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

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS[1]

This case must be dismissed because Plaintiffs filed it in the wrong court.[2] As a jurisdictional matter, any challenge to an "order" of the Department of Transportation ("DOT") "issued . . . in whole or in part under" Part A of Subtitle VII of Title 49 must be filed, if anywhere, in a court of appeals. 49 U.S.C. §§ 46110(a), (c). And as Plaintiffs concede, D.C. Circuit authority makes clear that the rule at issue ("Final Rule") is an "order." *See* ECF Nos. 14-1, 16, 17 ("Pltfs' Opp.") at 17 n.8; ECF Nos. 10-1, 11 ("Dfts' Mem."). Thus, the only issue is whether the Final Rule was issued, in whole or in part, under Part A. It was and this case must be dismissed.

ARGUMENT

As to the sole remaining issue in this case (whether the Final Rule was issued, at least in part, under Part A), Plaintiffs do not dispute any of the following: (1) the Final Rule states that it was "[i]ssued . . . under authority delegated in 49 CFR 1.27(n)"; (2) that provision, Section 1.27(n),

[1] This brief is limited to the issues on which Defendants moved to dismiss; Defendants do not address Plaintiffs' merits arguments that Defendants violated the APA and thus are not filing a separate response to Plaintiffs' motion for summary judgment. Therefore, Defendants believe briefing on jurisdictional issues should be deemed complete with this filing.

[2] As Defendants have noted, the suit is also untimely but that is an issue within the purview of the court of appeals if an action were to be filed there. Since the 60-day requirement applies in any case subject to Section 46110, Defendants do not address the timeliness issue separately here.

delegates authority that comes entirely from Part A; (3) two of the three statutes that are expressly cited in the authority section for 14 C.F.R. Part 234—which Plaintiffs wrongly claim is the authority section for the Final Rule—are Part A statutes; (4) included within Part A are directly on-point 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; (5) Plaintiffs' ***own Complaint*** cites sections 41708 and 41709 as authority for DOT to require the collection and reporting of data mandated by the 2016 Rule (which the Final Rule delayed); and (6) Section 1.27(n) does not by its terms even authorize DOT's Office of General Counsel—which issued the Final Rule—to issue rules under 49 U.S.C. § 329 (the non-Part A statute under which Plaintiffs now claim that the Final Rule was issued). Dfts' Mem. at 8-12. Plaintiffs also do not dispute that, in conducting the jurisdictional inquiry, this Court must resolve any "ambiguity. . . in favor of" the courts of appeals' exclusive jurisdiction, *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), and thus must dismiss this case if the Final Rule was even arguably issued, at least in part, under Part A, Dfts' Mem. at 8-9. It clearly was.

Urging otherwise, Plaintiffs contend that Defendants "invite this Court to ignore the plain text of the [Final] Rule and instead rely on their post-hoc rationalizations . . . to find jurisdiction lacking." Pltfs' Opp. at 12. Not so. The plain text of the Final Rule states that it was "[i]ssued . . . under authority delegated in" a regulation that delegates only Part A authority, and notes that the authority section for the underlying rule cites two Part A statutes. The text of the Final Rule thus confirms that the Rule was issued under Part A. Ultimately, Plaintiffs' basic problem is that, regardless of how the Court proceeds to analyze the jurisdictional question (whether it limits its

review to the text of the Final Rule or considers other sources), all paths lead to Part A—and to the need to dismiss this case for lack of jurisdiction. Consider the three possible routes:

1. *The Final Rule:* Defendants' principal argument is simple and dispositive. The Final Rule expressly states that the Rule was "[i]ssued . . . under authority delegated in 49 CFR 1.27(n)"—language which mirrors the "issued under" language of the statute. *Compare* Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14,437, 14,437 (Mar. 21, 2017), *with* 49 U.S.C. § 46110(a). The regulation delegates authority that derives entirely from Part A, Dfts' Mem. at 9, a point Plaintiffs do not dispute.[3] Thus, the Final Rule was issued under Part A. That should be the end of the analysis. Critically, Plaintiffs ***agree*** that DOT purported to issue the Final Rule under Part A: they concede that the regulation "signal[s] to the public that the Acting General Counsel signed the [Final] Rule because DOT was purporting to act under part A." Pltfs' Opp. at 18. Again, this should be determinative. Indeed, Section 1.27(n) by its terms does not delegate to DOT's Office of General Counsel the authority to issue rules pursuant to statutes outside Part A. Plaintiffs contend that "[t]his is true—but it is an argument for finding the Delay Rule unlawful." *Id.* at 18. n.9. No, it is an argument that the Final Rule was issued under Part A, as DOT indicated it was. The Court can—and DOT's primary submission is that it should—end its analysis there.

