Nos. 24-2109 (lead) & 24-2156

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GRAND TRUNK CORPORATION; ILLINOIS CENTRAL RAILROAD COMPANY, doing Business as CN,

Petitioner,

v.

TRANSPORTATION SECURITY ADMINISTRATION; DAVID P PEKOSKE, In his official capacity as Administrator of the Transportation Security Administration,

Respondents.

On Petition for Review of an Order of the Transportation Security Administration

BRIEF OF *AMICI CURIAE* SOUTH CAROLINA, GEORGIA, IDAHO, KANSAS, LOUISIANA, MONTANA, NORTH DAKOTA, SOUTH DAKOTA, AND UTAH

IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

As governmental parties, amici are not required to file a certificate of interested persons. Fed. R. App. P. 26.1(a).

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INTRODUCTION

On July 1, 2024, TSA ordered all freight and passenger railroad carriers to implement performance-based cybersecurity measures to address ongoing cybersecurity threats. *See Rail Cybersecurity Mitigation Actions and Testing, Security Directive* 1580/82-2022-01C ("July Security Directive"). But instead of engaging in notice and comment, the TSA bypassed this process by issuing the July Security Directive through a sixteen-page memorandum, imposing new obligations on all regulated railroad carriers without public input. Indeed, by merely invoking its "emergency procedures" and lacking substantive authority over cybersecurity, TSA issues this Directive based on, at best, vague statutory authority. *See* 49 U.S.C. § 114(*l*)(2)(A). But TSA has not pointed to any actual "emergency" under that word's ordinary meaning and insists that an "ongoing cybersecurity threat" is sufficient justification to issue the Directive. This surely is not a permissible interpretation of the "emergency procedures" statute, and most definitely doesn't rest on the "best interpretation" of its empowering statute's text. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

In the aftermath of the September 11, 2001 terrorist attacks on the World Trade Center and Pentagon, Congress created the Transportation Security Administration ("TSA") to safeguard the nation's civil aviation security and safety. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71 (2001) (codified at 49 U.S.C. § 114 *et seq*.) ("TSA Act"); *see also Alaska Airlines, Inc. v. TSA*, 588 F.3d 1116, 1117-18 (D.C. Cir. 2009) (the Act "establish[ed] the TSA and vest[ed] it with primary responsibility for maintaining civil air security"). The TSA Act confers TSA broad authority to "assess threats to transportation" and "develop policies, strategies, and plans for dealing with" such threats. 49 U.S.C. § 114(f)(2), (3). This authority extends to "ensuring the adequacy of security measures at airports and other transportation facilities" and to "carry out such other duties, and exercise such other powers, relating to transportation security as the Administrator considers appropriate, to the extent authorized by law." *Id*. § 114(f)(11), (16) (cleaned up).

But in what seems to be another chapter in an ongoing saga of administrative overreach, TSA, a sub-agency of the Department of Homeland Security ("DHS"), now postures itself as the expert agency in

railroad cybersecurity. This kind of action from a renegade agency can cause substantial harm on regulated parties while also undermining Congress's lawmaking ability to implement sound public policy. Thus, it's "vital to the integrity and maintenance of the system of government ordained by the constitution" that courts ensure agencies, like the TSA, act within their statutory authority and abide by Congress's intent. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). In drafting the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. ("APA"), one of Congress's goals was to prevent administrative agencies from the "arbitrary official encroachment on private rights." *See U.S. v. Morton Salt Co.*, 338 U.S. 632, 644 (1950). In urging this Court to protect those rights, Amici States South Carolina, Georgia, Idaho, Kansas, Louisiana, Montana, North Dakota, South Dakota, and Utah ("Amici States") through their Attorneys General submit this amicus brief in support of Petitioners.[1] The Attorney General of South Carolina, as chief legal officer, "speaks for all of its citizens" and may bring to this Court's attention Amici States's concerns to ensure agencies follow the formal

[1] Fed. R. App. P. 29(a)(2) Permits the Amici States through their Attorneys General to file this brief without needing consent of the parties involved or leave of this Court.

rulemaking process. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 241, 562 S.E.2d 623, 628 (2002).

