No. 24-02109

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GRAND TRUNK CORPORATION, D/B/A CN;
ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

TRANSPORTATION SECURITY ADMINISTRATION;
DAVID P. PEKOSKE, ADMINISTRATOR OF THE
TRANSPORTATION SECURITY ADMINISTRATION,
Respondents.

Petition for Review Under 49 U.S.C. § 46110(a)

BRIEF OF AMICI CURIAE THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION AND THE ASSOCIATION OF AMERICAN RAILROADS SUPPORTING PETITIONER

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Appellate Court No: 24-02109

Short Caption: Grand Trunk v. TSA

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i) Identify all its parent corporations, if any; and

None

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Attorney's Printed Name: Aram A. Gavoor

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INTEREST OF AMICI CURIAE[1]

Founded in 1913, the American Short Line and Regional Railroad Association ("ASLRRA") is an incorporated non-profit industry association that represents approximately 600 small businesses that own and operate short line and regional railroads throughout North America. ASLRRA's members operate 50,000 miles of track or nearly 30 percent of the national railroad network, providing the first- and last-mile connection between farmers and manufacturers and consumers. ASLRRA's members include Class II and Class III railroads, which are defined by the Surface Transportation Board as railroads earning annual operating revenues between $47.3 million and $1.05 billion and $47.3 million or less, respectively. 49 C.F.R. § 1201.1-1; Surface Transp. Bd., Indexing the Annual Operating Revenues of Railroads, 89 Fed. Reg. 45,729 (May 23, 2024). ASLRRA's members also include companies that supply goods and services to the short line industry and provide railroad switching, terminal, and tourism services.

The Association of American Railroads ("AAR") is an incorporated, non-profit industry association representing the nation's major freight railroads, Amtrak and several commuter railroads, and many smaller freight railroads. AAR's freight

[1] All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person other than amici curiae, their members, and their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

railroad members operate 83 percent of the line-haul mileage in the United States. In addition, AAR's passenger railroad members account for more than 80 percent of U.S. passenger railroad trips.

ASLRRA and AAR (collectively, the "Associations") and their respective members are directly affected by the U.S. Department of Homeland Security, U.S. Transportation Security Administration's cybersecurity Security Directives. The Associations and their members actively engage with regulators and avail themselves of the notice-and-comment process to provide expertise on the railroad industry. TSA's use of emergency authority to promulgate the Security Directives and its resulting bypass of notice-and-comment rulemaking has deprived ASLRRA, AAR, and their members from providing on-the-record comments in an official capacity and benefiting from others' on-the-record comments. The Associations can provide the Court with the perspective of the rail industry and elucidate the benefits of notice-and-comment rulemaking and narrow emergency exceptions to industry participants. In addition, ASLRRA aims to elevate the voice of small businesses and share their unique view on these issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The underlying petition for review challenges a July 2024 Security Directive that is one of four that have been successively promulgated by the U.S. Department of Homeland Security ("DHS"), U.S. Transportation Security Administration

("TSA") over a multi-year period to regulate cybersecurity practices of the rail industry. Using its statutory emergency authority, which allows for bypassing the well-tread notice-and-comment process when action must be taken immediately to protect transportation security, TSA promulgated the first iteration of the Security Directive in October 2022. Since then, the agency has used the same emergency basis to renew or modify the Security Directive three times, under authorization of the Transportation Security Oversight Board.

TSA has statutory authority to issue emergency regulations under the right qualifying circumstances. Repeatedly doing so, however—especially over a three-year period without any showing that the requisite "emergency" circumstances exist—causes an adverse impact on businesses that results from bypassing the notice-and-comment process and the corresponding analysis required under the Regulatory Flexibility Act regarding the impact of regulations on small businesses. The notice-and-comment process provides businesses and the public at-large with the opportunity to assess the potential impact of a proposed rule and submit on-the-record feedback for an agency to consider so that the proposed rule's scope and associated compliance burden is narrowly tailored. The Administrative Procedure Act ("APA") confirms the significance of public participation in an agency's formulation of new rules.

Notwithstanding TSA's authority to invoke emergency rulemaking, such authority should be narrowly tailored to qualifying situations that involve a discrete and finite emergency. Here, TSA has failed to identify a discrete emergency and instead has relied on broad national security concerns that are likely to endure for the coming decades. In contrast to TSA, other agencies have initiated the notice-and-comment process to regulate cybersecurity practices in other critical infrastructure industries rather than overbroadly rely on emergency authority.

