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' COMBINED MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, REPLY TO THE MOTION TO STAY PURSUANT TO 5 U.S.C. § 705, AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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REQUEST FOR A HEARING

Pursuant to Local Rule 7, Plaintiffs respectfully request a hearing on their motion for summary judgment and motion for a stay pursuant to 5 U.S.C. § 705; Plaintiffs also request a hearing on Defendants' motion to dismiss for lack of jurisdiction.

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INTRODUCTION

In November 2016, after a five-year negotiated notice-and-comment rulemaking process, Defendant Department of Transportation ("DOT") enacted a rule designed to effectuate the "public policy that air travel should be accessible to all members of the public." Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Components, 81 FR 76300 (AR 171), 76305 (Nov. 2, 2016) (the "Wheelchair Rule"). This rule "provides passengers with disabilities with a metric that they may use to compare air carriers' wheelchair handling performances and to make informed travel decisions." *Id.* at 76304. It took effect December 2, 2016, with a compliance date of January 1, 2018.

Four and a half months later, DOT and Defendant Elaine Chao (collectively, "Defendants") amended the Wheelchair Rule—without notice or comment—on the basis of a single, vague sentence in an email from an industry trade association claiming that unspecified airlines were having unidentified "challenges" meeting a compliance date that was nearly a year away. *See* Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Components; Extension of Compliance Date, 82 FR 14437 (AR 199), 14437 (Mar. 21, 2017) (the "Delay Rule"). The Delay Rule postponed the compliance date of the Wheelchair Rule until January 1, 2019. Paralyzed Veterans of America ("PVA"), an organization representing approximately 20,000 American veterans, nearly all of whom use wheelchairs for mobility, and Larry Dodson, an Air Force veteran with high-level quadriplegia (collectively, "Plaintiffs"), filed suit to challenge the Delay Rule and reinstate the original Wheelchair Rule. In addition to their Complaint (Dkt. 1), Plaintiffs also filed a motion for a stay pursuant to 5 U.S.C. § 705 (Dkt. 2)

In moving to dismiss the case and opposing a stay, Defendants make no effort to defend the Delay Rule. They do not explain why the Delay Rule is not a legislative rule subject to the

notice-and-comment procedures of the Administrative Procedure Act ("APA"). They do not provide any justification for why—even if a legislative rule—the Delay Rule would be exempted from such procedural requirements. And they do not explain why—even if the Delay Rule was exempted from notice-and-comment procedures—it is not arbitrary and capricious in light of DOT's previous findings and the scant record on which Defendants decided to delay the compliance date of the original Wheelchair Rule. Instead, Defendants' brief relies solely on two arguments: (1) that neither PVA nor Mr. Dodson are legally entitled to a day in court, and (2) that neither PVA nor Mr. Dodson are harmed by airlines being allowed to continue mishandling and damaging wheelchairs without reporting such incidents.

Neither argument is correct. This challenge is brought pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, and jurisdiction therefore lies in this Court under 28 U.S.C. § 1331. The Delay Rule does not rely on or cite any statutory authority that would strip this Court of jurisdiction and place it in the court of appeals. Only by asking this Court to ignore the actual text of the Delay Rule, which Defendants attribute to a "scrivener's error," and rewrite it to their benefit can they claim otherwise. Doing so is inconsistent with settled principles of judicial review of agency actions, and is manifestly unfair to Plaintiffs. The Federal Register publication of the Delay Rule put the public on notice of what Defendants relied on in issuing that rule. If that notice was flawed, the agency, not the public, should bear the burden.

Defendants' assertion that Plaintiffs are not harmed by the delay of the Wheelchair Rule's compliance date is equally meritless. The Delay Rule deprives Mr. Dodson and PVA's members of information that they need—and which DOT has determined they need—to minimize the risk that their wheelchairs will be mishandled by airlines, leading to incompensable personal injury, lost time, stress, and financial injury. It deprives PVA of information that it uses

to guide and strengthen its efforts to aid veterans with disabilities and improve the performance of airlines on this front—efforts to which it devotes substantial resources. And it deprives Plaintiffs of their procedural rights to comment on rules directly affecting their interests.

