No. 18-1465

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE PARALYZED VETERANS OF AMERICA AND
JAMES THOMAS WHEATON, JR.,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO ELAINE L. CHAO,
UNITED STATES SECRETARY OF TRANSPORTATION

PETITIONERS' MOTION
TO LIFT THE STAY

Petitioners brought this action to compel Respondents to comply with their overdue statutory duty to issue a proposed rule addressing lavatory accessibility on new commercial single-aisle aircraft. In response to Petitioners' Petition for Writ of Mandamus, Respondents indicated that they would fulfill their statutory obligation by December 2, 2019, and the Court thereafter held this case in abeyance subject to status reports updating the Court on Respondents' progress every 45 days. Order at 1 (May 20, 2019). In their July 5, 2019 status report, however, Respondents indicated that they do not intend to issue a

notice of proposed rulemaking that fully addresses lavatory accessibility this December—a proposed course of action which neither complies with the Department's statutory obligation nor provides Petitioners with any relief from their substantial injuries.

Accordingly, pursuant to Federal Rule of Appellate Procedure 27 and Tenth Circuit Rule 27, Petitioners move this Court to lift the stay and rule on the merits of their Petition.[1]

BACKGROUND AND PROCEDURAL HISTORY

The Department defines an "accessible lavatory" as one which would "permit a qualified individual with a disability to enter, maneuver within as necessary to use all lavatory facilities, and leave, by means of the aircraft's on-board wheelchair." 14 C.F.R. § 382.63(a)(1). It currently requires domestic and foreign carriers to have at least one accessible lavatory on dual-aisle aircraft. *See id.*

Since passage of the Air Carrier Access Act of 1986 ("ACAA"), the Department has been gathering information about the feasibility of requiring the same on single-aisle aircraft. *See generally* Pet. for

[1] Counsel for Petitioners has conferred with counsel for Respondents who stated that Respondents oppose this motion.

Mandamus at 3-8 (Nov. 29, 2018) (detailing the Department's efforts in this vein, including convening three advisory committees and publishing two proposed rules for public comment). Those efforts culminated in 2016 when the Air Carrier Access Committee, including industry stakeholders and disability rights organizations, submitted to the Department a consensus proposed rule to require accessible lavatories on single-aisle aircraft. *See id.* at 7-9. Concurrently, in 2016, Congress directed the Department to issue a proposed rule on "whether carriers should be required to provide accessible lavatories on certain new single-aisle aircraft." Secretary's Report on Significant Rulemakings (June 2015) (Add.6); *see also* FAA Extension, Safety, and Security Act of 2016, Pub L. No. 114-190, § 2108, 130 Stat. 615, 622 (2016) ("FAA Act of 2016"). The statutory deadline was July 15, 2017. *Id.* Two years later, no such proposal has been published.

In November 2018, Petitioners filed a Petition for Writ of Mandamus to compel the Department to comply with its statutory duty and issue a proposed rule on accessible lavatories on single-aisle aircraft. In response, the Department acknowledged that "the [2016 FAA] Act imposes a duty to issue a *proposed* rule." Resp. to Pet. for

Mandamus ("Resp'ts.' Br.") at 21 (Apr. 22, 2019). It asked, however, that the Court "defer a decision on the petition pending the proposed rule's projected date of December 2, 2019." Resp'ts.' Br. at 35. In so doing, Respondents repeatedly made clear that the Department would issue a proposed rule that satisfied its statutory obligation by December 2, 2019.[2] The Court then decided to hold the Petition in abeyance, requiring Respondents to file status reports every 45 days updating the Court on their progress. Order at 1.

