UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARALYZED VETERANS OF AMERICA, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF TRANSPORTATION, *et al.*, Defendants.	Civil Action No. 1:17-cv-01539-JDB

COMBINED MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A STAY[1]

Plaintiffs have filed this action too late and in the wrong court, as made clear by a controlling statute and by recent on-point case law from the D.C. Circuit. This case must be dismissed.

Plaintiffs seek to challenge a March 2017 rule ("Final Rule") of the Department of Transportation ("DOT") which extends the date by which domestic airlines must collect and disseminate certain data. Congress, however, has directed that a plaintiff wishing to challenge an "order" of DOT issued "in whole or in part under" Part A of Subtitle VII of Title 49 (among other provisions) must file a petition for review in the D.C. Circuit or the plaintiff's local court of appeals. 49 U.S.C. § 46110(a). The petition must be filed within 60 days of the order's issuance unless the court of appeals concludes there are "reasonable grounds" for a late filing. *Id.* This Court is of course not a court of appeals, and Plaintiffs filed this lawsuit 132 days after the Final

[1] This Court directed that "the government's motion for summary judgment, if any, shall be filed" with its motion to dismiss and opposition to Plaintiffs' stay motion. *See* ECF No. 8. Defendants have decided not to file a motion for summary judgment, but recognize that Plaintiffs intend to file their own summary judgment motion. Defendants are thus filing a certified list of the contents of the administrative record and will serve a copy of the record on Plaintiffs' counsel.

Rule was issued. Section 46110 thus bars this action, which challenges an "order" issued "in whole or in part" under Part A (indeed, issued entirely under Part A).

The D.C. Circuit held just last year that DOT rules are "orders" for purposes of section 46110. *Nat'l Fed'n of the Blind v. DOT*, 827 F.3d 51 (D.C. Cir. 2016) ("*NFB*"). The Final Rule was also issued "in whole or in part" under Part A. The D.C. Circuit has made clear that any ambiguity about where jurisdiction rests must be resolved in favor of the court of appeals. Here, however, there is no ambiguity to resolve. The Final Rule was expressly "[i]ssued . . . under authority delegated in 49 CFR 1.27(n)," a regulation that delegates authority that comes entirely from Part A. This Court thus lacks jurisdiction to adjudicate Plaintiffs' claims, which are also untimely. This Court concomitantly lacks jurisdiction to consider Plaintiffs' stay motion. Furthermore, Plaintiffs are not entitled to a stay, and their stay motion should be denied as moot in any event.

BACKGROUND

I. THE NOVEMBER 2016 FINAL RULE

On November 2, 2016, DOT issued a Final Rule. *See* Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Components, 81 Fed. Reg. 76300 (Nov. 2, 2016) ("Data Collection Rule"). The Data Collection Rule, inter alia, requires domestic airline carriers to report the total number of wheelchairs and scooters (collectively, "mobility aids") placed in their aircraft cargo compartments, as well as the number of mishandled mobility aids. *See* 14 C.F.R. § 234.6(b)(2), (4). The Data Collection Rule became effective on December 2, 2016, and set a compliance date of January 1, 2018 for domestic airlines to track and report the information described above. 81 Fed. Reg. at 76,300, 76,304-76,305; 14 C.F.R. § 234.6(b). The Rule was preceded by a Notice of Proposed Rulemaking ("NPRM"), which

generated 278 comments. *See* Reporting Ancillary Airline Passenger Revenues, 76 Fed. Reg. 41,726 (Jul. 15, 2011); 81 Fed. Reg. at 76,301.

II. THE CHALLENGED RULE

On March 21, 2017, DOT issued the Final Rule that Plaintiffs purport to challenge in this case, which delays the compliance date for the Data Collection Rule by one year, to January 1, 2019. *See* Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14,437 (Mar. 21, 2017). In the Final Rule, DOT noted that, on January 20, 2017, the White House Chief of Staff had issued a memorandum that, among other things, directed agencies to temporarily postpone the effective dates of regulations not yet effective. 82 Fed. Reg. at 14,437. After explaining that "[the airline] industry is facing challenges with parts of this regulation and needs more time to implement it," DOT "decided to grant an extension of the compliance date for the final rule on reporting of mishandled baggage and wheelchairs until January 1, 2019." *Id.* This explanation was consistent with comments DOT received during the 2016 rulemaking explaining that airlines would need 12 to 24 months after a final rule was published to comply with any such rule. *See* 81 Fed. Reg. at 76,304-76,305.

