r]ather than restricting TSA to preventing violent attack," as petitioner contends, "Congress selected broad language in its mandate to the agency." *Id.* at 18a.

For example, Congress charged TSA with "develop[ing] policies, strategies, and plans" to mitigate against all "threats to transportation security," without limitation. 49 U.S.C. 114(f)(3). To be sure, other provisions in the statutory scheme reflect a more specific focus on the threats posed by, for example, weapons or other means of physical attack. See, *e.g.*, 49 U.S.C. 44902(a)(1) and (2) (requiring TSA to prescribe regulations mandating that airlines refuse to transport passengers who do not consent to searches of their persons and property for "dangerous weapon[s]" and "explosive[s]"). But similar language does not appear in TSA's general grants of authority under Section 114, which speak broadly of taking steps to address "threats to transportation." *E.g.*, 49 U.S.C. 114(f)(3). And the natural inference from Congress's inclusion of language focused on physical attacks in some parts of the statutory scheme but not others is that the omission was deliberate and should be given effect. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The court of appeals was also plainly correct in concluding that, when TSA adopted and maintained the mask directives, COVID-19 posed a threat to transportation "security" under any reasonable understanding of that term. Pet. App. 20a. TSA was acting in the face of evidence that COVID-19 "spreads at high rates on transportation," particularly in crowded airports and on commercial planes where social distancing is infeasible.

Ibid. Based on CDC recommendations, TSA reasonably concluded that the uncontrolled spread of COVID-19 among passengers and transportation employees constituted a direct threat to the security of those passengers and employees and, in turn, could cause "cuts in service that [would] threaten the essential movement of people and goods." *Ibid.* Likewise, if too many TSA screening employees were to fall ill from close contact with infected passengers and be unavailable for work, TSA's ability to effectively conduct screening operations that are critical to the safety and security of the traveling public would be drastically impaired. The threat to transportation security posed by COVID-19 was no less real than the threat of violent attacks, and Congress gave TSA ample authority to address both.

Third, the court of appeals determined that the mask directives were properly promulgated under the additional authorities the agency may exercise during an emergency. See pp. 10-11, *supra*. That holding is independently fatal to petitioner's textual theory, because TSA's powers in an emergency are not limited to addressing "security" threats and thus are not susceptible to petitioner's effort to construe the term "security" narrowly in a manner that would preclude TSA from addressing the immediate risks posed by COVID-19. See, *e.g.*, 49 U.S.C. 114(g)(1)(D). Petitioner fails to explain how his focus on the term "security" (Pet. 9) has any bearing on the scope of the agency's authority under the Section 114(g) provisions that do not even use that term.

2. The decision below does not implicate any division of authority within the courts of appeals. Indeed, petitioner does not identify any other circuit decision

addressing the question presented here.[2] Petitioner also does not identify any other compelling basis for further review.

a. Petitioner contends (Pet. 9) that the decision below is inconsistent with the "general thrust" of this Court's decision in *National Federation of Independent Business* v. *Department of Labor, Occupational Safety & Health Administration*, 142 S. Ct. 661 (2022) (*OSHA*) (per curiam), which was issued after the panel decision in this case but before the court of appeals denied rehearing. That case concerned the authority of a different federal agency—the Occupational Safety and Health Administration (OSHA)—to invoke different statutory provisions to adopt a different policy, under which certain employers would have been required to ensure that their employees were either vaccinated against COVID-19 or wore masks and were regularly tested for the virus. See *id.* at 662-664. This Court concluded that the challengers to OSHA's emergency measure were likely to succeed in showing that OSHA

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[2] A number of other petitions for review of the mask directives are pending in the D.C. Circuit. See, *e.g.*, *Wall* v. *TSA*, No. 21-1220 (filed Nov. 9, 2021); *Faris* v. *TSA*, No. 21-1221 (filed Nov. 10, 2021); *Marcus* v. *TSA*, No. 21-1225 (file Nov. 12, 2021). The petitioner in one of those cases applied to this Court for a stay pending further review, which this Court denied. See *Wall* v. *TSA*, 142 S. Ct. 860 (2022) (No. 21A198). The same litigant also challenged the mask directives in a case now pending in the Eleventh Circuit. See *Wall* v. *CDC*, No. 21-cv-975, 2021 WL 8201517, at *11 (M.D. Fla. Dec. 18, 2021) (dismissing challenge to mask directives for lack of district-court jurisdiction), appeal filed, No. 22-11532 (11th Cir. docketed May 4, 2022). This Court denied a stay application arising from those proceedings as well. See Order, *Wall* v. *CDC*, No. 21A2 (July 13, 2021).

"lacked authority" to adopt it under the specific statute the agency had invoked. *Id.* at 664-665.