The Department filed the first of these status reports on July 5, 2019. The Department there laid out its plan to propose a rule that

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[2] *See id.* at 1 ("The [Department] intends to issue a notice of proposed rulemaking addressing accessible lavatories on single-aisle aircraft no later than December 2, 2019."); *id.* at 11 (acknowledging the "projected date of December 2, 2019 for a proposed rule"); *id.* at 15 ("[T]he Secretary intends to publish a notice of proposed rulemaking addressing accessible lavatories on single-aisle aircraft no later than December 2, 2019."); *id.* at 26 (asking this Court to allow the Secretary "an opportunity to voluntarily comply with the statute by issuing a proposed rule by December 2, 2019"); *id.* at 27 ("[T]he Department has made substantial progress on a proposed rule, which is set to issue on December 2, 2019."); *id.* ("[T]he Secretary has continuously announced … her intention to propose a rule no later than December 2019."); *id.* at 28 ("By December 2019, the Department expects to have voluntarily satisfied petitioners' request (Pet. 37) to 'act in compliance with its statutory obligations.'").

would address only what it calls "accessibility of features within an aircraft lavatory" but that would stop "short of increasing the size of the lavatories." *See* Status Report at 3 (July 5, 2019). With respect to lavatory size, the Department stated that it would not issue a proposed rule, but would instead only issue a request for information, which it calls an "advance notice of proposed rulemaking," or ANPRM, in December to "solicit comment and gather updated information on the costs and benefits of requiring airlines to make lavatories on new single-aisle aircraft large enough … to permit a passenger with a disability (with the help of an assistant, if necessary) to approach, enter, and maneuver within the aircraft lavatory as necessary to use all lavatory facilities and leave by means of the aircraft's on-board wheelchair." *Id.*

ARGUMENT

This Court Should Lift the Stay Because the Department's Plan for December 2019 Cannot and Will Not Satisfy Its Statutory Obligation.

A court's inherent power to stay a case includes the power to lift a stay. *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002); *see also Vivint, Inc. v Alarm.com Inc.*, 351 F. Supp. 3d

1341, 1354 (D. Utah 2018). That power stems from the court's authority to "control the disposition of the causes on its docket with economy of time and effort[.]" *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998). Courts will lift an imposed stay "[w]hen circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate." *Canady*, 271 F. Supp. 2d at 74.

The Court's decision to hold this case in abeyance followed the Department's statement that it planned to comply with its acknowledged statutory duty to propose a rule on accessible lavatories by December 2019. However, the July 5 Status Report makes clear that the Department in fact has no such plan. Instead, the Department intends to take two actions in December: (1) a Notice of Proposed Rulemaking ("NPRM"), proposing a rule on "accessibility features within lavatories," and (2) an Advance Notice of Proposed Rulemaking ("ANPRM"), requesting information on the costs and benefits of increasing lavatory size.

Neither satisfies the Department's statutory obligation. The proposed rule on "accessibility features within lavatories" does not address "accessible lavatories," as Congress required and as the

Department itself defines that term. *See* 14 C.F.R. § 382.63(a)(1). And the ANPRM, though addressing accessible lavatories, is not a proposed rule. *See P&V Enterprises v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008). Accordingly, this Court should lift the stay and proceed to decide this case on the merits.

A. The Department's planned NPRM does not satisfy its statutory obligation to propose a rule on accessible lavatories.

The Department's stated intention to publish a proposed rule on "accessibility features within lavatories" does not satisfy its statutory mandate to propose a rule that addresses "whether carriers should be required to provide accessible lavatories on certain new single-aisle aircraft." FAA Act of 2016, § 2108; Add.6. The Department defines an "accessible lavatory" as one which would "permit a qualified individual with a disability to enter, maneuver within as necessary to use all lavatory facilities, and leave, by means of the aircraft's on-board wheelchair." 14 C.F.R. § 382.63(a)(1); *see also* Oxford English Dictionary (3d. ed. 2011), https://www.lexico.com/en/definition/accessible (defining "accessible" to mean "able to be reached, entered, or used by people who have a disability"). Accordingly, a proposal to address the "accessibility

of features *within* an aircraft lavatory," but which stops "short of increasing the size of the lavatories," fails to address whether lavatories should be made "accessible" because passengers in wheelchairs, including PVA members and declarants in this case, cannot "enter, maneuver, … and leave" lavatories on single-aisle aircraft as currently sized. *See* Wheaton Decl. ¶ 5 (Nov. 29, 2018) (stating that because of his paraplegia, he "cannot access the lavatory" on single-aisle aircraft); Albertson Decl. ¶ 3 (Nov. 29, 2018) (same).