This Court therefore should deny Defendants' motion to dismiss and grant Plaintiffs' motion for summary judgment (or, in the alternative, grant Plaintiffs' motion for a stay pending judicial review of the Delay Rule) and reinstate the compliance deadline in the original Wheelchair Rule.

BACKGROUND

A. DOT promulgated the Wheelchair Rule after a thorough comment period.

In 2011, DOT proposed a rule to improve access to air travel for individuals with mobility disabilities. 76 FR 41726 (July 15, 2011). In its Notice of Proposed Rulemaking ("NPRM"), DOT explained that it

> is . . . interested in capturing data about the number of the mishandled wheelchairs/scooters per unit of wheelchairs/scooters transported in aircraft cargo. Many air travelers who use wheelchairs are reluctant to travel by air because of concern that the return of their wheelchairs or scooters will be delayed, or the wheelchair/scooter will be damaged or lost. However, we do not know the magnitude of the problem. The proposed data collection for mishandled wheelchairs/scooters is crucial to understanding the magnitude of the problem as this data is not available to us through other means.

76 FR at 41728. The NPRM further stressed, "It is very important that passengers with mobility disabilities arrive at their destination with their wheelchair/scooter in good working order. Without these devices, they will have great difficulty in exiting the airport or may be confined to their hotel or place of visit." *Id.*

During the rulemaking process, DOT reviewed 278 comments submitted by travelers, consumer and disability advocacy groups (including PVA), airlines, and airport authorities. In addition, DOT held a public hearing. The meeting was attended by representatives of major

airlines, including Alaska Airlines, American Airlines, Delta Air Lines, JetBlue Airways, Southwest Airlines, Spirit Airlines, United Airlines, and US Airways, as well as Airlines 4 America ("A4A"), an airline industry trade association. Public Meeting Attendee List – The Reporting of Ancillary Airline Passenger Revenues, Docket No. RITA-2011-0001 (DOT May 17, 2012).[1]

At the hearing and in subsequent public comments, the airlines told DOT that they would need 12-24 months to comply with the rule. 82 FR 76301. For example, when asked at the hearing how long airlines would need to implement a system to comport with the new calculations for checked bags and checked wheelchairs, Delta stated it would need "12 to 18 months" (AR 78:21-22); American stated that it would need "probably 18 months" (AR 80:2); and JetBlue stated that it would need "most likely 12 to 24 months" (AR 81:8-9). US Airways submitted post-hearing comments, stating that the airline did not oppose the wheelchair reporting requirements but asked that DOT "allow at least one year for carriers to implement the changes necessary to comply with this reporting requirement." AR 160.

Also at the hearing, airlines were asked whether the cost of complying with the new reporting requirements would "be reduced if the Department provided additional time." AR 77:7-8. In response, Delta stated that "[t]here would be no significant cost reductions depending on the time line" (AR 78:16-17); American stated that extra time to implement the changes would not "modif[y]" the cost (AR 80:3-4); and United stated that "costs don't go down because time is enhanced" (AR 80:7-8).

[1] On October 5, 2017, counsel for Defendants indicated to counsel for Plaintiffs that Defendants would not likely object to citation to this and two other documents not included in the Administrative Record. Defendants' counsel stated that Defendants reserve their right to contest to citation of such documents at a later point. And Plaintiffs reserve their right to move to supplement the record.