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. Pet. 9; see Pet. 9-13. But in the *OSHA* case, 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." *OSHA*, 142 S. Ct. at 665. *A fortiori*, this Court's *OSHA* decision does not call into question the authority of other agencies to address the risks of COVID-19 transmission under other statutes and in other circumstances. Compare *id.* at 665-666 (observing that, "[w]here the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible," and giving the example of "particularly crowded" environments), with Pet. App. 20a-21a (explaining that COVID-19 poses an especial hazard "in transportation areas" and "to persons employed to operate transportation services (as well as to people who use those services)").

b. Petitioner also contends (Pet. 14-16) that the decision below misapplied the *Chevron* framework. See *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984). That contention lacks merit. The court of appeals recited the familiar *Chevron* framework in the course of setting forth the "Standard of Review." Pet. App. 13a. The court ultimately determined, however, that TSA "plainly has the authority to address" the threats posed by COVID-19. *Id.* at 3a The court thus

resolved the parties' dispute about the scope of TSA's statutory authority without relying on deference to TSA under *Chevron*. See, *e.g.*, *id.* at 16a (stating that petitioner's principal argument for cabining TSA's authority is "belied by the text of the Act"); *id.* at 17a (stating that, "[i]n light of the language of the Act," TSA's authority to issue the mask directives "cannot seriously be doubted"); cf. *id.* at 27a (Henderson, J., dissenting) (stating that "[o]f course" TSA was authorized by statute to adopt the challenged measures). In seeking rehearing below, petitioner himself recognized that the panel appeared to be "operating at [*Chevron*] Step 1," because it "found that Congress has spoken with clarity." C.A. Pet. for Reh'g 8. To the extent the court deferred to the agency's views, it did so only with respect to TSA's determination that COVID-19 posed a sufficiently serious threat to transportation security to warrant the mask directives, not to TSA's understanding of its statutory authority. See Pet. App. 18a-19a. Petitioner identifies nothing in the brief discussion of *Chevron* in the decision below that would support his request for further review.

c. In the alternative, petitioner contends (Pet. 16-17) that this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of this Court's *OSHA* decision. But petitioner already brought that case to the attention of the court of appeals in his petition for rehearing en banc (at pp. 5-7, 9-10, 13-19), which the court denied without any noted dissent. Pet. App. 32-33a. Petitioner identifies no reason to think the result below would be any different if the court of appeals took a second look.

Moreover, although petitioner repeatedly invokes this Court's *OSHA* decision, he does not contend that

requiring passengers and employees to wear face masks during air travel is a "significant encroachment" of "'vast economic and political significance'" on a level comparable to the order at issue in that case. *OSHA*, 142 S. Ct. at 665 (quoting *Alabama Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam)); cf. Pet. 12 n.8 (disclaiming any argument that the mask directives were as "onerous [or] consequential" as the OSHA policy); Pet. 20 (acknowledging that "many * * * would consider the imposition of mask-wearing to be a mere 'trifle'"). Petitioner also does not ever squarely argue that the court of appeals should have applied any "major questions" doctrine, or that the result below would have been different had the court viewed the question presented through that lens. Cf. Pet. 13-14 (discussing *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608 (2022)). The D.C. Circuit had already determined, correctly, that Congress gave TSA a "clear mandate to secure the transportation system against threats that endanger that system's very ability to function." Pet. App. 20a.

3. This Court's review is not warranted for the additional reason that the challenged mask directives have now expired. See p. 9, *supra*. As the government has argued in a supplemental brief filed in the court of appeals in another case involving TSA's mask directives, the expiration of the mask directives has not rendered moot pending challenges to TSA's statutory authority to issue the directives. See U.S. Supp. Br. at 6-10, *Wall* v. *TSA*, No. 21-1220 (D.C. Cir. Sept. 12, 2022). The government has appealed the district court decision enjoining the CDC's separate masking order, which the TSA mask directives were designed to parallel and implement, see *id.* at 2-3, and TSA could invoke the same

statutory provisions in the future if circumstances warranted.

Although, as petitioner contends (Pet. 17-18), the expiration of TSA's mask directives has not rendered this case moot in the technical Article III sense, the presence of a threshold question about mootness could complicate this Court's review. At the least, the expiration of the mask directives eliminates any current practical significance of the question presented. If TSA were to determine in the future that comparable masking requirements are again necessary to protect the air-transportation system, any future security directives would be subject to judicial review in the ordinary course. See 49 U.S.C. 46110.

The Court should reject petitioner's alternative request for vacatur under *Munsingwear* if the case is thought to be moot. See Pet. 18-19. Under *Munsingwear*, this Court's "established practice * * * in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending [this Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39; see, *e.g.*, *Becerra* v. *Gresham*, 142 S. Ct. 1665 (2022) (recent example); *Biden* v. *Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021) (same).

Petitioner has failed to demonstrate that a *Munsingwear* vacatur would be appropriate even if the case is moot. Petitioner emphasizes (Pet. 19) that the mask directives were allowed to expire for reasons outside his control. But "not every moot case will warrant vacatur," *Azar* v. *Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam), and the *Munsingwear* doctrine is generally available only to "those who have been prevented from

obtaining the review to which they are entitled," *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39). That rationale for vacatur does not apply where the case becomes moot after the court of appeals has entered final judgment, because a losing party has no right to discretionary further review by this Court. See Sup. Ct. R. 10.

It has therefore been the consistent position of the United States that the Court should ordinarily deny review of a case that has become moot after the court of appeals entered its judgment, but before this Court has acted on a certiorari petition, when the case does not present any question that would independently be worthy of this Court's review. See U.S. Br. in Opp. at 5-8, *Velsicol Chem. Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900); see also, *e.g.*, U.S. Supp. Br. at 10-11, *Oracle Am., Inc.* v. *United States*, 142 S. Ct. 68 (No. 20-1057); U.S. Pet. at 23 n.4, *Azar* v. *Garza*, *supra* (No. 17-654); cf. Stephen M. Shapiro et al., *Supreme Court Practice* 19-28 & n.34 (11th ed. 2019). As discussed above, the petition in this case does not present any issue that is independently worthy of review. Accordingly, *Munsingwear* vacatur is not appropriate, and the petition should instead be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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