IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARALYZED VETERANS OF AMERICA, *et al.*, *Plaintiffs*, vs. U.S. DEPARTMENT OF TRANSPORTATION, *et al*., *Defendants*.	Case No. 17-1539 (JDB)

PLAINTIFFS' REPLY TO MOTION FOR SUMMARY JUDGMENT

Javier M. Guzman, Bar No. 462679
Karianne M. Jones (*pro hac vice*)*
Jeffrey B. Dubner, Bar No. 1013399
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
(202) 448-9090
jguzman@democracyforward.org
kjones@democracyforward.org
jdbuner@democracyforward.org

*Admitted in the State of Minnesota; practicing under the supervision of organization principals.

In moving for summary judgment, Plaintiffs explained (1) that the Court has jurisdiction to hear this matter because the Delay Rule is not subject to section 46110(a) because it is not an order issued under a Part A statute; and (2) that the rule should be vacated because it was not issued through notice-and-comment rulemaking and was arbitrarily and capriciously based on a one-sentence request by an airline industry representative.[1] In its opposition, Defendants do not contest the latter point and have thereby conceded Plaintiffs' APA claims (*see* LCvR 7(b)). Defendants instead bet all on the proposition that Plaintiffs are in the wrong court; that notwithstanding Defendants' flawed Federal Register notice of the Delay Rule, it is Plaintiffs who must bear the burden of that error and sue elsewhere. They are wrong.

Defendants rest on three flawed grounds. First, they argue that the Delay Rule's Authority Citation is not where one should look for the authority upon which DOT purported to act. But the Authority Citation is a requisite part of any rule published in the Federal Register, and must—to provide adequate notice to the public—state the complete and correct basis for agency action. Second, they argue that the court cannot factually ascertain the basis for agency action in considering subject matter jurisdiction. But courts properly may—and routinely do—make preliminary findings to test a party's jurisdictional assertion or challenge. Third, they argue that Plaintiffs must show that they actually relied on the flawed Federal Register notice in order to claim any relief from it. But, by statute, the public is charged with constructive notice of any notice published in the Federal Register.

[1] Defendants assert that briefing on jurisdiction "should be deemed complete with [their] filing." Defs' Opp. at 1 n.1. But because Plaintiffs bear the burden of establishing jurisdiction, and, accordingly, addressed jurisdiction in their summary judgment motion, Pls.' Br. at 12-20, they file this reply pursuant to the Court's scheduling order (Dkt. 8).

In sum, because jurisdiction is proper in this Court and because Defendants have conceded the merits of the case, Plaintiffs are entitled to summary judgment.

1. *The Delay Rule's Authority Citation controls the jurisdictional inquiry*. To channel review to the circuit court, the Delay Rule must have been promulgated pursuant to authority delegated by a Part A statute. *See* 49 U.S.C. § 46110(a). That authority is to be found, if at all, in the Authority Citation. The Authority Citation to the Delay Rule lists three statutes: two Part A statutes and one non-Part A statute. But the two Part A statutes—49 U.S.C. §§ 41101 and 41701—do not give Defendants the authority to require airlines to collect, collate, and report information about how often they damage wheelchairs during flights. Defendants conceded as much in their opening brief, acknowledging that the citation to sections 41101 and 41701 were, at best, a scrivener's error. Defs.' Opening Br. at 11.[2] Nonetheless, Defendants make several claims about why they win regardless. None is persuasive.

First, Defendants baldly argue that this Court should ignore the statutory citations listed in the "Citations of Authority" section of the Delay Rule and instead focus solely on the reference to 14 C.F.R. § 1.27(n). Defs.' Opp. at 3. But such a blinkered reading is wholly unsupported by law. An Authority Citation is a requisite part of any final rule published in the Federal Register. 1 C.F.R. § 21.40 ("Each section in a document subject to codification must include, or be covered by, a complete citation of the authority under which the section is