On November 2, 2016, DOT published in the Federal Register a final rule requiring airlines, *inter alia*, to report on incidents of mishandled wheelchairs and mobility devices. 81 FR 76300. In the Wheelchair Rule, DOT acknowledged that persons with disabilities have "the right to know which airlines provide the best service" and that air carriers have "obligations and duties to passengers with disabilities." 81 FR at 76304. As DOT explained, "[i]t is public policy that air travel should be accessible to all members of the public." *Id.* The Wheelchair Rule advanced that goal by "act[ing] as an additional incentive" for air carriers to "handle wheelchairs and scooters properly," and by "provid[ing] passengers with disabilities with a metric that they may use to compare air carriers and to make informed travel decisions." *Id.*

The Wheelchair Rule was signed by Secretary of Transportation Anthony R. Foxx. 81 FR at 76306. The rule became effective on December 2, 2016. *Id.* at 76300. As the Final Rule stated: "During the public meeting and in subsequent public comments, most air carriers commented that they would need 12 to 24 months . . . to comply." *Id.* at 76304-05. DOT thus set the compliance date for the reporting requirements to be January 1, 2018—14 months after the final rule was published in the Federal Register. *Id. at* 76305. This date, DOT found, "provides air carriers with adequate time to update their internal systems and reporting processes." *Id.*

B. Defendants delayed the Wheelchair Rule based on *ex parte* communications with airlines and without providing the public notice or the opportunity to comment.

On January 20, 2017, Reince Priebus, then Chief of Staff to President Trump, issued a memorandum to the heads of executive departments and agencies, calling for a "regulatory freeze" (the "Regulatory Freeze Memo"). *See* AR 205. The memo directed agencies to postpone for 60 days rules that had been published in the Federal Register but had not yet

become effective. AR 206. It further directed agencies to "consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period." *Id.*

Shortly thereafter, both A4A and Delta Air Lines contacted DOT about the Regulatory Freeze Memo's applicability to DOT rules. Delta wrote to DOT once, on February 10, 2017, about the applicability of the memo to several rules, without mentioning the Wheelchair Rule. *See* AR196. A4A wrote to DOT several times: On January 27, 2017, A4A wrote to DOT, claiming that the Wheelchair Rule was covered by the Regulatory Freeze Memo and urging DOT to delay the implementation date by 60 days. AR194-95. On February 27, 2017, A4A emailed, again urging DOT to delay implementing the Wheelchair Rule pursuant to the Regulatory Freeze Memo. AR197. None of these communications identified any substantive concerns about the Wheelchair Rule. Finally, a third time, on March 2, 2017, A4A emailed:

> As a follow up to our 27th letter regarding the status of several rulemakings in light of the January 20th Regulatory Freeze Memorandum, we would also like to know how the final rule on mishandled baggage and wheelchair reporting is impacted. If that rulemaking remains, we request, in the spirit of the regulatory freeze memorandum that the implementation period be delayed one year, until January 2019. *Industry is facing some real challenges with both parts of this regulation and will need more time to implement it.*

AR198 (emphasis added). That same day, without providing the public with notice or an opportunity to comment, DOT announced that, "[a]fter carefully considering the [airlines'] requests," it would delay the compliance date for the Wheelchair Rule by one year, until January 1, 2019. 82 FR at 14437.[2] The Delay Rule was published as a final rule in the Federal Register on March 21, 2017. *Id.*

[2] Eight Senators have since written to Secretary Chao criticizing DOT for failing to provide the public with notice and the opportunity for comment. Letter from U.S. Senators to Sec'y of Transp. Elaine Chao (Apr. 3, 2017), *available at* https://goo.gl/WbggVC ("We certainly understand that DOT may be in the process of reviewing certain regulations. Any change in previously finalized rules and regulations, however, must comport with the Administrative

C. Parties.

Each Plaintiff has significant interests in the Wheelchair Rule and in ensuring that the compliance requirement goes into effect on January 1, 2018, as originally scheduled.

1. Paralyzed Veterans of America

PVA serves approximately 20,000 members, each a military veteran with a spinal cord injury or dysfunction. Ex. A ("Zurfluh Decl.") ¶ 4. A key part of PVA's mission is to advocate for and assist its members in transportation-related issues. *Id.* ¶¶ 2, 8-13. PVA's efforts on this score are wide-ranging and require significant resources. PVA works with air carriers and DOT to identify and remediate problems in accessibility or service, both systemically and with regard to individual travelers' incidents. *Id.* ¶¶ 8-9. It trains airlines and contractors to help them improve their performance. *Id.* ¶ 8. And it assists individuals in filing complaints with DOT and airlines. *Id.* ¶ 9.