With these background principles in mind, Amici States emphasize two points for this Court's consideration. *First*, the July Security Directive is a legislative rule that needs to go through notice and comment. The plain text of 49 U.S.C. § 114 ("Section 114") and the basic principles of administrative law support this conclusion. This Circuit has held that an agency rule creating new substantive obligations on private parties is the clearest example of a legislative rule requiring adherence the formal rulemaking process. *See Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996). *Second*, the use of emergency powers must be used cautiously, sparingly, and only during an *actual* national emergency when bypassing formal rulemaking procedures.

ARGUMENT

The lines of the Constitution have been blurred over recent decades with the emergence of the "Fourth Branch" of government: the Administrative State. *See* Peter L. Strauss, "*The Place of Agencies in Government: Separation of Powers and the Fourth Branch*," Columbia L.

Rev. 573, 578-82 (1984). In recent decades, and through "reams of regulations," modern executive agencies comprising the Administrative State have amassed "vast power" influencing "almost every aspect of daily life." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (cleaned up). This development would've left the Founders astonished at the "vast and varied federal bureaucracy" that's emerged over the last fifty years. *Id.* Indeed, these agencies have blurred traditional understandings of separation of powers by exercising legislative power via promulgating regulations "with the force of law"; executive power via enforcing compliance with those regulations; and judicial power via "adjudicating enforcement actions" against noncompliance. *Id.* at 312 (Roberts, C.J., dissenting).

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excess not contemplated in legislation creating their offices." *Loper Bright*, 144 S. Ct. at 2261 (quoting *United States v. Morton Salt Co.,* 338 U.S. 632, 644 (1950)). One such check requires agencies to give public notice and an opportunity to comment if an agency is poised to promulgate a substantive rule. *See* 5 U.S.C. § 553(b). "Rule[s]" are considered

"statement[s] of general or particular applicability and future effect that [are] designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 554. A rule can include statements that describe agency organization, procedures, or practice requirements. *Id*. Substantive rules are promulgated by specific statutory authority and bind the public "with the force of law." *Azar v. Allina Health Services*, 587 U.S. 566, 587 (2019). Substantive rules are also known as "legislative rules" and recognized as "regulations" because they are promulgated via a grant of statutory authority from Congress. *See id*.; *see also American Hospital Assn. v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (Explaining that "regulations," "substantive rules," or "legislative rules" are those which create law). These are required to be promulgated pursuant to formal notice and comment rulemaking to be considered valid. *See Perez v. Mort. Bankers Ass'n*, 575 U.S. 92, 107 (2015).

However, Congress created certain exemptions from the notice and comment procedure, including "general statements of policy[,]" "interpretative rules[,]" and "rules of agency organization." *See* 5 U.S.C § 553(b)(A), (d)(2) (hereinafter "the statutory exemptions"). These statutory exemptions don't need to go through notice and comment

because they "merely explain how the agency will enforce a statute or regulation," and don't "purport to impose [any] new obligations … or requirements on regulated parties." *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). Essentially, these rules simply dictate what the administrative agency thinks the underlying statute means and reminds any regulated parties of their existing duties. *See Perez*, 575 U.S. at 97 ("[T]he critical feature of interpretive rules is that they are 'issued by an agency to advice the public of the agency's construction of the statutes and rules which it administers.'" (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)).

Distinguishing between the statutory exemptions and legislative rules can be "enshrouded in considerable smog." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108 (D.C. Cir. 1993). One useful way to clear the air and distinguish between the two is to remember that legislative rules are "binding" with the force of law, *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979), and "impose legally binding obligations" on regulated parties. *National Mining Ass'n*, 758 F.3d at 251; *accord Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169-70 (7th Cir. 1996). That's because legislative rules are promulgated pursuant to a

congressional grant of "quasi-legislative authority" and conform with the "procedural requirements" of the APA. *Chrysler Corp.*, 441 U.S. at 302-03. Thus, if a rule is binding and "intend[ed] to create new law, rights, or duties" pursuant to a legislative delegation of authority, then that's "the clearest example of a legislative rule," which makes notice and comment "mandatory." *See e.g.*, *Perez*, 575 U.S. at 107 (cleaned up) (Holding that a Department of Labor letter restricting mortgage-loan officer eligibility for FLSA overtime pay substantively affected worker's rights, thus a legislative rule subject to APA notice and comment); *Mendoza v. Perez*, 754 F.3d 1002, 1021-22 (D.C. Cir. 2014) (Field memorandum altering H-2A visa processes, wages, and working conditions required notice and comment); *Hoctor*, 82 F.3d at 169-70 (Memorandum requiring a certain fencing height for zoos promulgated under the Animal Welfare Act was the "clearest example of a legislative rule" requiring notice and comment).