[2] Defendants now seek to retreat from that assertion, cursorily suggesting that "[t]hough Defendants do not address this question," the language of sections 41101 and 41701 "is quite broad and it is far from obvious that it is 'inapposite.'" Defs' Opp. at 6 n.5. This Court should disregard this unreasoned aside and hold Defendants to their original concession. The D.C. Circuit has made clear that "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *New York Rehab Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 207); *see also Armstrong v. Geithner*, 608 F.3d 854, 858 n.** (D.C. Cir. 2010) (noting that a court is not required to "address an argument raised only cursorily in a footnote").

issued."). That Authority Citation must *both* (a) identify the "[g]eneral or specific authority delegated by statute," and (b) identify any "executive delegations . . . necessary to link the statutory authority to the issuing agency." *Id.* And it must be located where the Delay Rule's Authority Citation is: "as the first item in the list of amendments" to the Code of Federal Regulations. *Id.* § 21.43(a)(2). Thus, Defendants cannot read the requirement of a complete and correct statutory citation out of section 21.40 by focusing solely on the executive delegation in 14 C.F.R. § 1.27(n).

Second, Defendants contend that mere citation of sections 41101 and 41701 was enough to bring the Delay Rule within the purview of section 46110(a). Defs.' Opp. at 3-4 ("[C]abining the analysis to the statutes cited in the [Federal Register] does not help Plaintiffs since two of the three cited statutes—Sections 41101 and 41701—are Part A statutes."). But the consequence of that argument would be that agencies could cite entirely irrelevant and inapplicable statutory authority and on that basis alone trigger jurisdictional provisions that would bind the public. This would mean that agencies could pick and choose the jurisdictional provisions that apply to their rules, regardless of any actual statutory authority. For example, under Defendants' theory, they could have cited section 80b-6(4) of the Investment Providers Act,[3] which triggers a jurisdictional provision requiring a challenge to be brought within 60 days in the court of appeals.[4] Even though section 80b-6(4) is entirely irrelevant to airline reporting requirements,

[3] Section 80b-6(4) gives the SEC the authority to promulgate "rules and regulations . . . reasonably designed to prevent[] such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 80b-6(4).

[4] "Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal office or place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days

and, indeed, grants *no* authority to DOT, under Defendants' proposition, the *citation* of that statute would itself be sufficient to require that a challenge to the Delay Rule be brought in the court of appeals within 60 days of its promulgation. This would be the pinnacle of forum shopping. *See* Pls.' Br. at 15. And under Defendants' logic, the agency need not have acted intentionally in this scenario; an erroneous citation would be sufficient to confer jurisdiction on a circuit court. But ultimately, whether a function of intent or inadvertence, a citation alone cannot be enough to trigger a jurisdictional provision. Otherwise, the executive branch would be able to dictate when jurisdiction lies in the district court without regard to actual congressional authorization—a clear violation of the principle of separation of powers. *See Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("Congress decides what cases the federal courts have jurisdiction to consider."). Here, neither of the Part A statutes identified in the Authority Citation, as Defendants concede, support the Delay Rule; thus, neither can trigger jurisdiction under section 46110(a).[5]

Third, Defendants argue the Court should reform their scrivener's error by assuming that they actually intended to cite sections 41708 and 41709 (Defs.' Opp. at 4-5).[6] But a "scrivener's

---

after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part." 15 U.S.C. § 80b-13(a).

[5] Defendants downplay this fatal flaw in their argument by asserting that "if an agency invokes authority that does not actually support its action, the action will be at great risk of being invalidated." Defs.' Opp. at 8 n.7. This is not necessarily so: an agency could cite a statute that *does* authorize an action (but lacks a jurisdiction-shifting provision) and a statute that *does not* authorize it (but contains a jurisdiction-shifting provision). The inappropriate citation would not invalidate the action, but it *would*, under Defendants' theory, give the agency the benefit of a shorter review period.