Many of PVA's members (in addition to Mr. Dodson discussed below) have had their wheelchairs damaged. For example, PVA member Stan Brown, a U.S. Army veteran with quadriplegia, has on multiple occasions endured physical harm, stress, and damage to his wheelchair during air travel. Ex. B ("S. Brown Decl.") ¶ 2. On one instance, in August 2011, an airline broke the back of Mr. Brown's chair and then duct-taped it together upon returning it. *Id.* ¶¶ 7-12. Because Mr. Brown must lean back repeatedly to perform pressure releases, necessary to avoid painful and life-threatening pressure sores, the damaged back left him in constant fear of being cut by the jagged edges or falling out of the chair. *Id.* ¶ 18. Another example occurred in June 2009, when airline personnel left Mr. Brown unstrapped and unsecured in an aisle chair. *Id.*

Procedure Act (APA) and give all involved stakeholders—including veterans and other disabled consumers—a meaningful opportunity to provide input. In this case, the DOT did not do that.").

The aisle chair toppled over, throwing Mr. Brown to the ground. *Id.* ¶ __ Mr. Brown had to spend eight hours in the emergency room and miss a full day of board meetings. *Id.*

Charles Brown (no relation), a PVA member and U.S. Marine Corps veteran with quadriplegia, has experienced similar hardships. Ex. C ("C. Brown Decl.") ¶¶ 1-2. During a recent flight, for example, an airline damaged Mr. Brown's wheelchair to the point that it would no longer power on. C. Brown Decl. ¶ 5. Mr. Brown had to be pushed in his broken chair from the airport to the hotel, where he had no choice but to wait in bed for an entire day until a repairman arrived. *Id.* ¶¶ 11-12. Not only did Mr. Brown miss the fundraiser for which he had traveled, he accrued $3,200 in repair expenses—an amount for which (to date) he still has not been compensated. *Id.* ¶¶ 12-13.

Because of these, and countless other stories,[3] PVA has spent significant resources advocating for a rule that would require airlines to submit data on incidents of mishandled wheelchairs. PVA believes that such a rule would enable the organization to better support its members, both by reducing the resources PVA spends assisting members with travel difficulties and by allowing PVA to better target its advocacy, training, and education efforts. *See* Zurfluh Decl. ¶¶ 8-9. As part of this effort, PVA submitted comments on the original Wheelchair Rule:

> PVA strongly supports the proposed requirement that airlines document incidents of mishandled mobility devices.
>
> . . .
>
> PVA regularly hears from its members regarding their air travel experiences with mishandled, damaged and even lost wheelchairs. Based on this abundant anecdotal evidence, we strongly agree with the Department's assertion that "[m]any air travelers who use wheelchairs are reluctant to travel by air because of concerns that the return of their wheelchairs or scooters will be delayed, or the wheelchair/scooter will be damaged or lost."

[3] *See* Paralyzed Veterans of America, *Share Your Story*, http://www.airaccess30.org.

Comment of Paralyzed Veterans of America, Docket No. RITA-2-11-0001 (DOT Sept. 13, 2011). PVA specifically noted that the reporting requirement would be vital to individuals seeking to file complaints with DOT against airlines that have mishandled their wheelchairs. This is because DOT requires individual complaints to include evidence that the specific airline complained of has a "pattern or practice" of mishandling wheelchairs. As PVA explained, "Without a robust data collection requirement, complaints of mishandled mobility devices remain single events and may never accrue to the level of [a] pattern or practice, the Department's primary basis for investigating complaints." PVA's work to assist individuals in filing complaints will thus be significantly aided from airlines' compliance with the Wheelchair Rule.