These background principles of administrative law should inform this Court's analysis of TSA's obligations under Section 114.

I. The July Security Directive is a Legislative Rule That Must Go Through Notice and Comment.

TSA issued the July Security Directive via a memorandum to all regulated railroad owners and operators without notice and the opportunity to comment. Just recently (and four months later), TSA issued a notice of proposed rulemaking—including substantive mandates outside of its statutory jurisdiction—with the currently challenged Security Directive incorporated within it. *See* 89 Fed. Reg. 88488 (Nov. 7, 2024). However, that does not cure the defect in TSA's swashbuckling *act-now-ask-later* approach to avoiding the formal notice and comment requirements prescribed by the APA. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (Explaining that courts evaluate an "agency's rationale at the time of the decision."). The July Security Directive binds and prescribes substantive obligations onto all TSA-regulated railroads identified in 49 C.F.R. § 1580.101.[2] *See* July Security

[2] The regulations in 49 CFR § 1580.101 apply to each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation, as well as to each rail hazardous materials shipper and each rail hazardous materials receiver located within a High Threat Urban Area (HTUA). Additionally, the regulations cover each freight railroad carrier serving as a host railroad to a freight railroad operation involved in passenger transportation—including the owner/operators of private rail cars, business

Directive, at 1, 4. TSA cites 49 U.S.C. § 114(*l*)(2)(A) to bind regulated railroad owners and operators with "the force of law" by requiring the implementation of performance-based cybersecurity measures. *See Azar*, 587 U.S. at 587; July Security Directive, at 1 n. 3. These "substantive obligations," *see National Mining Ass'n*, 758 F.3d at 251; *accord Hoctor*, 82 F.3d at 169-70, incurred by railroad owners and operators include: (1) establishing a TSA-approved Cybersecurity Implementation Plan to bolster large-scaled cyber security network infrastructure; and (2) developing a Cybersecurity Assessment Plan that's subject to annual updates, assessments, and approval from TSA. *See* July Security Directive, at 2-3. These requirements apply to *all* critical cyber systems of TSA-designated freight and passenger railroads covered in 49 C.F.R. § 1580.101. *See* July Security Directive, at 1-4. Among other things, TSA also mandates the following obligations:

(1) The identification of the owner/operator's critical cyber systems, including both information and operational technology systems, as well as any dependent business services;

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transportation, and those that are on or connected to the general railroad system of transportation.

(2) The implementation of network segmentation polices and controls to prevent operational disruptions;

(3) The implementation of access control measures, including authentication controls, enforcement standards, and updated hardware and software for freight and passenger locomotives;

(4) The implementation of continuous monitoring and detection procedures to prevent, detect, and respond to cybersecurity threats, while correcting anomalies in critical cyber systems;

(5) Risk reduction for unpatched systems through timely application of security patches and updates for operating systems, applications, drivers, and firmware in critical cyber systems;

(6) The development of a cybersecurity assessment plan, including an architecture design review within 12 months of TSA approval and every two years thereafter.

See July Security Directive at 5-9. Indeed, TSA admits this memorandum is meant to "mandate railroad Owner/Operators into implementing … cybersecurity measures to prevent disruptions to their infrastructure and/or operations." July Security Directive, at 2 (cleaned up). On top of this, TSA acknowledges its intent to codify the cybersecurity measures through rulemaking. *See* July Security Directive, at 1 n. 2. Essentially, TSA (an agency originally designed to protect civil aviation security) now mandates that all railroad owners and operators bolster their cybersecurity infrastructure according to its standards.