III. THE COMPLAINT AND MOTION TO STAY

Plaintiffs filed this lawsuit on July 31, 2017. ECF No. 1 ("Compl." or "Complaint") According to their pleading, Plaintiffs are Paralyzed Veterans of America (described as a Veterans service organization) and Larry Dodson, an individual with high-level quadriplegia who alleges that his wheelchair has been mishandled by air carriers on multiple occasions. *Id.* ¶¶ 6-9. Plaintiffs contend that the Final Rule violates the Administrative Procedure Act ("APA"). *Id.* ¶ 1. Count One asserts that DOT unlawfully promulgated the Final Rule without following notice and

comment procedures. *Id.* ¶¶ 55-58. Count Two alleges that the Rule is arbitrary and capricious. *Id.* ¶¶ 59-61. Plaintiffs seek vacatur of the Rule and corresponding declaratory relief. Compl., Prayer for Relief. The same day they filed the Complaint, Plaintiffs filed a motion for a stay of the Final Rule pending judicial review. *See* ECF No. 2. In support of that motion, Plaintiffs contend that they are likely to succeed on the merits and will suffer irreparable harm absent a stay. ECF No. 2-1 at 6-16.

ARGUMENT

I. THE CASE MUST BE DISMISSED FOR LACK OF JURISDICTION

"Congress is free to 'choose the court in which judicial review of agency decisions may occur.'" *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1332 (D.C. Cir. 2013) (citations omitted) (quoting *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007)). Such "[l]imits on subject-matter jurisdiction 'keep the federal courts within the bounds the Constitution and Congress have prescribed,' and those limits 'must be policed by the courts on their own initiative.'" *Watts*, 482 F.3d at 505 (quoting *Rurhgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)).

Plaintiffs' challenge is governed by 49 U.S.C. § 46110, which vests jurisdiction over challenges to certain DOT "orders" in federal courts of appeals. The relevant provision states that:

> a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under [Part A of Subtitle VII of Title 49, 49 U.S.C. §§ 40101-46507, among other provisions] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a).[2] The court of appeals' jurisdiction is exclusive. *Id.* § 46110(c).

[2] Section 46110(a) further provides that a challenge to a covered order must be brought within 60 days of the order being issued, unless the court determines that "there are reasonable grounds for not filing by the 60th day." 49 U.S.C. § 46110(a). The Final Rule was promulgated on March 21, 2017 but Plaintiffs did not file their complaint until July 31, more than 60 days later. The

Accordingly, this Court lacks jurisdiction over this lawsuit (and the lawsuit is untimely) if: (1) the Final Rule is an "order" for purposes of section 46110(a); and (2) the Final Rule was issued "in whole or in part" under Part A. The Final Rule is plainly both and this lawsuit must be dismissed.

A. The Final Rule is an "Order" under Section 46110(a)

The Final Rule constitutes an "order" under section 46110(a). The word "order" as used in the statute has been "broadly construed" and "should be read expansively." *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 520 (D.C. Cir. 2011). And the D.C. Circuit held just last year that DOT rules are orders for purposes of section 46110. *NFB*, 827 F.3d at 54-57; *id.* at 55 ("Considering the breadth of the language and analysis in [a prior case], we can easily conclude that section 46110(a) includes review of DOT rulemakings.").

NFB is dispositive here. But *NFB* does not stand alone. As early as 1973, the D.C. Circuit recognized that section 46110 (then codified at 49 U.S.C. § 1486) provided it with jurisdiction to review regulations promulgated by a covered agency. *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912, 916 (D.C. Cir. 1973), *abrogated on other grounds*, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). The D.C. Circuit has since repeatedly reviewed DOT and Federal Aviation Administration ("FAA") rules under section 46110 (and its predecessor, section 1486).[3]

Complaint makes no reference to any reason for the late filing. The suit is thus also untimely, though that is of course an issue within the purview of the court of appeals to decide if an action were to be filed there.