2. *The Authority Section for 14 C.F.R. Part 234:* Another approach—which Plaintiffs appear to suggest—would be for the Court to limit its analysis to the three statutes that the Code of Federal Regulations lists as authority for the entirety of 14 C.F.R. Part 234 . Pltfs' Opp. at 13-

[3] Plaintiffs characterize Defendants' argument as "picking two other sections (out of the five entire chapters covered by section 1.27(n)) as the supposed reference point for the citation to section 1.27(n)." Pltfs' Opp. at 18. But the salient point for jurisdictional purposes is that ***all*** of the provisions covered by Section 1.27(n) are within Part A.

16. This approach is wrong, and would not help Plaintiffs in any event. As DOT previously explained, the Final Rule was expressly issued under authority delegated in 49 C.F.R. § 1.27(n); the Final Rule referred to the three statutes merely to note that it was not changing the authority for 14 C.F.R. pt. 234 ***as a whole***. Dfts' Mem. at 10. That brief notation was not, as Plaintiffs contend, the authority citation for the Final Rule. In any event, cabining the analysis to the statutes cited in the C.F.R. does not help Plaintiffs since two of the three cited statutes—Sections 41101 and 41701—are Part A statutes. *Id.* at 11.

3. *An Independent Analysis*: Though DOT does not advocate this approach, suppose the Court were to disregard both (1) and (2), and conduct its own independent analysis of the statutory scheme—deciding for itself whether the Final Rule was arguably issued, at least in part, under Part A. (In light of the presumption articulated by the D.C. Circuit, of course, the applicable test requires nothing more.) This approach also gets Plaintiffs nowhere, since Sections 41708 and 41709 (both within Part A) are directly on point. Among other provisions, Section 41708 authorizes the Secretary to require a carrier "to file annual, monthly, periodical, and special reports with the Secretary in the form and way prescribed by the Secretary," 49 U.S.C. § 41708(b)(1)(A), and "to provide specific answers to questions on which the Secretary considers information to be necessary," *id.* § 41708(b)(2). Section 41709 directs that "[t]he Secretary of Transportation shall prescribe the form of records to be kept by an air carrier, including records on the movement of traffic, receipts and expenditures of money" and states that, generally, "[a] carrier may keep only records prescribed or approved by the Secretary." *Id.* § 41709(a). Again, Plaintiffs' Complaint ***cites*** Sections 41708 and 41709 (along with Section 329) as authority for DOT to require the collection and reporting of data mandated by the 2016 Rule (which the Final Rule delayed).

Compl. ¶¶ 15-16.[4] There is simply no plausible theory of the Final Rule's issuance that does not involve Part A.

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How then, can Plaintiffs possibly maintain that the Court has jurisdiction to hear this case? Plaintiffs appear to choose some variant of option (2), by focusing on the three statutes listed in the authority section for 14 C.F.R. Part 234. But again, the obvious problem with that approach is that two of the three statutes are within Part A. 49 U.S.C. §§ 41101, 47101. So Plaintiffs attempt to thread the needle. The Court, they contend, should rely exclusively on the statutes listed in the C.F.R.—ignoring DOT's express statement that the Rule was issued pursuant to authority delegated by regulation, as well as the broader statutory scheme—but should also determine whether those specific statutes ***actually*** authorized the Final Rule. Pltfs' Opp. at 13-17.

Applying this test, Plaintiffs assert that Sections 41101 and 41701 "are inapposite" and that "[t]he ***only*** statutory provision Defendants cited that actually ***grants*** them the authority to do what they did here is" Section 329. Pltfs' Opp. at 15, 17 (emphasis in original). "[T]o trigger the jurisdictional provision of section 46110(a)," Plaintiffs argue, DOT must invoke a statute that "***both*** provide[s] Defendants with the authority to issue the Delay Rule ***and*** itself trigger[s] the jurisdictional provision in section 46110(a)." Pltfs' Opp. at 14 (emphasis in original). Even if Plaintiffs were correct in their reliance on the authority section for 14 C.F.R. Part 234, and even if Plaintiffs' characterization of Sections 41101 and 41701 were accurate,[5] this argument would still

[4] Defendants do not suggest that the analysis would be different if the Complaint had not included this language (it would not) or that Plaintiffs could confer jurisdiction by amending their Complaint to eliminate it (they could not). Defendants simply observe that, at the time Plaintiffs filed this action, even Plaintiffs understood that these Part A statutes were directly on point.