The Department knows as much and has long acknowledged a distinction between "accessible lavatories" and "accessibility features within lavatories." During the Department's first rulemaking to implement the ACAA, it proposed that "[t]here would have to be *fully accessible lavatories* in aircraft with 200 or more seats and lavatories with *accessibility features* in aircraft with 60-199 seats." 55 Fed. Reg. 8008, 8019 (Mar. 6, 1990) (emphasis added)). Likewise, in 2008, the Department extended the requirement for "accessible lavatories" to dual-aisle aircraft operated by foreign carriers, despite industry concerns that "accessible lavatories" "would require more space than its inaccessible predecessor." 73 Fed. Reg. 27,614, 27,626 (May 13, 2008).

Even here, the Department has used that precise term—which it has itself defined, 14 C.F.R. § 382.63(a)(1)—in its previous statements in this matter about its planned proposed rule. Resp'ts.' Br. at 1 (intending to issue NPRM addressing "accessible lavatories"); *id.* at 15 (same).

In sum, Congress has directed the Department to address whether airlines must provide "accessible lavatories" on new single-aisle commercial aircraft. Pub L. No. 114-190, § 2108. A proposed rule that expressly cabins off the fundamental issue of size—which determines the ability of persons in wheelchairs to "enter, maneuver …, and leave" a lavatory—does not satisfy that directive.[3]

B. The Department's planned ANPRM does not satisfy its statutory obligation to promulgate a proposed rule.

The Department's planned ANPRM also fails to satisfy its statutory duty to issue a proposed rule on accessible lavatories. That is

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[3] It bears emphasizing what the Department is *not* planning to do here. The Department is not proposing a rule which declines to extend the accessible lavatory requirement to single-aisle aircraft. Instead, by bracketing off the most significant aspect of the accessible lavatories issue and punting on it to some later, undetermined date, the Department is publishing a proposed rule that fails entirely to even consider an essential part of the issue Congress has charged it with addressing.

because, quite simply, an ANPRM is not a proposed rule. Instead, it is merely a mechanism used by an agency to "get more information" that may inform a decision about whether the agency will take some further action, like, for example, publishing a proposed rule, at some point in the future. Off. of the Fed. Reg., *A Guide to the Rulemaking Process* (2011) 3, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf ("The Advance Notice is a formal invitation to participate in *shaping the proposed rule*[.]" (emphasis added)); Off. of Info. & Reg. Aff., Off. of Mgmt. & Budget *Abbreviations*, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/Abbrevs.myjsp (last visited July 31, 2019) (ANPRM "describes the general area that *may be subject to regulation* and usually asks for public comment on the issues and options being discussed." (emphasis added)).

Indeed, that was the decision of the D.C. Circuit when it was asked to decide the effect of a similar ANPRM issued by the U.S. Army Corps of Engineers, which "request[ed] public input on issues associated with the definition of 'waters of the United States'" and "solicit[ed] information or data" concerning a recent Supreme Court decision on jurisdictional issues under the Clean Water Act. *P & V Enterprises*, 516

F.3d at 1022. The court determined that the ANPRM did not reopen a rulemaking because it did not "set forth for public comment the [agency's] views … much less its views in the form of a proposed rulemaking" but rather merely "requested information and data from interested parties so that the Corps could determine upon consideration of the responses whether to take any further action." *Id.* at 1024.

