

BEFORE THE SECRETARY OF THE UNITED STATES DEPARTMENT OF  
TRANSPORTATION

PETITION FOR EMERGENCY RULEMAKING

August 4, 2020

This Petition for an emergency final rule is filed pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e). The Department of Transportation (DOT) has the authority to issue this rule under 5 U.S.C. § 553(b)(3)(B) immediately while any comment period is pending.

**I. Background**

As of August 4, 2020, over 155,000 Americans and 695,000 people globally have died from the coronavirus.<sup>1</sup> The World Health Organization declared Covid-19 a pandemic on March 11, 2020.<sup>2</sup> After reviewing all the available health information available, DOT has recommended, among other measures, that passengers wear face masks at airports and on airplanes.<sup>3</sup> Without justification, the Department of Transportation has not initiated a rulemaking, emergency or otherwise, to require and ensure that the recommended safety procedures actually happen and has refused informal requests by consumer and passenger groups, unions, the International Air Transport Association (IATA), and some air carriers.

The Department of Transportation's Abdication of Responsibility

Despite the coronavirus pandemic, DOT and its subagency, the Federal Aviation Administration (FAA), have not promulgated rules for air carriers or airports to help reduce the transmission of the virus. Instead, DOT remained silent for months, forcing air carriers and airports to develop their own policies and procedures. The Department of Transportation finally acted on July 2, recommending but not requiring that air carriers and airports follow certain safety protocols, including requiring mask wearing. DOT published its guidance 156 days after

<sup>1</sup> <https://coronavirus.jhu.edu/>.

<sup>2</sup> WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020, World Health Organization, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>3</sup> Dep't of Trans., Dep't of Homeland Sec., Dep't of Health and Human Servs., "Runway to Recovery," <https://www.transportation.gov/briefing-room/runway-recovery>.

the formation of the White House Coronavirus Task Force, 154 days after the Department of Health and Human Services (HHS) declared a public health emergency, 114 days after the World Health Organization declared the coronavirus a global pandemic, and 91 days after the Centers for Disease Control and Prevention (CDC) recommended the wearing of masks in public.

The Department of Transportation, in conjunction with the Department of Health and Human Services and the Department of Homeland Security, published this guidance, “Runway to Recovery” on July 2, recommending, among other protocols, that air carriers and airports require the wearing of face masks. The guidance recognized the need for masks, but the DOT stopped short of initiating a rulemaking.

DOT has unreasonably and unlawfully ceded authority over coronavirus prevention policies and procedures to airlines and airports in the most deadly pandemic and air travel crisis in history. Many members of the lay public hold beliefs that masks do not help prevent the spread of the virus, resulting in a number of passengers refusing to wear masks. A DOT regulation would greatly help air carriers to enforce the current DOT-endorsed recommendations for a safer air travel environment and would help airlines navigate exceptions to the rule without frustrating the purpose and efficacy of the rule.

Regulation of air travel belongs exclusively to the Department of Transportation. DOT cannot rely on local authorities and airline corporations to ensure the health and safety of passengers. This is in contrast to other areas where local and state authorities have exclusive or primary authority over health and safety matters.

#### The Risks of Masked Air Travel and the Heightened Risks of Unmasked Air Travel

Air travel poses a substantial risk of spreading the coronavirus due to both (1) the lengthy confinement of passengers in small spaces and (2) the intermingling of passengers from different parts of the country and from different connecting flights. Air travel before the pandemic already entailed elevated risks, as areas such as tray tables, arm rests, and TSA security bins were hotspots for bacteria and viruses.<sup>4</sup>

Medical experts have deemed masked air travel to be dangerous, and many states have prohibited or recommended against non-essential air travel. Unmasked air travel would be even more dangerous. DOT has already recognized the benefits of mask wearing in stopping or slowing the spread of the coronavirus.

<sup>4</sup> Travelmath, 2015, <https://www.travelmath.com/feature/airline-hygiene-exposed/>.

The Texas Medical Association (TMA) has recently published a scale assessing the risk of various activities during the coronavirus pandemic.<sup>5</sup> TMA placed air travel as a “7” on a 1-10 scale, with 10 representing the most dangerous activities. The TMA ratings assume “that participants are following recommended safety protocols when possible.” As previously noted, mask wearing and social distancing are currently “recommended” by the DOT but not actually required. Other activities rated as a 7 include eating indoors at a restaurant and playing basketball or football, notably activities where mask wearing is NOT recommended. Air travel when participants are not following the recommended safety protocols would therefore be riskier, comparable to riskier activities such as eating at a buffet or attending a large concert.

### Competition Over Safety

Mask policies should not be left up for competition among air carriers and airports. By not promulgating a rule, DOT is leaving face masks and other safety procedures to the vagaries of market competition and sowing nationwide confusion among the public. Few argued for a continuation of a privatized airport security policy in the aftermath of September 11th. The few who want competition on safety during the coronavirus have, to date, halted the Department of Transportation from carrying out its duties.

Air carriers are caught in a difficult spot if they fail to enforce their own policies due to the uncertainty caused by DOT inaction. By requiring passengers to wear masks, air carriers are reassuring passengers that they are taking necessary safety precautions and inducing them to travel with them rather than another air carrier with a different, less precautionary (and less safe) policy. By promising a service and failing to provide that service, the air carriers would be exposing themselves to unfair and deceptive act enforcement by the DOT.

Passengers overwhelmingly wear masks in public and cite mask wearing, temperature screening, and social distancing as the most important safety precautions for airports and air carriers.<sup>6</sup> IATA found that 67% of passengers have worn masks in public, and 58% of passengers say they have avoided air travel.<sup>7</sup> A mask rule, besides its health benefits, will satisfy a large majority of passengers and would help encourage more passengers to fly.

<sup>5</sup> Texas Medical Association, July 2, 2020, [https://www.texmed.org/uploadedFiles/Current/2016\\_Public\\_Health/Infectious\\_Diseases/309193%20Risk%20Assessment%20Chart%20V2\\_FINAL.pdf](https://www.texmed.org/uploadedFiles/Current/2016_Public_Health/Infectious_Diseases/309193%20Risk%20Assessment%20Chart%20V2_FINAL.pdf).

<sup>6</sup> IATA Public Opinion Survey, <https://www.iata.org/en/pressroom/pr/2020-07-07-01/>.

<sup>7</sup> Id.

## **II. Action Requested**

We petition the Department of Transportation to publish an Emergency Rule providing as follows.

- (1) All air carriers and airport operators must require all persons to wear protective face masks or coverings at all times with the following exceptions
  - (a) Eating or drinking
  - (b) Safety, security, or identification purposes
  - (c) Operational exceptions, including pilots in the cockpit
- (2) All air carriers and airport operators must enforce this rule and either (1) refuse to transport or (2) remove from airport property any individual who does not wear a facemask after being informed of the rule once.

## **III. Legal Authority**

1. This rulemaking is necessary.
2. This rulemaking is authorized by statute.
3. This rulemaking is supported by the best available scientific data.
4. This rulemaking is straightforward and clear.
5. This rulemaking is compelled by safety.

We request that the Department of Transportation immediately implement this rulemaking on an emergency basis as an Interim Final Rule. This action would save countless lives and still enable a public notice and comment period after enactment.

Respectfully submitted,



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