[5] Section 41701 authorizes DOT to establish reasonable classifications for air carriers and "reasonable requirements for each class when the Secretary decides those requirements are

fail. As their own formulations make clear,[6] Plaintiffs' argument about whether Sections 41101 and 41701 authorized the Final Rule raises a merits question for a court with jurisdiction, not a jurisdictional question that strips the courts of appeals of their exclusive jurisdiction.

When DOT purports to issue an order under authority covered by Section 46110(a), the courts of appeals exercise their exclusive jurisdiction over a challenge to that order, even when the challengers allege that the order was in fact not authorized by the cited authority. *See, e.g.*, *Taylor v. Huerta*, 856 F.3d 1089 (D.C. Cir. 2017) (holding that DOT lacked statutory authority to issue regulation pertaining to certain unmanned aircraft, but never suggesting that this ***merits*** determination affected the Court's ***jurisdiction***); *Competitive Enterprise Inst. v. DOT*, 863 F.3d 911 (D.C. Cir. 2017) (reviewing claim that DOT regulation lacked statutory authority, without suggesting that resolution of that ***merits*** issue might affect the Court's ***jurisdiction***). Conversely, a claim that an order is not statutorily authorized does not give a district court jurisdiction. *See, e.g.*, *Nat'l Fed. of the Blind v. DOT*, 78 F. Supp. 3d 407 (D.D.C. 2015) (holding that Section 46110 gave courts of appeals exclusive ***jurisdiction*** over challenge to DOT regulation, even though challengers raised a ***merits*** claim that "DOT did not have statutory authority to promulgate the Final Rule"), *mandamus denied by* 827 F.3d 51 (D.C. Cir. 2016) (agreeing that district court lacked jurisdiction).

Arguing otherwise, Plaintiffs contend that the applicability of Sections 41101 and 41701 "is a factual question about whether Defendants properly invoked sections 41101 and 41701 to

necessary in the public interest." 49 U.S.C. § 41701. Though Defendants do not address this question here, this language is quite broad and it is far from obvious that it is "inapposite."

[6] *See, e.g.*, Pltfs' Opp. at 13 (contending that "Defendants did not cite any statutory authority that ***properly*** triggered section 46110(a)" (emphasis added)); *id.* at 18 (arguing that Defendants "did not ***validly*** issue the Delay Rule pursuant to a provision subject to section 46110(a)" (emphasis added)); *id.* at 20 (asserting that Plaintiffs were purportedly not "on notice that [the Final Rule] was ***validly*** promulgated under part A" (emphasis added)).

support the Delay Rule—the type of determination courts are often called upon to make in the course of deciding jurisdictional questions." Pltfs' Opp. at 16. But Plaintiffs' argument is that Sections 41101 and 41701 do not grant DOT "the authority to issue the Delay Rule." *Id.* at 14. As demonstrated by the cases cited above, the question of an agency's statutory authority to issue a rule is not a "factual question" that is a prerequisite to the court of appeals' exclusive jurisdiction. Rather, whether an agency action was duly authorized is a ***merits*** question of law to be decided by the court to which Congress conferred jurisdiction. The cases Plaintiffs cite—which involve a court's authority to review whether a petitioner was an alien convicted of an aggravated felony, *Ramtulla v. Ashcroft*, 301 F.3d 202, 203 (4th Cir. 2002), and allegations about a party's business activities for purposes of a personal jurisdiction analysis, *Ventura v. BEBO Foods, Inc.*, 595 F. Supp. 2d 77, 82 (D.D.C. 2009)—lend no support to Plaintiffs' argument that an agency's substantive authority under a statute is a "factual question" to be addressed as part of a jurisdictional analysis.

Indeed, under Plaintiffs' theory, if an agency purported to act pursuant to authority subject to a direct review provision, the courts of appeals would have jurisdiction over any challenge to a ***valid*** exercise of that authority, while the district courts would have jurisdiction over any challenge to an ***invalid*** exercise of that authority. Courts at both levels, moreover, would be forced to determine whether the agency's action was statutorily-authorized before deciding whether they even could exercise jurisdiction. For example, after the D.C. Circuit determined in *Taylor* that the challenged rule was not authorized by statute, it would—under Plaintiffs' formulation—have been required to dismiss the petition for review for lack of jurisdiction. And before the District Court in *National Federation of the Blind* determined that it lacked jurisdiction, it would have had to consider the merits of the challengers' claim that the challenged rule lacked statutory authority.