That logic holds here. By its own terms, the ANPRM will "solicit comment and gather updated information on the costs and benefits" of requiring accessible lavatories on single-aisle aircraft. Status Report at 3. It will not, however, make any proposal or offer up the Department's views on whether to make lavatories accessible on single-aisle aircraft. It therefore cannot serve to satisfy the Department's statutory duty to *propose a rule* addressing accessible lavatories—a duty the Department concedes it has, Resp'ts.' Br. at 21 ("The [2016 FAA] Act imposes a duty to issue a *proposed* rule.").

C. The Department's plan to indefinitely delay issuing a proposed rule on accessible lavatories harms Petitioners.

As described in the Petition, Petitioners will continue to suffer as long as the Department fails to issue a proposed rule on accessible lavatories. Mr. James Thomas Wheaton, Jr., a U.S. Navy veteran who is

paraplegic, flies on single-aisle aircraft approximately once per month. Wheaton Decl. ¶ 5, Add.9. Similarly, Mr. Albertson, a Marine Corps Veteran who is also paraplegic, flies on single-aisle commercial aircraft approximately 25 times per year. Albertson Decl. ¶ 3, Add.15. Like other PVA members, Mr. Wheaton and Mr. Albertson are unable to access the lavatories on these flights, causing them to have to avoid bladder relief or bowel movements for at least three to five hours at a time. Wheaton Decl. ¶ 7, Add 11; Albertson Decl. ¶ 7, Add.16. Both undertake elaborate precautions to avoid having a bladder or bowel accident in flight, such as limiting food and fluid intake starting the day before flying, wearing catheters or protective garments during flights, wearing dark clothing to mask any accidents, and instead taking long drives requiring overnight stays, Wheaton Decl. ¶¶ 10-12, Add.12; Albertson Decl. ¶¶ 7-9, Add.16-17. Having to fly without lavatory access causes both of them, and many of PVA's members, considerable distress. Wheaton Decl. ¶¶ 13-14 (describing his experience flying as "psychologically disheartening").

Mr. Wheaton, Mr. Albertson, and all of PVA's members will continue to suffer these very real and serious injuries as long as the

Department continues to delay issuance of a proposed rule on lavatory accessibility, in derogation of its clear and nondiscretionary statutory duty.

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Simply put, after promising to issue an NPRM addressing accessible lavatories, as required by Congress, the Department now plans to engage in a regulatory sleight of hand. The NPRM will not be about "accessible lavatories," *see* 14 C.F.R. 382.63(a)(1), and the ANPRM about accessible lavatories will not be a proposed rule. Accordingly, neither suffices to fulfill the Department's now two year-overdue statutory duty to issue a proposed rule on accessible lavatories. The Department has been gathering data on the costs and benefits of requiring accessible lavatories on single-aisle aircraft for almost three decades. *See* Pet. for Mandamus at 3-8. Even now, the Department informs the Court that it has received the Volpe Center's economic analysis, which informs the Department and the public "about potential costs and benefits" of requiring accessible lavatories on single-aisle aircraft. Resp'ts'. Br. at 34; Status Report at 3. And Petitioners will continue to suffer serious injuries as long as the Department fails to

fulfill its duty. It is therefore high time that the Department propose a rule—particularly in light of "the clarity of [its] statutory duty[.]" *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 193 (D.C. Cir. 2016) ("[T]he clarity of the statutory duty will likely require issuance of the writ if the political branches have failed to make meaningful progress within a reasonable period of time.").

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court lift the stay and compel the Department to act in compliance with its statutory obligations.

Dated: August 5, 2019 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(g), the undersigned counsel for Petitioners certifies that this motion:

(i) complies with the type-volume limitation of FRAP 27(d)(2)(A) because it contains 2,605 words, including footnotes and excluding the parts of the brief exempted by FRAP 32(f) and Tenth Circuit Rule 32(B); and

(ii) complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14-point or larger.

Dated: August 5, 2019

/s/ *Karianne M. Jones*
Karianne M. Jones

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2019, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM-ECF system.

Dated: August 5, 2019

/s/ *Karianne M. Jones*
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