Despite its obligation to provide notice and comment under Section 114, TSA decided to play *leapfrog* by skipping required notice and comment. And TSA cannot now rely on a new notice of proposed rulemaking brought on the backend to cure this procedural defect. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683 (2020) ("[T]he APA requires agencies to publish a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force."). And since, TSA intends to make this document binding, it "may not rely upon the statutory exemption[s]" to disregard the notice and comment process. *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 382-83 (D.C. Cir. 2002). Rather, it "must observe the APA's legislative rulemaking procedures." *Id.*

In *Hoctor v. U.S. Department of Agriculture*, this Court addressed this issue, analyzing whether a memorandum requiring an eight-foot security fence for zoos housing dangerous animals was a legislative or interpretive rule. 82 F.3d at 167-70. The U.S. Department of Agriculture ("USDA") relied on the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.*, to provide regulatory standards for, among other things, the handling and housing of animals. *Id.* at 168. The USDA originally promulgated a rule

via notice and comment that required facilities to use materials of proper "structural strength" for the housing of animals. *Id.* at 168. The following year, by internal memorandum, USDA mandated that dangerous animals be held within a fence that was at least eight feet in height. *Id.* A zookeeper of large cats challenged the memorandum on the grounds that it was a legislative rule necessitating notice and comment. *Id.* at 168-69. The Seventh Circuit agreed, holding that the USDA's eight-foot fence requirement was a legislative rule because it was promulgated pursuant to the Animal Welfare Act and imposed a specific, binding standard (the height of the fence) not previously included in the "structural strength" regulation. *Id.* at 169-70. Thus, this represented the "clearest example of a legislative rule" making notice and comment "mandatory." *Id.*

A similar issue was determined in *Mendoza v. Perez*, when the Department of Labor ("DOL") issued two Training and Employment Guidance Letters ("TEGLs") providing special procedures for certain H-2A certifications without going through notice and comment. 754 F.3d 1002, 1008 (D.C. Cir. 2014). The TEGLs established different employment guidelines for sheepherding employers seeking H-2A

certification—specifically, they imposed different minimum wage requirements and provided lower standards for employer-provided housing. *Id.* at 1008. *Mendoza* distinguished the TEGLs from an interpretive rule because they supplemented the Immigration and Nationality Act ("INA"), 8 U.S.C. 1188 *et seq.*, and imposed "specific duties on employers" under the statute. *Id.* at 1022. Among other things, they required regulated employers to pay H-2A visa workers either the higher of the prevailing wage rate or minimum wage, exempted employers from recording herders' hours worked, and allowed employers to pay employees only once per month. *Id.* at 1025. In this instance, the TEGLs "endeavor[ed] to implement the statute [to] the effect of a legislative rule." *Id.* at 1023 (quoting *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980) (internal quotations omitted). The Court found that the TEGLs "meaningfully altered the rights and obligations" of the regulated sheepherders and their employers, substantively changed "existing law [and] policy" under the INA, and "changed the regulatory scheme for herding operations[.]" Thus, the TEGLs were considered the "hallmark of a legislative rule" that required notice and comment. *Id.* at 1024.

In the instant case, TSA admits the July Security Directive *is* a binding mandate promulgated via 49 U.S.C. § 114 that imposes specific duties and obligations on all TSA-regulated railroad entities. *See* July Security Directive, at 2-3. Even the title of the memorandum gives way to the notion that TSA is implementing an "authoritative order." *See Directive*, MERRIAM-WEBSTER DICTIONARY, *available at* https://www.merriam-webster.com/dictionary/directive. (last visited Nov. 19, 2024). By using Section 114 to require the adoption of the cybersecurity measures in the July Security Directive, TSA established legally binding obligations with the force of law. *See Chrysler Corp*., 441 U.S. at 302-03. Therefore, mandating these new duties from covered freight and passenger railroad entities makes the Security Directive the "clearest example of a legislative rule." *Hoctor*, at 169-70. Moreover, the plain text on the face of the of the July Security Directive binds freight and passenger railroad entities into compliance with TSA's cybersecurity measures. *See Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002) (An agency pronouncement will be considered binding …. if it "appears on its face to be binding"). And when this happens, an agency action that

imposes "legally binding obligations on regulated parties is a legislative rule." *McCarthy*, 758 F.3d at 251 (cleaned up).