This is obviously not how jurisdictional statutes work and it is not how Section 46110 works. And by requiring courts to address the merits issue of statutory authority in determining which courts have jurisdiction, Plaintiffs' approach is contrary to the principle that jurisdictional and merits inquiries are distinct, and to the Supreme Court's insistence that jurisdictional rules "remain as simple as possible." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).[7]

Plaintiffs' theory also suffers from internal inconsistency. Plaintiffs contend that because Sections 41101 and 41701 purportedly did not authorize the Final Rule, it was not "issued under" those sections. But they insist that the Final Rule ***was*** "issued under" Section 329, even though all parties agree that 49 C.F.R. 1.27(n) does not by its terms delegate to DOT's Office of General Counsel (which issued the Final Rule) authority to issue rules pursuant to Section 329. Pltfs' Mem. at 18 n.9. This inconsistency further illustrates that Plaintiffs' proposed approach is meritless.

Plaintiffs also fault Defendants for purportedly asking this Court to look at materials outside the Final Rule to address the jurisdictional question, contravening the principle that "agencies cannot retroactively justify their actions." Pltfs' Opp. at 19 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Putting aside the oddity of Plaintiffs disparaging as "extra-record sources of authority" two statutes that their own Complaint cites as authority, this argument is makeweight. The Final Rule on its face states that it was "issued . . . under" a regulation that delegates solely Part A authority, and notes that the authority section for the underlying rule cites two (out of three) Part A statutes. It is Plaintiffs who ask the Court to ignore what the Final Rule

[7] Plaintiffs raise the specter of agencies "manufactur[ing] appellate jurisdiction through sham citations (or at least inadvertently erroneous ones)." Opp. at 16. But if an agency invokes authority that does not actually support its action, the action will be at great risk of being invalidated. It is thus extremely unlikely that an agency would purport to rely on "sham" authority merely to secure jurisdiction in a court of appeals rather than a district court. In any event, Plaintiffs do not suggest that Defendants' invocation of Part A authority was a sham to avoid district court review.

actually says on this issue, and to entertain a thinly disguised merits challenge under the guise of assessing jurisdiction.

Finally, Plaintiffs frame the jurisdictional issue as a question of notice, asserting that "[p]rivate individuals like Mr. Dodson, and groups like PVA, should not bear the burden of divining an agency's 'true' intent or spinning out hypotheticals when an agency provides them with flawed notice." Opp. at 20. "Nothing in the [Final] Rule," Plaintiffs contend, "put [them] on notice that it was validly promulgated under part A, subtitle VII, and, accordingly, that a jurisdictional provision directed any challenge might need to be brought in the court of appeals within 60 days." *Id.* The argument likewise goes nowhere. As a threshold matter, the equitable considerations Plaintiffs purport to raise would ***at most*** be relevant to whether the court of appeals should waive the 60-day time limit if an action were to be filed there. Equitable considerations are not a basis for ignoring a ***jurisdictional*** limitation on which Article III courts can entertain a claim. *See, e.g.*, *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

In any event, Plaintiffs' notice argument is meritless and nonsensical (and therefore would not be a basis for waiving the 60-day time limit though that would, again, be a question for the court of appeals). Plaintiffs do not contend that they ***actually*** relied on any putatively flawed notice to conclude that Section 46110 did not apply here. And any such claim of detrimental reliance would be illogical. The Final Rule stated that it was "[i]ssued . . . under authority delegated in 49 CFR 1.27(n)," and Plaintiffs acknowledge that this citation "signal[ed] to the public that the Acting General Counsel signed the [Final] Rule because DOT was purporting to act under part A." Pltfs' Opp. at 18. And even the authority section for 14 C.F.R. Part 234—which Plaintiffs wrongly characterize as the authority section for the Final Rule—lists two Part A statutes. Under these circumstances, interested parties were plainly on notice of Section 46110's

applicability; no reasonable litigant with knowledge of the Final Rule and the statute could responsibly decide to file only an untimely district court action. The Complaint must be dismissed.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening brief, the Court should dismiss this action for lack of jurisdiction.

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Respectfully submitted

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