PVA was unaware that DOT was considering a delay to the Wheelchair Rule's compliance date, and like the rest of the public, was not provided an opportunity to comment. Zurfluh Decl. ¶ 12. Since DOT announced the Delay Rule, PVA has engaged in extensive outreach efforts to educate lawmakers on why that rule is harmful to paralyzed veterans. For example,

- On March 10—eight days after learning about the Delay Rule—PVA issued a press release announcing its "grave concerns" with the Delay Rule.
- On March 13, PVA sent a letter to Secretary Chao expressing concerns about the Delay Rule, which they sent to other DOT personnel the following day.
- On March 23, PVA submitted testimony for the record to the House Transportation and Infrastructure Committee, Subcommittee on Aviation hearing that had taken place on March 8 on air transportation in the United States.
- On May 3, PVA submitted testimony to the Senate Commerce, Science, and Transportation Committee, Subcommittee on Aviation Operations, Safety, and Security, thanking the members of the subcommittee who had already expressed concerns about the Delay Rule to Secretary Chao.

- On May 8, PVA expressed strong support for including language rescinding the Delay Rule in the Senate's version of the Federal Aviation Administration ("FAA") Reauthorization.

- On June 24 and July 12, PVA suggested including the Senate provision rescinding the Delay Rule in the House's version of the FAA Reauthorization.

- And on July 26, PVA again expressed concerns to DOT personnel as part of a meeting about the air travel experience of people with disabilities, including pending regulations.[4]

Id. ¶ 13. Had PVA been given the opportunity, it would have raised its concerns in the first instance to DOT in a formal comment. *Id.* ¶ 12.

2. Larry J. Dodson

Plaintiff Mr. Dodson, a veteran of the U.S. Air Force with high-level quadriplegia, has repeatedly had his power wheelchair damaged during air travel. Ex. D ("Dodson Decl.") ¶ 2. For example, on a recent flight, his wheelchair was misplaced for approximately an hour, even though the flight was a direct one. Dodson Decl. ¶ 5. While Mr. Dodson waited, he was put in an aisle chair—a "glorified hand truck"—before being transferred to an ill-fitting manual wheelchair. *Id.* The whole ordeal left Mr. Dodson with lower-body discomfort and sores that took three days of bed rest to heal. *Id.* ¶ 6. It also subjected him to humiliating public transfers, exposing his body and personal needs to strangers. *Id.*

Mr. Dodson had a similar experience on August 3, 2017—four days after filing this complaint. Dodson Decl. ¶ 13. Mr. Dodson had no choice but to fly in this instance because he had only two days between obligations. *Id.* Mr. Dodson gate-checked his wheelchair, but upon arrival was told that the chair could not be found. *Id.* After about an hour, his wheelchair was returned to him broken: the back had come loose from the frame and the chair covering had been split. *Id.* ¶ 14. Mr. Dodson reported this damage to the airline, but to date, his chair has not

[4] Only after these attempts to address this rule failed did PVA resort to filing suit.

been fixed. *Id.* ¶ 15. In describing the experience of living in the broken wheelchair, he draws an analogy: "It's as though you wear a size 8 shoe, but are forced to maneuver in a size 12 shoe. That is the kind of instability and insecurity I've been feeling for about 6 weeks." *Id.*

The frequency and severity of these incidents force Mr. Dodson into a difficult choice every time he needs to travel: fly, and risk physical injury and damage to his wheelchair that could immobilize him for days; drive, making the trip longer and limiting the events in which he can participate; or forgo travel altogether. *Id.* at ¶¶ 18-20. He will be driving from Texas to South Carolina for a PVA board meeting later this month, and expects to make similar decisions for PVA events in 2018. *Id.* ¶¶ 20-21.