[3] *See, e.g.*, *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430 (D.C. Cir. 2013); *Spirit Airlines, Inc. v. DOT*, 687 F.3d 403 (D.C. Cir. 2012); *Aircraft Owners & Pilots Ass'n v. FAA*, 296 F. App'x 92 (D.C. Cir. 2008); *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161 (D.C. Cir. 2007); *Sabre, Inc. v. DOT*, 429 F.3d 1113 (D.C. Cir. 2005); *Air Transp. Ass'n of Canada v. FAA*, 323 F.3d 1093 (D.C. Cir. 2003); *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997 (D.C. Cir. 2002); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), *abrogated on other grounds, Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455 (D.C. Cir. 1998); *Cronin v. FAA*, 73 F.3d 1126 (D.C. Cir. 1996); *National Air Trans. Ass'n v. McArtor*,

Describing this history, the D.C. Circuit recently explained that "[f]or nearly four decades, it has been blackletter administrative law that, absent countervailing indicia of congressional intent, statutory provisions for direct review of orders encompass challenges to rules." *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1129 (D.C. Cir. 2015). The presumption that "order" includes rules, the Court reasoned, "is now a tenet of administrative practice and is hornbook administrative law." *Id.* at 1131.[4]

Construing section 46110(a)'s reference to "order" to include final rules, moreover, is consistent with the purpose of jurisdictional statutes. As the D.C. Circuit has explained, the use of "order" in such statutes typically means "any agency action capable of review on the basis of the administrative record" and "the availability of a record for review . . . is now the jurisdictional touchstone." *Inv. Co. Inst. v. Bd. of Governors of the Fed. Reserve Sys.*, 551 F.2d 1270, 1277-78 (D.C. Cir. 1977) (citation omitted). In these cases, "requiring petitioners challenging regulations to go first to the district court results in unnecessary delay and expense." *Am. Petroleum Inst.*, 714 F.3d at 1333 (citation omitted).

In this case, the parties agree that the Final Rule is a rule. *See* 82 Fed. Reg. at 14,437; Compl. ¶ 50. Indeed, Plaintiffs rely on their characterization of the Final Rule as a legislative rule for their argument that DOT was required to go through notice-and-comment rulemaking before issuing it. ECF No. 2-1 at 6-11. Under the wealth of precedent discussed above—including the

866 F.2d 483 (D.C. Cir. 1989); *Alaska v. DOT*, 868 F.2d 441 (D.C. Cir. 1989); *Arrow Air, Inc. v. Dole*, 784 F.2d 1118 (D.C. Cir. 1986); *Advanced Micro Devices v. C.A.B.*, 742 F.2d 1520 (D.C. Cir. 1984).

[4] *See also N.Y. Republican State Comm.*, 799 F.3d at 1129 (explaining that "[i]nnumerable litigants have relied on [this presumption] to determine where and when to file challenges to agency rules across a broad spectrum of statutes promulgated by numerous agencies" and that "[w]e have, for example, applied it when reviewing rules promulgated by the Securities and Exchange Commission, the Federal Aviation Administration, and the Department of Transportation implementing statutes ranging from the Securities Act to the National Parks Overflights Act").

D.C. Circuit's directly on point decision in *NFB*—the Final Rule constitutes an order under Section 46110. But even if the Final Rule was something other than a "rule," it would still be an "order" for purposes of the statute. Under D.C. Circuit precedent, "agency actions are reviewable as orders under section 46110 so long as they are final, i.e., so long as they mark the consummation of the agency's decisionmaking process and determine rights or obligations or give rise to legal consequences." *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007) (quotation marks omitted). Plaintiffs cannot dispute that this standard is met here. Indeed, if Plaintiffs were attempting to challenge something that was ***not*** an "order," that would not mean that they could pursue their case in this Court. Instead, the action would be subject to dismissal on the grounds that the challenged action did not constitute final agency action.[5]

At the August 15 status conference, Plaintiffs' counsel suggested that section 46110 might not apply to rules that were not promulgated via notice and comment procedures. But there is no textual basis for this assertion. And any such argument is inconsistent with the D.C. Circuit's holdings that DOT rulemakings constitute "orders" and that any agency action is an "order" so long as it is final. *See* pp. 5-7, *supra*. Indeed, the D.C. Circuit has reviewed DOT and FAA rules under Section 46110 even when they were adopted without notice and comment. *See Taylor v. Huerta*, 856 F.3d 1089 (D.C. Cir. 2017) (reviewing interim final rule); *cf. Aircraft Owners & Pilots Ass'n*, 296 F. App'x 92, 94 (D.C. Cir. 2008) (concluding that decision to move an unregulated flyway did not require notice and comment); *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 416-17 (D.C. Cir. 2012) (addressing claim that final rule was not a logical outgrowth of proposed rule without suggesting that argument might affect court's jurisdiction). Other courts