ARGUMENT

I. Public Participation in Rulemaking Is Crucial to Successful Regulation.

A. TSA Regulates Within the APA's Domain.

TSA's authorizing statute gives its Administrator the authority to "issue, rescind, and revise such regulations as are necessary to carry out the functions of the Administration." 49 U.S.C. § 114(*l*)(1). The statute also contains an "Emergency Procedures" subsection that permits the Administrator to bypass the APA's notice-and-comment rulemaking process (*see* 5 U.S.C. § 553(b)–(c)) when the Administrator "determines that a regulation or security directive must be issued immediately in order to protect transportation security." 49 U.S.C. § 114(*l*)(2)(A). The "Emergency Procedures" expressly allow the Administrator to issue emergency regulations "without providing notice or an opportunity for comment," (49 U.S.C. § 114(*l*)(2)(A)) which demonstrates that Congress unambiguously intended for APA rulemaking procedures to govern non-emergency regulations promulgated by TSA.

See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 6 (D.C. Cir. 2011) (finding that "the TSA's use of [advanced imaging technology] for primary screening has the hallmark of a substantive rule and, therefore, *unless the rule comes within some other exception, it should have been the subject of notice and comment*") (emphasis added). In practice, TSA regularly engages in notice-and-comment rulemaking for its transportation security functions.[2] Further, even as to the instant Security Directive, the agency announced its intent to "more permanently codify" its requirements "through rulemaking," Security Directive 1580/82-2022-01C at 1 n.2 (July 1, 2024), in the exact same fashion as it did with previous iterations of the Security Directive. *See, e.g.,* Security Directive 1580/82-2022-01B at 1 n.2 (May 2, 2024); Security Directive 1580/82-2022-01A at 1 n.2 (Oct. 24, 2023). TSA's recently proposed cybersecurity rule to codify the Directive—late, but in earnest—is an important first step in the process of completing the regulatory process. *See* Enhancing Surface Cyber Risk Management, 89 Fed. Reg. 88,488 (proposed Nov. 7, 2024). The Security Directive will, however, remain binding under the strictures of the agency's security directive regime unless and until that notice-of-proposed-rulemaking process is completed. *See id.* at 88,510. The question is whether such

[2] *See, e.g.*, Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 88 Fed. Reg. 60,056 (proposed Aug. 30, 2023); Vetting of Certain Surface Transportation Employees, 88 Fed. Reg. 33,472 (proposed May 23, 2023).

continuation of the Security Directive goes too far as an indefinite exercise of emergency authority by TSA.

B. Notice-and-Comment Rulemaking Is Fundamental to the APA's Goal of Ensuring Participatory Democracy in Agency Regulation.

The APA has been deemed a "Bill of Rights" for the administrative state. *See* Senate Comm. on the Judiciary, Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 298 (1946) (citing Sen. McCarren). The Supreme Court accords great weight to the APA's legislative history and post-enactment context, both of which emphasize the statute's goal of providing the public with notice and the opportunity to provide feedback on proposed agency rules. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) (finding that "the legislative material elucidating [the APA] manifests a congressional intention that it cover a broad range of administrative actions"); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (noting that "[i]t is fair to say that in [the APA] Congress expressed a mood" and that "[a]s legislation that mood must be respected."). For example, the Attorney General's Manual on the APA—widely viewed as offering a compelling interpretation of the statute[3]—declares that one of the core principles of

[3] The Supreme Court has referred to the Manual as a highly persuasive document. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004) (referring to the Manual as "a document whose reasoning we have often found persuasive"); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 103 (2015); *Vt. Yankee v. Nat'l Res. Def. Council*, 435 U.S. 519, 546 (1978) (referring to the Manual as a "contemporaneous interpretation previously given some deference by this Court").

the APA is "to provide for public participation in the rule making process." *See* Attorney General's Manual on the Administrative Procedure Act, U.S. Dep't of Just., I–Fundamental Concepts, (1947). The Manual further notes that "the objective [of rulemaking] should be to assure informed administrative action and adequate protection to private interests." *Id.* at III Section 4–Rule Making, Informal Rule Making.

The Seventh Circuit also has emphasized the importance of notice and public comment as a mechanism to promote public participation and democratic accountability in the rulemaking process. *See Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170–71 (7th Cir. 1996) (describing notice-and-comment as "a procedure that is analogous to the procedure employed by legislatures in making statutes"). In *Hoctor*, this Court explained that notice-and-comment rulemaking permits the regulated public to "communicate their concerns in a comprehensive and systematic fashion to the legislating agency." *Id.* at 171. In *Zero Zone, Inc. v. U.S. Dep't of Energy*, this Court recognized that "the primary purpose of the notice and comment period" is for an agency to be "apprised of responsible opinions contrary to its own." 832 F.3d 654, 672 (7th Cir. 2016).