[6] Defendants seize upon a factual allegation in Plaintiffs' Complaint that "[p]ursuant to 49 U.S.C. §§ 329, 41708, and 41709, the Secretary of Transportation has the authority to require air carriers to collect and report information related to transportation that the Secretary decides will contribute to the improvement of the transportation system." Defs.' Opp. at 4-5 (citing Compl. ¶ 15). True but irrelevant; Plaintiffs did not issue the Delay Rule and had no role in Defendants'

error" defense cannot excuse Defendants from the jurisdictional consequences of that error. Not only are Defendants prohibited from retroactively pointing to *other* statutes that *might have* been cited (*SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)), they in fact had an affirmative duty to be accurate in their Federal Register publication of the Delay Rule—which extends with equal force to the Authority Citation. 1 C.F.R. § 21.41 ("Each issuing agency is responsible for the accuracy and integrity of the citations of authority in the documents it issues."). This duty stems from the fact that the public is deemed to have constructive notice of the contents of documents published in the Federal Register (44 U.S.C. § 1507)—a fact with jurisdictional consequences. *See, e.g., Taylor v. Huerta*, 856 F.3d 1089, 1094 (D.C. Cir. 2017) (applying the constructive notice portion 44 U.S.C. § 1507 to find plaintiff's claim time-barred, despite plaintiff's claim that he did not have notice of the agency action). For these reasons, this Court should give "deference to the agency's express recitation of the source of its authority when it first promulgated the regulation" (*Zarr v. Barlow*, 800 F.2d 1484, 1491 (9th Cir. 1986)): two Part A statutes that do not support the Delay Rule, and therefore do not convert it to an order issued under Part A subject to judicial review under section 46110(a).

2. *The Court may inquire into the basis for an agency's action as part of the jurisdictional inquiry.* Defendants next suggest that it would be unworkable to require courts to make merits determinations in the course of deciding questions of jurisdiction. *See* Defs.' Opp. at 6-7. But there is nothing inherently unworkable—or even unusual—about courts making preliminary factual and legal determinations to test the veracity of jurisdictional assertions. *See* Pls.' Br. at 16-17. For example, under the Federal Tort Claims Act, courts make legal

---

compilation of the Authority Citation for it. Although Defendants *could have* promulgated the Delay Rule in a way that both comported with the APA and properly triggered the jurisdictional provision in section 46110(a), the salient point for this case is that they didn't.

determinations about whether federal law "prescribes a course of action" as a necessary part of deciding whether sovereign immunity has been waived and thus whether jurisdiction exists. *United States v. Gaubert*, 499 U.S. 315, 322 (1991). That workability does not change simply because the jurisdictional question might touch on the merits. *See, e.g.*, *Scottsdale Capital Advisors Corp. v. Fin. Indus. Regulatory Auth., Inc.*, 844 F.3d 414, 421 (4th Cir. 2016) (explaining that when jurisdiction is claimed under *Leedom v. Kyne*, 358 U.S. 184 (1958), a court "conduct[s] a cursory review of the merits to determine if the agency acted clearly beyond the boundaries of its authority" (internal quotation marks omitted)); *Van Orden v. Laird*, 467 F.2d 250, 252 (10th Cir. 1972) ("In the course of determining whether the case at bar is one in which there exists jurisdiction to review the [agency] action, we have given at least a cursory evaluation of the merits of appellant's claim."); *see also Professional Cabin Crew Ass'n v. Nat'l Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir. 1989) (explaining that to determine whether jurisdiction exists to review National Mediation Board decision, courts "peek at the merits" to determine whether presumption of non-reviewability applies).

Moreover, as discussed above, if a court must take at face value an agency's citation of a jurisdiction-triggering statute, agencies will have carte blanche to manufacture direct-review jurisdiction—an untenable proposition that would both breed forum-shopping and violate principles of separation of powers. *See supra* at 3-4. Just as the constitutional power to determine the appropriate forum for a given subject matter belongs to Congress, the question of whether a rule was actually "issued" under a given authority is within the provenance of the courts—not an executive agency. Defendants' insistence that a court must defer to the mere fact that an agency "purports to issue an order" under an authority triggering a shorter review period

and a jurisdiction-shifting provision (Defs.' Opp. at 6) gives the agency an adjudicative power entirely beyond its constitutional authority.