[5] *See Sw. Airlines Co. v. DOT*, 832 F.3d 270, 275-77 (D.C. Cir. 2016) (dismissing petition for review of letter under section 46110(a) because letter did not constitute final agency action).

have explained that agency action is not excluded from Section 46110 merely because it was undertaken without notice and comment.[6] And any such argument, if accepted, would mean that courts of appeals would review DOT rules preceded by notice and comment and district courts would review other DOT rules (even when the basis for a challenge is precisely that the relevant agency should have engaged in notice and comment procedures but did not), a bizarre result. This theory has no basis and is foreclosed by both statutory text and precedent. The Final Rule is an order for purposes of section 46110.

B. The Final Rule was Issued "In Whole or in Part" under Part A

The Final Rule was also issued under Part A of Subtitle VII, 49 U.S.C. §§ 40101-46507. Section 46110 applies if an order is issued "in whole ***or in part***" under Part A, among other provisions. 49 U.S.C. § 46110(a) (emphasis added). Indeed, even before Congress added the "in whole or in part" language, the D.C. Circuit held that it had jurisdiction over challenges to orders that were issued partially under statutes covered by Section 46110 and partially under other statutes. *See Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 683-84 (D.C. Cir. 2004). The D.C. Circuit has also explained that "in administrative appeals, where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter." *Gen. Elec. Uranium Mgmt. Corp. v. Dep't of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985) (quotation marks, citation, and footnote omitted); *cf. Telecommc'ns Research and*

[6] *See Ibrahim v. DHS*, 538 F.3d 1250, 1256 n.8 (9th Cir. 2008) (explaining that "the Transportation Security Administration may issue its Security Directives without first giving notice and an opportunity to comment, yet the appellate courts review those directives under section 46110 all the same"); *Redfern v. Napolitano*, No. 10-cv-12048, 2011 WL 1750445, at *5 (D. Mass. May 9, 2011) (noting that courts "have rejected that the term 'order' as used in Section 46110 requires that persons receive notice and an opportunity to comment"), *vacated and remanded as moot*, 727 F.3d 77 (1st Cir. 2013); *cf. Safe Extensions*, 509 F.3d at 599 (stating that "there is no longer any doubt about whether we may review agency actions [under section 46110] when the agency held no hearing").

Action Ctr. v. FCC, 750 F.2d 70, 78-79 (D.C. Cir. 1984) (explaining that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals"). Accordingly, the Final Rule is subject to section 46110(a) so long as it was even arguably issued, at least in part, under Part A.

The Final Rule meets this criterion, as it was ***unambiguously*** issued ***entirely*** under Part A. The Final Rule states that it was "[i]ssued . . . under authority delegated in 49 CFR 1.27(n)." Section 1.27(n), in turn, delegates authority that comes entirely from Part A—the authority to "[a]ssist and protect consumers in their dealings with the air transportation industry and conduct all departmental regulation of airline consumer protection and civil rights pursuant to [49 U.S.C. Chapters 401, 411, 413, 417, and 423]." 49 C.F.R. § 1.27(n). Included in those chapters (in chapter 417 specifically) are provisions authorizing DOT to require air carriers to file annual, monthly, periodical, or special reports with certain information, 49 U.S.C. § 41708, and prescribing the form of records to be kept by an air carrier, *id.* § 41709. Indeed, Plaintiffs ***themselves*** cite sections 41708 and 41709 (along with one other statute) as authority for DOT to require the collection and reporting of data mandated by the Data Collection Rule. Compl. ¶¶ 15-16.

Finally, the structure of the statutory scheme reinforces that the Final Rule must have been issued under Part A of Subtitle VII. Subtitle VII broadly covers "Aviation Programs," and contains five parts. Part A contains all statutes related to "Air Commerce and Safety," the obvious subject of the Final Rule. Orders issued under Part B are also covered under section 46110. 49 U.S.C. § 46110(a). The only portions of Subtitle VII not subject to section 46110 (Parts C-E) concern such narrow matters as Metropolitan Washington airports, buy-American preferences, and discrete chapters related to particular financing matters. The Final Rule was plainly issued pursuant to Part

A authority.