Other circuit courts have underscored the purpose of the APA's notice-and-comment process. The Fifth Circuit observed that notice and comment is "designed to ensure that affected parties have an opportunity to participate in and influence

agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979). In *Prometheus Radio Project v. F.C.C.*, the Third Circuit acknowledged three purposes of notice-and-comment: ensuring "agency regulations are tested via exposure to diverse public comment," providing "fairness to affected parties," and giving the regulated public "an opportunity to develop evidence in the record … [which] thereby enhance[s] the quality of judicial review" if regulation is subsequently challenged in the courts. 652 F.3d 431, 450 (3d Cir. 2011) (internal citations omitted).

C. The Associations Routinely Exercise Their Public Participation Rights Via Notice-and-Comment Rulemaking.

ASLRRA and AAR frequently comment on proposed rules to effectuate changes in final agency regulations.[4] For example, the Associations actively participate in rulemakings covering cybersecurity. *See, e.g.*, Comment from AAR and ASLRRA on Enhancing Surface Cyber Risk Management, https://tinyurl.com/44fht58n (Feb. 1, 2023); Comment from AAR and ASLRRA on

[4] ASLRRA and AAR also actively participate in other avenues of engagement with government agencies, such as the Federal Railroad Administration's Railroad Safety Advisory Committee, a federal advisory committee established under the Federal Advisory Committee Act to provide information, advice, and recommendations to the Federal Railroad Administration on matters relating to rail safety. *See* RSAC Members, Railroad Safety Advisory Committee, https://tinyurl.com/2fepazat.

Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) Reporting Requirements (July 3, 2024), https://tinyurl.com/yc4wc2tm.

Such comments provide important feedback on the impact of proposed rules on the railroad industry. For example, ASLRRA submitted comments in December 2022 in response to a proposed rule by the Federal Railroad Administration that would establish minimum train crew sizes as a safety measure. *See* Train Crew Size Safety Requirements, 87 Fed. Reg. 45,564 (proposed July 28, 2022). In its comments, ASLRRA noted that the proposed rule would greatly harm short line railroads and explained that the proposed small railroad exception was inadequate. *See* Comments of the American Short Line and Regional Railroad Association on Train Crew Size Safety Requirements (Dec. 21, 2022), https://tinyurl.com/yj49wen4. In the final rule, the Federal Railroad Administration acknowledged ASLRRA's comments and modified the rule to make several accommodations and provide a delayed implementation timeline for Class II and III railroads per ASLRRA's request. *See* Train Crew Size Safety Requirements, 89 Fed. Reg. 25,052, 25,074 (April 9, 2024).

In addition, AAR commented in October 2023 on a rule proposed by the Pipeline and Hazardous Materials Safety Administration to require railroads that carry hazardous materials to provide certain information about these materials to first responders, emergency response officials, and law enforcement. *See* Hazardous

Materials: FAST Act Requirements for Real-Time Train Consist Information, 88 Fed. Reg. 41,541 (proposed June 27, 2023). AAR made several recommendations to more effectively tailor the proposed rule to railroad emergency response procedures. *See* Comments of the Association of American Railroads on Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information (Oct. 27, 2023), https://tinyurl.com/3sevhasy. AAR contended that the requirement to include certain information beyond a telephone number for emergency points of contact was extraneous and could impede emergency response. *See id.* at 21–23. AAR also explained that the rule's requirement for railroads to notify all emergency responders within a 10-mile radius in the event of an accident that results in a release of hazardous materials set an arbitrary radius that should be eliminated. *See id.* at 17–21.

In response, the Pipeline and Hazardous Materials Safety Administration adjusted the rule to require only a telephone number for an emergency point of contact and eliminated the 10-mile radius push notification requirement. *See* Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information, 89 Fed. Reg. 52,969 (June 24, 2024).

D. Notice-and-Comment Rulemaking to Regulate Rail Cybersecurity Enables the Associations' Members to Share Valuable, Diverse Views on The Record to Which the Agency Must Respond.

In notice-and-comment rulemaking, regulated entities can meaningfully engage with an agency and effectuate change in the final rule, as the Associations have done in the past. As the Second Circuit opined in *United States v. Nova Scotia Food Products Corp.*, "[t]he inadequacy of comment . . . leads in the direction of arbitrary decision-making." 568 F.2d 240, 252 (2d Cir. 1997). Even with informal communication channels, such a situation creates a heightened risk of arbitrary decision-making by *any agency* and contravenes the basic principles of the APA.