Like the eight-foot fence requirement in *Hoctor*, the July Security Directive was promulgated onto all covered railroad owners and operators in the form of a memorandum via Section 114(*l*)(2)(A) of the TSA Act. *See* 49 U.S.C. § 114(*l*)(2)(A). And like the TEGLs in *Mendoza*, the Security Directive meaningfully alters the rights and obligations of railroad owners and operators by mandating the Cybersecurity Implementation Plan and Cybersecurity Assessment Plan (among other things) that are subject to TSA approval. Therefore, the July Security Directive *is* a legislative rule because (1) it was promulgated via 49 U.S.C. § 114; (2) imposes substantive obligations onto covered railroad entities; and (3) is intended to create new law, rights, and duties for freight and passenger railroad owners and operators that will require the implementation of new cybersecurity measures.

Although this Circuit has not necessarily determined whether a *directive* itself is a legislative rule, other Federal Circuits have held that an agency directive itself is a legislative rule that must go through notice and comment. *See e.g.*, *Children's Health Care v. Centers for Medicare &*

Medicaid Servs., 900 F.3d 1022 (8th Cir. 2018) (CMS directive that hospitals include private insurance payments was a legislative rule); *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 174 F.3d 206 (D.C. Cir. 1999) (OSHA directive mandating safety and health programs was a legislative rule); *Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992) (HHS Directives requiring Title X grantees to sign an assurance to permit abortion counseling was a legislative rule requiring notice and comment).

a. TSA's use of "regulatory dark matter" is an unlawful way to avoid notice and comment.

Despite legislative rules having to go through notice and comment, agencies have increasingly relied on "regulatory dark matter" to avoid formal rulemaking procedures that are required by the APA. *See* C.W Crews, *Mapping Washington's Lawlessness: An Inventory of Regulatory Dark Matter*, CEI, Issue Analysis 2017, No. 4, available *at* https://tinyurl.com/yw4pyw2h (Mar. 1, 2017). This term, coined by Clyde Wayne Crews, is used to describe the vast array of executive branch and federal agency actions, such as guidance documents, memoranda, bulletins, and general policy statements that have regulatory effects

which can bind the rights and obligations of private individuals or regulated businesses. *Id*. Agencies often utilize "regulatory dark matter" to avoid the burdensome procedural requirements of substantive rulemaking, including notice and comment requirements. *See* Non-Binding Legal Effect of Agency Guidance Documents, COMMITTEE ON GOVERNMENT REFORM, H.Rept. 106-1009, at 1 (2000) ("[T]he committee's investigation found that some guidance documents were intended to bypass the rulemaking process and expanded an agency's power beyond the point at which Congress said it should stop. Such 'backdoor' regulation is an abuse of power and a corruption of our Constitutional system.").

While guidance documents or policy statements don't technically have legal force (unless they create substantive obligations), they do have a strong influence on private behaviors subject to regulatory scrutiny. *See* Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 Yale Journal on Regulation 165, 185 (2019) (explaining that regulated parties are incentivized to follow guidance because they are subject to the "mercy" of the agency). And as the D.C. Circuit explained:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as the years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand for regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its website. An agency operating in this way gains a large advantage. "It can issue or amend rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribe procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L.REV. 59, 85 (1995). The agency may also think there is another advantage—immunizing its lawmaking from judicial review.

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

To the extent that TSA seeks to bypass notice and comment rulemaking by disguising the Directive as guidance, such gamesmanship must fail. In *Appalachian Power*, the D.C. Circuit addressed a guidance document issued by the EPA under the Clean Air Act, 42 U.S.C. § 7401 *et seq*., which establishes a complex permitting process involving federal

review of state operating permits. *Id.* at 1017-19. The EPA used this guidance to announce a "case-by-case analysis" for determining the adequacy of states' air-quality monitoring standards. *Id.* at 1022. The court found that the guidance effectively required states to evaluate their own laws against EPA's standards under the Clean Air Act and replace them in accordance with the guidance. *Id.* at 1022-23. This, in essence, amounted to a legislative rule, which created a "binding effect" on the States. *Id.* at 1021. Indeed, the court found that EPA's guidance imposed "marching orders" on the regulated States by "commanding," "ordering," "dictating," and "requiring," compliance without undergoing proper notice and comment. *Id* at 1023 (cleaned up). Thus, because EPA didn't follow the proper APA procedures, the guidance was determined to be unlawful. *Id.* at 1028.