At the status conference, Plaintiffs' counsel nonetheless stated that Plaintiffs do not believe the Final Rule was issued in whole or in part under Part A. Plaintiffs' argument, as the Government understands it (from an admittedly brief exchange at the status conference), is as follows: (1) The Final Rule refers to three statutes—49 U.S.C. §§ 329, 41101, and 41701—as authority; (2) Sections 41101 and 41701 cannot, in Plaintiffs' view, serve as statutory authority for the Final Rule; (3) Section 329 is located outside of Part A; (4) Therefore, the Final Rule was not issued in whole or in part under Part A. This line of reasoning fails.

Initially, the problem with this argument is that DOT did not invoke any of these three statutes as support for the Final Rule. Rather, DOT referred to those statutes as the previously cited authority for 14 C.F.R. pt. 234, and did so merely to note that the authority for that part had not changed. *See* 82 Fed. Reg. at 14,438. The Final Rule, by contrast, was expressly based on authority delegated in 49 C.F.R. § 1.27(n) which, as noted above, derives entirely from Part A. Indeed, DOT's Office of General Counsel ("OGC") issued the Final Rule and the regulation does not by its terms delegate to OGC the authority to issue rules pursuant to Section 329. *See* 49 C.F.R. § 1.27(n).

Moreover, the reference in the Final Rule to sections 41101 and 41701, in addition to just parroting the Data Collection Rule, does not alter the fact that sections 41708 and 41709 are directly on point and specific statutory authority for the Data Collection Rule (as Plaintiffs' Complaint recognizes). Prior to the Data Collection Rule, the authority section for 14 C.F.R. pt. 234 listed 49 U.S.C. §§ 329, 41708, and 41709 (and indeed, the Westlaw version of the regulation

appears to still cite sections 41708 and 41709). *See* 14 C.F.R. pt. 234 (Jan. 1, 2016).[7] Although the Data Collection Rule changed the two Part A citations to sections 41101 and 41701, the Rule provided no explanation for this alteration, which appears to have been merely a scrivener's error. As noted above, sections 41708 and 41709 clearly encompass both Rules and Plaintiffs' Complaint ***cites them*** as the authority for the Data Collection Rule. In any event, as noted above, the Final Rule was expressly issued under 49 C.F.R. § 1.27(n), a regulation which delegates authority entirely under Part A.

But even if this Court were to ignore (1) DOT's express invocation of 49 C.F.R. § 1.27(n), (2) the clear applicability of sections 41708 and 41709, as well as (3) Plaintiffs' citation of those provisions in its Complaint (which it should not)—and even if the Court were to conclude that DOT issued the Final Rule under sections 329, 41101, and 41701 in particular (which it also should not)—that ***still*** would not change the jurisdictional analysis because sections 41101 and 41701 are within Part A. To the extent Plaintiffs argue that DOT did not properly invoke authority covered by Part A as authority for the Final Rule, this would be a merits question for the court of appeals. The statute requires only that an order "be issued" in whole or in part under a covered provision; it cannot reasonably be read as permitting a district court to invade a court of appeals' exclusive jurisdiction based on the district court's ***merits conclusion*** that the invoked statutes do not authorize the agency action in question. And of course, if Plaintiff did wish to fault the agency for referring to sections 41101 and 41701, this would be no less an issue for the 2016 Rule (that they wish to reinstate in full) as it would for the 2017 Rule (that they purport to challenge). Under any possible analysis, the Final Rule was clearly issued under Part A. The Complaint must be

[7] *See* https://www.gpo.gov/fdsys/pkg/CFR-2016-title14-vol4/pdf/CFR-2016-title14-vol4-part234.pdf.

dismissed.

II. PLAINTIFFS ARE NOT ENTITLED TO A STAY AND THE STAY MOTION SHOULD BE DENIED AS MOOT IN ANY EVENT

The Court directed the parties to brief Plaintiffs' motion for a stay along with whatever dispositive motions they choose to file. *See* ECF No. 8. The stay motion appears to be academic now since, as the Government understands it, the Court intends to decide the stay issue in conjunction with the parties' dispositive motions. Accordingly, the Court should deny the stay motion as moot regardless of its disposition of Defendants' motion to dismiss and Plaintiffs' forthcoming motion for summary judgment.