After more than three years of TSA issuing and re-issuing its Security Directives under its emergency powers, the regulated public—including ASLRRA, AAR, and their respective members—has not been able to offer any on-the-record views to the agency. Consequently, the Associations and their members have been deprived of the opportunity to publicly communicate their concerns to TSA "in a comprehensive and systematic fashion" as envisioned by the APA. *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996). Moreover, the Associations have been unable to review on-the-record responses of other regulated entities, which may alert them to additional, previously unconsidered consequences of the proposed rule.

E. The Regulatory Flexibility Act Analysis That Is Part of Notice-and-Comment Rulemaking Particularly Benefits Small Businesses, Which Comprise Much of ASLRRA's Membership.

In its election to issue successive security directives using emergency authority, TSA also bypassed the Regulatory Flexibility Act's ("RFA") assessment of how a rule will impact small businesses. Small entities, like the Class II and Class III railroads that comprise ASLRRA's membership, uniquely bear the brunt of this choice.

The RFA requires federal agencies to "assess the effect of their rules on small entities." *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 683 (7th Cir. 2016) (citing 5 U.S.C. §§ 601–612 (as amended by the Small Business Regulatory Enforcement Fairness Act (1996))). The RFA requires agencies to prepare an initial on-the-record analysis when they propose a rule for public comment and a final analysis at the final rule stage. *See* 5 U.S.C. §§ 603–604. In an initial RFA analysis, agencies are required to describe the perceived impact of a proposed rule on small entities and any significant alternatives to the proposed rule that would minimize its impact on small businesses, such as small business exemptions, delayed implementation, or simplified compliance requirements. 5 U.S.C. § 603(b)-(c). When an agency finalizes a rule, it must include a final RFA analysis that describes "the steps the agency has taken to minimize the significant economic impact on small entities . . . including a statement of the factual, policy, and legal reasons for

selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(6); *Zero Zone, Inc.*, 832 F.3d 654, 683 (7th Cir. 2016) (citing 5 U.S.C. § 604(a)).

The RFA directly benefits ASLRRA and its members by requiring agencies to consider the "significant economic impact" of their regulations on "small entities" and allowing ASLRRA's members affected by TSA's regulations to inform the agency of alternatives through the traditional notice-and-comment period. 5 U.S.C. § 603(a). ASLRRA frequently provides public comments on how proposed rules could disproportionately affect short-line railroads and other small businesses in the rail industry. *See, e.g.*, Comments of the American Short Line and Regional Railroad Association on Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information (Oct. 27, 2023), https://tinyurl.com/bdej99xa. These comments provide insight into the unique challenges posed to small rail operators. In addition, agencies frequently conduct thoughtful regulatory flexibility analyses that result in workable, tailored approaches for small businesses. *See generally* U.S. Small Bus. Admin., Off. of Advocacy, Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act and Executive Order 13,272 (June 2024), https://tinyurl.com/55pkuy8z.

TSA's issuance of the Security Directives to impose cybersecurity requirements for the rail industry has permitted TSA to bypass the RFA analysis that would specifically address how the cybersecurity requirements affect small businesses. If TSA had previously proposed a rule to regulate cybersecurity using notice-and-comment rulemaking, ASLRRA and its members would have publicly commented on the initial RFA analysis that TSA would have been required to publish. They would have been able to propose alternatives on the record to TSA, as appropriate, that would have a less significant economic impact on small businesses. Specifically, ASLRRA could have brought to TSA's attention that Class II and Class III railroads have small IT departments or work with third-party cybersecurity vendors to implement cyber protections, which makes compliance with the Security Directive more burdensome. In addition, without an RFA analysis, ASLRRA and its members have not been made publicly aware of the steps TSA has taken to minimize the significant economic impact of the requirements in its Security Directive on small entities.

II. TSA's Emergency Rulemaking Authority Should be Invoked Narrowly to Respond to a Discrete Event for a Limited Period.

A. This Court Should Review TSA's Invocation of Emergency Authority.

TSA's authorizing statute provides for "emergency procedures" that permit the agency to bypass notice-and-comment rulemaking if the TSA Administrator

determines that a regulation or security directive "must be issued immediately in order to protect transportation security." 49 U.S.C. § 114(*l*)(2)(A). Courts have held that TSA security directives constitute "orders" that are subject to judicial review under 49 U.S.C. § 46110. *See Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006); *Corbett v. Transp. Sec. Admin.*, 19 F.4th 478, 480 (D.C. Cir. 2021). A person "disclosing a substantial interest" in an order issued by TSA may apply for judicial review in a U.S. court of appeals, and the court has "exclusive jurisdiction" to affirm, amend, modify, or set aside the order. 49 U.S.C. § 46110.