The court further clarified that formal rulemaking would be required for an agency guidance if: (1) the agency acts as if the document issued is controlling in the field; (2) treats the document as a legislative rule; (3) bases enforcement actions on policies or interpretations outlined in the document; or (4) leads private parties or regulated entities to believe their compliance is necessary. *Id.* at 1021. In such cases, the

agency document or action is considered binding, necessitating notice and comment.

Here, the July Security Directive exemplifies the type of "regulatory dark matter" that requires notice and comment rulemaking, as analyzed under the four-part test established in *Appalacian Power*. *See id*. at 1021. *First*, the Directive "on its face" binds covered freight and railroad entities by mandating specific cybersecurity measures such as network segmentation and infrastructure bolstering, with enforceable deadlines for compliance and plan submissions. *See Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 294 (D.C. Cir. 2002) (Holding that EPA's "[G]uidance Document was a legislative rule because on its face it purports to bind both applicants and [EPA] with the force of law."). *Second*, it's the "clearest example," *Hoctor*, at 169-70, and "hallmark," *Mendoza*, at 1024, of a legislative rule, because it imposes new, specific duties on regulated entities pursuant to 49 U.S.C. § 114, effectively issuing "marching orders" for compliance with TSA-approved cybersecurity measures. *See Appalachian Power*, at 1023.

Third, TSA bases enforcement actions on policies outlined in the Directive. By explicitly stating that "[o]wners/operators must make

records necessary to establish compliance," TSA bases any noncompliance with failure to submit its mandated cybersecurity measures. *See* July Security Directive at 11, 4. *Finally*, the Directive leaves no doubt that compliance is mandatory: covered railroad owners and operators must submit required cybersecurity measures for TSA approval with strict deadlines, update them annually, and can face liability for non-compliance. *See id*. at 10-12; *see also* 49 U.S.C. § 114(u). These factors collectively demonstrate that the Directive operates as a binding legislative rule that requires notice and comment. *See Appalachian Power*, at 1021.

Therefore, when "regulatory dark matter" creates a binding and substantive effect on regulated entities, it must go through the formal rulemaking process. *See e.g.*, *Appalachian Power,* at 1024; *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 56-58 (2020) (Thomas, J., Concurring) (DHS memorandum rescinding DACA program was a legislative rule that needed to go through notice and comment); *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106 (D.C. Cir. 2021) (Guidance from Department of State, which prohibited certain adoption referrals was a legislative rule requiring notice and comment);

Nat. Res. Def. Council v. E.P.A., 643 F.3d 311 (D.C. Cir. 2011) (Guidance broadened EPA's consideration of alternative programs to satisfy Clean Air Act requirements which changed the statutory mandate, necessitating notice and comment); *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011) (TSA's policy decision to implement security screening technology needed to go through notice and comment because it had a substantive regulatory change to airport security); *Texas v. Cardona*, No. 4:23-CV-00604-0, 2024 WL 3658767 at 43 (N.D. Tex. Aug. 5, 2024) (Guidance documents were subject to APA's notice and comment because they created substantive new obligations on recipients of federal funding).

II. Using Emergency Powers To Bypass Notice and Comment Should Be Used Sparingly And With Care.

During a national emergency, and when "good cause" exists, bypassing notice and comment may be appropriate. *See* 5 U.S.C. § 553(d)(3); see also 49 U.S.C. § 114(*l*)(2). However, there are compelling policy reasons why invoking emergency powers to bypass notice and comment isn't appropriate in this case, and why TSA should only do this in an actual national emergency.

As a general policy matter, notice and comment rulemaking helps "(1) ensure agency regulations are tested via exposure to diverse public comment, (2) ensure fairness to affected parties, and (3) give affected parties an opportunity to develop evidence in the record to support their objections to the rule." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). If these covered railroad owners and operators were permitted to comment on the mandated cybersecurity measures, then perhaps it would enable TSA to maintain "a flexible and open-minded attitude" towards its intended goals of mitigating significant harm to the national and economic security of the United States. *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988); *see* July Security Directive, at 1. But that's not the current situation. Despite TSA's blatant disregard for notice and comment rulemaking, having an exchange of views, information, and criticism between interested parties and TSA is essential for sound public policy—especially in complex regulatory matters such as cybersecurity. *See Home Box Off., Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977) (explaining that the dialogue between the public, regulated parties, and the agency is a "two-way street" and that the opportunity to comment is

meaningless unless the agency responds to significant points raised by the public.).