Defendants seek to paint a picture of chaos if jurisdiction lies in this case, where all courts "would be forced to determine whether the agency's action was statutorily-authorized before deciding whether they even could exercise jurisdiction." Defs.' Opp. at 7. This parade of horribles is unfounded, and, in any event, the Court need not reckon with it here. This case presents the scenario in which the issuing agency *concedes* the cited jurisdiction-shifting authorities do not apply. Where an agency identifies the proper or even a colorable link between the rule and its underlying authority, the Court might be able to find a specialized judicial review provision applicable without intensive scrutiny. *Cf. Nat'l Fed'n of the Blind v. Dep't of Transp.*, 78 F. Supp. 3d 407, 410 n.2 (D.D.C. 2015) (finding, where parties did not dispute statutory authority under which agency purported to act, that agency's rule had been issued pursuant to authority specified in section 46110(a)), *mandamus denied*, 827 F.3d 51 (D.C. Cir. 2016). But that situation is irrelevant here because all parties to this case agree that the cited Part A statutes are inapposite. In such a case, where the government has *conceded* that it cited inapplicable statutory authority, and *conceded* that the action was unlawful on its merits, the Court's task is simple: look to the only statute that any party contends authorizes the agency's action—section 329—and determine whether it shifts jurisdiction to the appellate court to review Delay Rule. As all parties agree, it does not, ending the Court's inquiry.

Defendants also contend that Plaintiffs' argument is somehow undercut by the fact that 49 U.S.C. § 329 did not authorize the Acting General Counsel to issue the Delay Rule. *See* Defs.' Opp. at 8. Not so. Section 329—a non-Part A statute—has no bearing on the jurisdictional question here because it cannot serve as a basis to trigger the direct-review

provision in section 46110(a). And if no direct-review provision applies, jurisdiction rests in the district court. *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1439 (D.C. Cir. 1988) ("If Congress makes no specific choice . . . then an aggrieved person may get 'nonstatutory review' . . . in federal district court pursuant to the general 'federal question' jurisdiction of that court."). The fact that the signatory of the Delay Rule lacked delegated authority to issue a rule under section 329 may make the Delay Rule *invalid* (a challenge not raised by Plaintiffs), but it does not somehow transmute it into a rule issued under a different authority.

3. *Plaintiffs need not show actual reliance on Defendants' flawed notice.* Finally, Defendants suggest that Plaintiffs must prove that they "*actually* relied on any putatively flawed notice to conclude that Section 46110 did not apply here." Defs.' Opp. at 9 (emphasis in original). Actual reliance on an error necessarily requires actual notice of it. But the standard in cases involving Federal Register publications is *constructive* knowledge; actual knowledge is irrelevant and a party could not rely on its ignorance of the contents of a Federal Register publication to escape its consequences. *See supra* at 5. Federal law explicitly puts the "responsib[ility] for the accuracy and integrity of the citations of authority" on issuing authorities, not individuals. 1 C.F.R. § 21.41. Indeed, if Defendants' concern is that "jurisdictional rules remain as simple as possible" (Defs.' Opp. at 8 (internal quotation marks omitted)), it would be hard to imagine a more inapt standard than one requiring courts to investigate a plaintiff's actual reliance before determining jurisdiction.

CONCLUSION

Because jurisdiction lies in this Court under 28 U.S.C. § 1331, and because Defendants have conceded the merits of this case, Plaintiffs respectfully request this Court grant their motion for summary judgment.

Dated: October 27, 2017

Respectfully submitted,

/s/ *Javier M. Guzman*
Javier M. Guzman
D.C. Bar No. 462679
Karianne M. Jones*
Pro hac vice
Jeffrey R. Dubner
D.C. Bar No. 1013399
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
(202) 448-9090
jguzman@democracyforward.org
kjones@democracyforward.org
jdubner@democracyforward.org

Attorneys for Plaintiffs

* Admitted in the State of Minnesota; acting under the supervision of firm principals.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2017, the foregoing was served electronically on all parties via the Court's CM/ECF system.

Dated: October 27, 2017 /s/ *Javier M. Guzman*