In the emergency rulemaking context, courts have made clear that review of an agency's decision to bypass notice-and-comment is narrow and demanding. *See Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012) (holding that the APA's good cause standard should be "narrowly construed" and "reluctantly countenanced"); *Mobay Chem. Corp. v. Gorsuch*, 682 F.2d 419, 426 (3d Cir. 1982) (the exception to notice-and-comment should be "narrowly construed"); *San Diego Air Sports Ctr. v. F.A.A.*, 887 F.2d 966, 969 (9th Cir. 1989) (adopting the D.C. Circuit's standard of "narrowly construed" and "reluctantly countenanced"). For example, the D.C. Circuit described the APA's good cause standard as an exception that "excuses notice and comment in emergency situations, or where delay could result in serious harm." *See Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)

(internal citations omitted). These standards indicate that emergency rulemaking is a narrow exception to the general rule of notice-and-comment rulemaking.

B. Emergency Rulemaking Requires an Agency to Point to "Something Specific" to Which It Is Responding.

The Supreme Court has acknowledged that an agency must be responding to "something specific" when it chooses to bypass notice-and-comment rulemaking. *See Biden v. Missouri*, 595 U.S. 87, 96 (2022). In a *per curiam* opinion, the Court held that the Secretary of Health and Human Services had authority to impose COVID-19 vaccination mandates for staff at healthcare facilities participating in Medicare and Medicaid and properly issued the mandate without notice-and-comment. *See id.* at 96.

The majority endorsed a standard for good cause in response to Justice Alito's dissent. Justice Alito opined that the Centers for Medicare and Medicaid Services—acting through the U.S. Department of Health and Human Services—failed to meet the standard for invoking good cause, which requires the agency to "point to something specific that illustrates a particular harm that will be caused by the delay required for notice and comment." *See id.* at 106–07 (2022) (Alito, J., dissenting) (citing *United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014)). In response to Justice Alito, the Court agreed that "something specific" is "required" and held that Centers for Medicare and Medicaid Services properly bypassed notice-and-comment because the Health and Human Services Secretary's finding that advance

promulgation of a rule ahead of flu season would significantly reduce COVID-19 deaths was "something specific." *See id.* at 96.

Federal agencies that regulate the rail industry have invoked emergency authority in a manner that meets the traditional legal standard of identifying a discrete emergency. For example, the Federal Railroad Administration invoked emergency authority during the COVID-19 pandemic to issue a mask mandate and activate its "emergency docket," which permits entities to petition for regulatory relief during an emergency. *See* Emergency Order Requiring Face Mask Use in Railroad Operations, 86 Fed. Reg. 11,888 (March 1, 2021); FRA Administrator's Declaration of Emergency Situation: Novel Coronavirus 2019 (COVID-19), Federal Railroad Administration (Mar. 13, 2020), https://tinyurl.com/ycsjyfec. In contrast to the general cyber threats cited by TSA, which relate to all critical infrastructure and are not targeted to freight rail or any specific threat thereto, COVID-19 was a discrete, temporary health emergency that required immediate action by the federal government and that has subsequently subsided.

This Court also has acknowledged that an agency may bypass notice-and-comment rulemaking in discrete emergency situations. In *U.S. Steel Corp. v. U.S. E.P.A.*, this Court noted that early legislative versions of the APA intended for notice and comment to be avoided where it was "impracticable because of unavoidable lack of time or other emergency." *See U.S. Steel Corp. v. U.S. E.P.A.*, 605 F.2d 283, 287

(7th Cir. 1979); *see also White Eagle White Eagle Co-op Ass'n v. Conner*, 553 F.3d 467, 481 (7th Cir. 2009) (holding that the U.S. Department of Agriculture properly invoked emergency authority when it "identif[ied] a problem" that "went to the heart" of the Agricultural Marketing Agreement Act and explained how the emergency order would address the "conditions" that were creating the problem).