Yet in limited cases, when there is an imminent and present danger, bypassing notice and comment during an emergency can be appropriate. *See infra. Jifry*; 5 U.S.C. § 553(b)(3)(B). However, those limited instances are to be "narrowly construed and only reluctantly countenanced." *Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (citing *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992)).

Take for instance the aftermath of the September 11th terrorists attacks—then the D.C. Circuit upheld a Federal Aviation Administration ("FAA") rule that provided for the automatic suspension of certain noncitizen pilots' airmen certifications upon notice from the TSA that certain noncitizen pilots posed a threat to national security. *Jifry*, 370 F.3d at 1177-80. The FAA determined that good cause existed and bypassed notice and comment rulemaking to revoke the licenses of certain noncitizens who posed a threat to national security. *Id.* The D.C. Circuit agreed with the rationale because the agency needed to act promptly to address and protect against ongoing threats after the

September 11th terrorist attacks. *Id.* at 1179-80. It explained that there existed a "legitimate concern over the threat of further terrorist acts involving aircraft" that warranted bypassing the notice and comment period. *Id.* Indeed, the use of notice and comment prior to the issuance of these regulations could've delayed the ability of TSA and FAA "to take effective action" and safeguard national security. However, skipping this procedure was "necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States." *Id.* at 1179.

Similarly, in *Corbett v. Transportation Security Administration*, the D.C. Circuit upheld orders from TSA mandating that facemasks be worn in airports, on commercial flights, and on surface transportation in light of the COVID-19 Pandemic. 19 F.4th 478 (D.C. Cir. 2021). TSA implemented this mask mandate without going through notice and comment because the Pandemic's transmutability was a threat to maintaining the health and safety of the national transportation system. *See Corbett*, 19 F.4th at 481-82. TSA was empowered to do this, because in January of 2021, the Acting Secretary of the Department of Homeland Security determined that the Pandemic constituted a national emergency; and in response to this emergency determination, TSA

promulgated this security directive and several others under 49 U.S.C. § 114. *Id.* at 481. The Petitioner in *Corbett* challenged these on the grounds that TSA had no statutory authority to address the threat that the Pandemic posed to national transportation systems. *Id.* at 482.

The D.C. Circuit noted that from the very text of 49 U.S.C. § 114, Congress conferred TSA with expansive power to act in relation to the transportation system *during a national emergency*. *Id.* at 486 (emphasis added); *accord* 49 U.S.C. § 114(g). The court supported TSA's determination that COVID-19 "pose[d] a serious threat to the security and safety of the transportation system and that the Mask Directives [helped] curtail the spread of the virus and mitigate its adverse effects." *Id.* at 487. Because the risk of COVID-19 transmission was particularly high in transportation hubs and its threat to the security and safety of the nation's transportation systems, Section 114 granted TSA with the statutory authority to bypass notice and comment rulemaking during the Pandemic. *Id.* at 488-90. Additionally, once the Secretary of Homeland Security declared a national emergency, *see* 49 U.S.C. § 114(g), TSA had the express grant of authority to "coordinate and oversee transportation-related responsibilities of other departments and agencies" and to "carry

such other duties, and exercise such other powers, relating to transportation during a national emergency." *Id.* at 490; *accord* 49 U.S.C. 114(g)(1)(B), (D). Thus, imposing the mask directives without notice and comment was well within TSA's "limited" delegated authority to address the threats to transportation posed by the COVID-19 Pandemic. *Id.*

In the instant case and like in *Corbett*, TSA decided to bypass the notice and comment requirement under its "emergency procedures" power, *see* 49 U.S.C. § 114(*l*)(2), to issue the July Security Directive. Section 114(*l*)(2)(A) grants TSA the authority to issue a regulation or security directive without notice and comment if the Administrator determines that immediate action is necessary to protect transportation security. However, these rules can only remain in effect for up to 90 days unless ratified by the Transportation Security Oversight Board. *See* 49 U.S.C. § 114(*l*)(2)(B).