Plaintiffs are, in any event, not entitled to a stay. Initially, Plaintiffs have not established that they will suffer irreparable injury absent a stay of the Final Rule.[8] Irreparable harm is "the sine qua non of the preliminary injunction inquiry." *Trudeau v. FTC*, 384 F. Supp. 2d 281, 296 (D.D.C. 2005), *aff'd*, 456 F.3d 178 (D.C. Cir. 2006). And "[t]he irreparable injury requirement erects a very high bar for a movant." *Coal. for Common Sense in Gov't Procurement v. United States*, 576 F. Supp. 2d 162, 168 (D.D.C. 2008).

Plaintiffs have not come close to meeting that demanding standard here. Mr. Dodson contends that he will experience irreparable harm because the Final Rule increases the risk that, in the interim, he will travel on an airline that is comparatively more likely to lose or mishandle his mobility aid. ECF No. 2-1 at 14. Merely stating that proposition suffices to make clear that this

[8] Because the stay motion should be denied as moot—and because the prerequisites for a stay are clearly not met in any event—the Government will assume without conceding that 5 U.S.C. § 705, under which Plaintiffs filed their stay motion, permits a stay motion where, as here, a Plaintiff initiates litigation and then subsequently moves for a stay. The Government similarly assumes for purposes of this discussion that Plaintiffs are correct in arguing that "[m]otions for such relief are reviewed under the same standards used to evaluate requests for interim injunctive relief." ECF No. 2-1 at 5 (quotation marks omitted).

claim of injury is entirely speculative. A court, however, may not issue "a preliminary injunction based only on a possibility of irreparable harm. . . ." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Indeed, even that formulation fails to account for another layer of speculation, namely, speculation that the information Plaintiffs seek would even be useful: it is pure conjecture to suggest that any information Plaintiffs might receive in 2018 (absent the Final Rule) would disclose any significant difference among airlines concerning the frequency of mishandled mobility aids. Defendants appreciate that Plaintiffs have a subjective interest in receiving this information and do not doubt the sincerity of their views. But these allegations do not even establish Article III standing, let alone irreparable harm. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (explaining that Supreme Court has "repeatedly reiterated that threatened injury must be ***certainly impending*** to constitute injury in fact" for standing purposes (emphasis in original)); *see also In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (stating that "to show irreparable harm, a plaintiff must do more than merely allege harm sufficient to establish standing." (alterations and quotation marks omitted)).

Plaintiffs also contend that Mr. Dodson and similarly situated individuals will react to the Final Rule by minimizing air travel or abstaining from it altogether. ECF No. 2-1 at 14. But this too is precisely the sort of allegation that the Supreme Court has held deficient even to establish standing. *See Clapper*, 568 U.S. at 416 (parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending"). Indeed, such voluntary conduct does not suffice to establish standing (let alone irreparable harm) even if the conduct is "a reasonable reaction to a risk of harm. . . ." *Id.*

Paralyzed Veterans further argues that the Final Rule will force it to spend resources assisting veterans with mobility impairments, and will interfere with its ability to advise members

whose mobility aids have been mishandled in submitting complaints, in dealing with incidents of mishandling, and in working with DOT and airlines to identify problem areas and train personnel. ECF No. 2-1 at 15. For the most part, these allegations do not have any logical nexus to the Final Rule. There is no reason to think that Paralyzed Veterans needs the broad statistical information at issue to advise its members about how to submit complaints and to otherwise address individual incidents, or to work with airlines on disability-related issues. In any event, these conclusory allegations fall far short of meeting Paralyzed Veterans' burden to allege (for standing purposes) "that discrete programmatic concerns are being directly and adversely affected by the challenged action." *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995). But even if Plaintiffs' various arguments are (barely) sufficient to establish standing, they do not come close to demonstrating irreparable harm.

In any event, the Court need not—and respectfully, should not—even address the question of irreparable harm. Since this Court lacks jurisdiction to adjudicate the merits of Plaintiffs' claims, there is no possibility that Plaintiff will obtain relief in this Court on those claims. Plaintiffs are thus plainly not entitled to a stay for the same reason the Complaint must be dismissed.[9]

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss, dismiss this action with prejudice, and deny Plaintiffs' motion for a stay.

Dated: September 15, 2017

Respectfully submitted

CHAD A. READLER
Acting Assistant Attorney General

[9] Likewise, because the jurisdictional considerations addressed above mean that Plaintiffs cannot succeed on their claims and because they have not shown irreparable harm that would result absent a stay, independent consideration of the remaining preliminary injunction factors is unnecessary and unwarranted.

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