C. TSA's Emergency Rulemaking Power Should Be Used Narrowly to Respond to a Discrete Event.

The structure of TSA's authorizing statute indicates that the agency's emergency authority should be used narrowly to respond to a discrete event. The statute clearly lays out TSA's plenary authority to issue regulations "as are necessary to carry out the functions" of the agency. 14 U.S.C. § 114(*l*)(1). The agency's emergency authority is contained in a subsection called "Emergency Procedures," indicating that it is an exception to the general rulemaking norms. *See* 14 U.S.C. § 114(*l*)(2). The emergency procedures to bypass notice-and-comment are accompanied by a requirement that the Transportation Security Oversight Board ratify any security directive if it is to remain effective for a period longer than 90 days. 14 U.S.C. § 114(*l*)(2)(B). The ratification requirement further confirms the temporary nature of security directives by imposing an additional approval requirement to assess whether a regulation or security directive issued in an emergency should remain effective for more than three months.

The statute's language supports the notion that emergency authority should be used narrowly to respond to a discrete event. TSA's authority to bypass notice-and-comment procedures is set out in a section called "Emergency Procedures." 49 U.S.C. § 114(*l*)(2). In plain language, an emergency typically refers to a situation that necessitates an immediate response to avoid harm, rather than an impending threat, which would be considered a threat of an emergency.[5] These procedures should therefore be reserved for specific situations that require an immediate response by TSA, and not for addressing broad threats that are unlikely to subside in the near future.

The statute's procedures permit the TSA Administrator to bypass notice-and-comment rulemaking if the Administrator "determines that a regulation or security directive must be issued immediately in order to protect transportation security." 49 U.S.C. § 114(*l*)(2)(A). The statute squarely vests the TSA Administrator with discretion to invoke the emergency authorities, but the circumstances in which TSA must act "immediately" to "protect transportation security" should be viewed narrowly, or the exception will swallow the rule. TSA has a broad mandate to protect the nation's transportation systems. *See* Mission, Transp. Sec. Admin., https://tinyurl.com/mt2wemzh. Because *any* TSA regulatory action authorized by

[5] An "emergency" is defined as "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Emergency, Merriam-Webster, https://tinyurl.com/4ncjztzb.

the statute promotes transportation security, the agency must act rigorously to lay out which circumstances require immediate action. Generalized long-term threats should not fall within this narrow exception.

D. TSA Has Not Identified a Discrete Emergency to Which It Is Responding in the Rail Cybersecurity Security Directives.

TSA has repeatedly referred to generalized cybersecurity threats but has not identified a specific emergency that the Security Directives are intended to address. Accordingly, TSA's proffered justification does not meet the narrow and discrete emergency standard that permits an agency to bypass notice-and-comment rulemaking. The Security Directive at bar provides that the use of emergency authority is justified based on the "ongoing cybersecurity threat to surface transportation systems and associated infrastructure." *See* Security Directive 1580/82-2022-01B at 1. The Directive generically refers to "recent and evolving intelligence" that "emphasizes the growing sophistication of nefarious persons, organizations, and governments; highlights vulnerabilities; and intensifies the urgency of implementing" the Directive. *See* Security Directive 1580/82-2022-01B at 2.

Instead of providing evidence of a specific threat, the Directive refers to a series of joint cybersecurity advisories issued by the United States and foreign allies, as well as the Office of the Director of National Intelligence's Annual Threat Assessment, to substantiate the claim that the Directive must be urgently

implemented. *See* Security Directive 1580/82-2022-01B at 2 n.4. These cybersecurity advisories and assessments recognize a general heightened threat of potential cyberattacks on critical infrastructure, but, crucially, TSA provides no indication that these threats are emergent. *See Impacts of Emergency Authority Cybersecurity Regulations on the Transportation Sector: Hearing Before the H. Subcomm. on Transp. & Mar. Sec.*, 118th Cong. (2024) (statement of Ian Jeffries, President & CEO of Ass'n of Am. R.Rs.) ("AAR was unaware of, nor was it made aware of, any prevailing freight rail emergency conditions that would require use of emergency authority").

By simply portending ongoing general threats of cyberattacks, TSA has failed to identify a discrete emergency that warrants the issuance of a security directive, let alone one that justifies three years of reissuing multiple renewals and modifications of the same. The identified threats are, unfortunately, an indefinite reality caused by long-term geopolitical competitors of the United States. *See, e.g.*, Exec. Off. of the President, National Security Strategy 23 (Oct. 2022), https://tinyurl.com/2urrb7xk. As such, the general heightened concern over potential cyberattacks is unlikely to be resolved in the upcoming years or perhaps even decades. *See id.* The long-term nature of the cyber threats is reflected in TSA's multiple renewals of the Security Directives, including the challenged Security Directive, which TSA first issued in October 2022 and renewed most recently in July 2024. *See* Security Directives and

Emergency Amendments, Transp. Sec. Admin., https://tinyurl.com/46z6jvme. By renewing the Security Directives multiple years without elucidating an emergency, the Security Directive falls short of meeting the Section 114(*l*)(2) standard.