To validate the perpetuity of the Security Directive, TSA refers to an "ongoing cybersecurity threat to surface transportation systems and associated infrastructure," but fails to provide specific details or evidence substantiating such a threat in the Directive. *See* July Security Directive,

at 1-2.[3] Further, as ably explained by Petitioners, a threat alone does not constitute a true emergency.

Therefore, without a specific and ongoing national emergency, TSA lacks the requisite statutory authority to invoke its emergency powers to bypass notice and comment rulemaking. As a general principle, the "plain meaning" of the "particular statutory language" in Section 114 and the "design of the statute as a whole" should control this Court's inquiry. *United States v. Melvin*, 948 F.3d 848, 852 (7th. Cir. 2020) (cleaned up). Letting TSA play *fast-and-loose* with the emergency powers provision to enact cybersecurity measures for railroad entities without specifying *the* national emergency runs afoul to the "unambiguously expressed intent of Congress" that TSA's emergency powers should be used only during an *actual* national emergency. *Loper Bright Enterprises*, 144 S. Ct. at 2297 (2024).

[3] This lack of specificity is also problematic because 49 U.S.C. § 114(g)(1) requires TSA to act under the "direction and control" of the Secretary of Homeland Security, who alone has the sole authority to declare a national emergency. *See* 49 U.S.C. § 114(g)(3). Moreover, Section 114(g)(2) precludes TSA from "superseding" the Secretary's authority, even in cases of an *actual* national emergency. *See* 49 U.S.C. § 114(g)(2). Unlike in *Corbett*, there is no ongoing national emergency. Reading the statue as a whole and considering the design of the TSA Act denotes a lack of authority claimed within the July Security Directive. *See Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004).

Unlike *Jifry*, where the FAA had good cause to revoke noncitizen pilots' licenses due to a clear and present threat to national security following the September 11th terrorist attacks, TSA fails to cite a substantiated and specific national emergency that permits it to bypass notice and comment. In *Jifry*, TSA provided the FAA with the determination that the *individual* noncitizen pilots posed risks to aviation and national security. *See Jifry*, 370 F.3d at 1177. This was not a nationwide regulation on *all* noncitizen pilots but was rather *limited in scope* considering the circumstances of September 11th. TSA's unsubstantiated claim of an "ongoing cybersecurity threat" that justifies bypassing APA procedural requirements cannot stand with the limited holding in *Jifry*.

And unlike *Corbett*, where the COVID-19 Pandemic was an *actual* national emergency, TSA invokes its emergency procedures to promulgate this mandate on all covered railroad owners and operators in 49 C.F.R. § 1580.101 without specifying what the actual national emergency is. Unlike the mask mandate in *Corbett*, TSA fails to substantiate an *actual* national emergency concerning cybersecurity threats to railroad systems. Again, the D.C. Circuit limited its holding in

Corbett given the unique emergency and circumstances posed by the COVID-19 Pandemic. *See Corbett*, at 480-82. Without a valid and ongoing national emergency, TSA's reliance on its emergency powers is unfounded and bypassing notice and comment must be "reluctantly countenanced" in cases of an actual national emergency. *Jifry*, at 1179.

CONCLUSION

The July Security Directive is a legislative rule that imposes "new rights and duties" on covered railroad owners and operators without formal procedural requirements. *See Perez*, 575 U.S. at 107. Moreover, TSA's failure to follow proper rulemaking procedures renders the July Security Directive an overextension of its emergency powers without specifying an actual national emergency. Therefore, it's clear that Congress didn't authorize the TSA with an emergency "workaround" of regulatory authority, nor did it grant this sub-agency unlimited discretion to define what qualifies as a national "emergency." *See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 122-23 (2022) (Gorsuch, J., concurring). And regardless of "how serious the problem [is]" that ongoing cybersecurity threats pose, TSA cannot exercise its authority "in a manner

inconsistent" with both the APA and Section 114. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

The Court should vacate the July 2024 Security Directive.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains **6,118** words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook font) using Microsoft Word (the same program used to calculate the word count).

The Amici States are authorized to file this brief without the consent of the parties or the leave of the Court. Fed. R. App. P. 29(a)(2).

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CERTIFICATE OF SERVICE

I certify that on December 4, 2024, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that the foregoing document is being served on this day to all counsel of record registered to receive a Notice of Electronic Filing generated by CM/ECF.

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