By contrast, TSA has recently invoked its emergency authority to respond to discrete, temporary emergency events. For example, during the COVID-19 pandemic TSA issued security directives to impose mask and vaccination mandates for air travelers to prevent the spread of disease. *See, e.g.*, Security Directive 1582/84-21-01. These directives implemented an executive order and Centers for Disease Control and Prevention emergency regulations requiring masks to be worn on various forms of transportation. *See* Exec. Order No. 13,998, 86 Fed. Reg. 7,205 (Jan. 21, 2021); Security Directive 1582/84-21-01 (Feb. 1, 2021); *cf. Health Freedom Defense Fund, Inc v. Biden*, 599 F. Supp. 3d 1144 (M.D. Fla. 2022) (enjoining implementation of Centers for Disease Control and Prevention's travel mask mandate). Unlike in that matter, TSA in the instant Security Directive does not point to any discrete emergency at all to support its issuance.

In addition to failing to identify a discrete emergency, TSA has not enumerated how the rail and pipeline industries are sufficiently related such that the Colonial Pipeline attack should justify security directives for the rail industry. TSA Administrator Pekoske testified to the U.S. Senate Committee on Commerce, Science, and Transportation in July 2021 that the TSA issued two pipeline security

directives "[i]n response to this cyber intrusion," referring to the Colonial Pipeline attack. *Pipeline Cybersecurity: Protecting Critical Infrastructure: Hearing Before the Sen. Comm. on Commerce, Science, and Transp.*, 117th Cong. (2021) (statement of David P. Pekoske, TSA Administrator). Besides the generalized cyber threats to all U.S. critical infrastructure sectors, TSA has not explained how the Colonial Pipeline attack created an emergency that justified issuing security directives for other sectors under TSA's jurisdiction. Although both sectors operate critical infrastructure, the pipeline and rail industries are not monolithic. They are distinct and involve different companies and infrastructure. Moreover, for 25 years, railroads have maintained a dedicated coordinating committee focused on cyber threats, effective risk mitigation practices, and engagement with appropriate government entities. *See, e.g.*, Freight Rail Security, Ass'n of Am. R.Rs., https://tinyurl.com/mryrcs6d (describing the Rail Information Security Committee).

E. Other DHS and Non-DHS Agencies Have Regulated Cybersecurity Using Notice-and-Comment Rulemaking.

Notwithstanding the heightened potential-threat space in which they operate, multiple agencies within and outside DHS have used notice-and-comment rulemaking to regulate cybersecurity in industries that face generalized cyber threats similar to the rail industry. Many of these efforts have resulted from statutes or presidential action directing agencies to act under invoked executive authority. For example, President Biden launched an initiative in February 2024 to strengthen the

cybersecurity of U.S. ports. *See* Fact Sheet: Biden-Harris Administration Announces Initiative to Bolster Cybersecurity of U.S. Ports (Feb. 21, 2024), https://tinyurl.com/bdkbu5k6. The initiative included an executive order that gave DHS express authority to respond to malicious cyber activity in the maritime domain and required cyber incident reporting. *See* Exec. Order No. 14,116, 89 Fed. Reg. 13,971 (Feb. 21, 2024).

The U.S. Coast Guard, part of DHS, acted by issuing a proposed rule that established minimum cybersecurity requirements for U.S.-flagged vessels and U.S. facilities subject to maritime security regulations. *See* Cybersecurity in the Marine Transportation System, 89 Fed. Reg. 13404 (proposed Feb. 22, 2024). The Coast Guard's proposed rule on cybersecurity, like the TSA Security Directives for the rail industry, aims to address "current and emerging security cybersecurity threats" to a segment of the U.S. transportation sector. *See id.* at 13405. The proposed rule cites the Colonial Pipeline attack as an example of a successful cyberattack that necessitates regulatory action to protect the maritime transportation sector. *See id.* The rule, which proposes measures similar to TSA's Security Directives, would require U.S.-flagged vessels and certain maritime facilities to develop Coast Guard-approved cybersecurity plans and implement measures to protect critical systems and identify vulnerabilities. *See id.* at 13410–12. The Coast Guard's on-the-record rationale for proposing the rule and the substance of the proposal itself are

substantially similar to TSA's rail cybersecurity directives. However, the Coast Guard used the notice-and-comment rulemaking process to address the general state of heightened cyberattack risks for critical maritime infrastructure. As a sister DHS subagency, TSA could and should similarly utilize the notice-and-comment rulemaking process.

Another example of an agency that regulates critical infrastructure providers using notice-and-comment rulemaking to regulate cybersecurity is the Federal Energy Regulatory Commission ("FERC"). In October 2024, FERC directed the North American Electric Reliability Corporation—a FERC-certified self-regulatory organization—to develop standards requiring regulated entities to identify cybersecurity risks related to their supply chains. *See* Supply Chain Risk Management Reliability Standards, 89 Fed. Reg. 79,794 (proposed Oct. 1, 2024); FERC Acts to Improve Reliability by Closing Supply Chain Cyber Risk Management Gaps, FERC (Sept. 19, 2024), https://tinyurl.com/bdh5yx9w. The proposal builds on existing supply chain risk management standards by adding new standards requiring entities to identify, assess, and respond to cyber-related risks in their supply chains from vendors and third parties. *See* Supply Chain Risk Management Reliability Standards, 89 Fed. Reg. at 79,795–801. FERC explained that the rule is necessary based on "increasing opportunities for attacks posed by the global supply chain" and the "increasing threat environment." *See id.* at 79,795–96.

Like TSA, FERC regulates critical infrastructure providers and aims to prevent and mitigate cyber threats to infrastructure such as the electrical grid. However, FERC acted by using notice-and-comment rulemaking.

The Cybersecurity Infrastructure and Security Agency, yet another DHS subagency, has also used notice-and-comment rulemaking to regulate cybersecurity. Under the Cyber Incident Reporting for Critical Infrastructure Act of 2022, the Cybersecurity and Infrastructure Security Agency proposed a cyber incident reporting rule using notice-and-comment. *See* Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) Reporting Requirements, 89 Fed. Reg. 23,644 (proposed Apr. 4, 2024). Although this cyber reporting directive creates an incident disclosure regime instead of specific cybersecurity measures on regulated parties, the proposal stressed the importance of public participation in the rulemaking, calling it "essential to effective rulemaking." *Id.* at 23,645.

Considering the notice-and-comment rulemaking path that these other agencies have taken in response to the same ongoing cybersecurity risks that exist globally, TSA's justification for instead relying on its emergency rulemaking authority should be carefully scrutinized.

F. Judicial Review Is Particularly Valuable Where the Authority Ratifying the TSA's Directives Is an Interagency Group of Executive Branch Officials and Not an Independent Agency.

TSA's statutory emergency authority requires security directives to be ratified by the Transportation Security Oversight Board ("TSOB") to remain in effect for longer than 90 days. 49 U.S.C. § 114(*l*)(2)(B). The TSOB is chaired by the Secretary of Homeland Security and is composed of seven cabinet members or senior officials: the Secretaries of Homeland Security, Defense, Transportation, and the Treasury; Attorney General; Director of National Intelligence; and a representative from the National Security Council. *See* 49 U.S.C. § 115. The TSOB ratified TSA's Security Directives for the rail industry in May 2022 and again in November 2022. *See* Ratification of Security Directives, 87 Fed. Reg. 31,093 (May 23, 2022); Ratification of Security Directives, 88 Fed. Reg. 36,921 (June 6, 2023). The ratification largely tracks with TSA's stated justification for issuing the Security Directives, citing to the general threat of cyberattacks from malicious actors and foreign adversaries. *See* Ratification of Security Directives, 88 Fed. Reg. 36,921, 36,922 (June 6, 2023). The TSOB authorized TSA to extend each of the Security Directives for an unspecified period if the TSA Administrator determines an extension is necessary to address the "evolving threat" that may continue beyond the original expiration date. *See id.* at 36,923–24.

Although the TSOB ratification requirement should appropriately be viewed as a check on the TSA Administrator's power to impose security directives, it remains comprised of executive branch cabinet officials that are likely to further administration policy. For this reason, judicial review of the security directives is useful to assess whether the directives are being properly issued under TSA's emergency authority.

CONCLUSION

For the reasons stated above, this Court should grant the instant Petition for Review.

Dated: December 4, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Cir. Rs. 29 and 32(c), and Fed. Rs. App. P. 29(a)(5) and 32(a)(7)(B), because the brief contains 6,030 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Cir. R. 32(b) and Fed. R. App. P. 32 (a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman font.

Dated: December 4, 2024

/s/ Aram A. Gavoor
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on December 4, 2024.

I hereby certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the appellate CM/ECF system.

Dated: December 4, 2024

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