D. Procedural background.

On July 31, 2017, Plaintiffs filed suit against DOT and Secretary Chao for violations of the APA. Plaintiffs maintain that Defendants violated the APA by promulgating the Delay Rule absent notice-and-comment procedures, or, in the alternative, acted arbitrarily, capriciously, or otherwise not in accordance with law. Along with the Complaint, Plaintiffs filed a motion for a stay pursuant to 5 U.S.C. § 705. *See* Dkt. No. 2. Pursuant to the Court's briefing schedule, Defendants have moved to dismiss this action, arguing that the Court lacks subject matter jurisdiction, and have filed an opposition to the stay motion, arguing that Plaintiffs have failed to show irreparable harm. Dkt Nos. 10, 11. Defendants have waived their right to file a motion for summary judgment. *See* Defs.' Br. 1 n.1.

STANDARD OF REVIEW

In the context of an APA suit, "[s]ummary judgment is . . . the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record." *Se. Conference v. Vilsack*, 684 F. Supp. 2d 135, 142 (D.D.C. 2010). This Court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law" or if the action was promulgated "without observance of procedure required by law." 5 U.S.C. § 706.

ARGUMENT

Defendants violated the APA by promulgating the Delay Rule without adhering to mandatory notice-and-comment procedures in violation of 5 U.S.C. § 706(2)(D), and by acting arbitrarily, capriciously, or otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A). Plaintiffs—PVA and Mr. Dodson—have been, and will continue to be, harmed by the Delay Rule. And this Court has jurisdiction over these claims pursuant to 28 U.S.C. § 1331. This Court therefore should deny Defendants' motion to dismiss for lack of jurisdiction and grant Plaintiffs' motion for summary judgment, or, in the alternative, grant Plaintiffs' motion for a stay pursuant to 5 U.S.C. § 705.

I. This Court Has Jurisdiction To Decide Whether Defendants Violated The APA By Promulgating The Delay Rule Without Notice-And-Comment And In A Manner That Was Arbitrary And Capricious.

This Court has jurisdiction to review final agency action pursuant to the APA, 5 U.S.C. §§ 701-706, and it has jurisdiction over this action seeking such review pursuant to 28 U.S.C. § 1331. Defendants disagree and seek dismissal, insisting that this case is covered by 49 U.S.C. § 46110(a). That provision directs that challenges to orders issued under certain parts of title 49 must be brought in the court of appeals. But the Delay Rule did not rely on or cite any statutory authority that would trigger section 46110(a). Simply put, the Delay Rule was not issued at all, let alone in whole or in part, under part A.

To get around this fact, Defendants now invite this Court to ignore the plain text of the Delay Rule and instead rely on their post-hoc rationalizations—what are, essentially, hypotheticals about how the agency *could* have chosen to justify the Delay Rule—to find jurisdiction lacking. This Court should decline that invitation. *See SEC v. Chenery Corp.*, 318

U.S. 80, 87 (1943) ("*Chenery I*") ("The grounds upon which an administrative [action] must be judged are those upon which the record discloses that its action was based."). Because Defendants did not cite any statutory authority that properly triggered section 46110(a), the Delay Rule does not come within its purview, and jurisdiction rests in this Court. To the extent Defendants now claim to have *erred* in their publication of the Delay Rule, the consequences of that error must be borne by Defendants.

A. The Delay Rule was not issued under any part A statutory provision.

Section 46110(a) by its own terms applies *only* to orders issued pursuant to certain parts of title 49: "[A] person disclosing a substantial interest in an order issued . . . in whole or in part under [part A], part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the . . . court of appeals." As relevant here, Defendants now contend that the Delay Rule was promulgated, in part, under part A of Subtitle VII, 49 U.S.C. §§ 40101-46507.[5] Defs.' Br. 8-11. That is incorrect. The Delay Rule cites three statutory provisions as its authority. 82 F.R. at 14438. But only one of those—a non-part A statutory provision—actually provides the Defendants with the authority to do what they did here. For this reason, section 46110(a) is inapplicable and Plaintiffs' case is properly before this Court.

All rules issued by DOT and other federal agencies "must include, or be covered by, a complete citation of the authority under which the section is issued, including . . . [g]eneral or specific authority delegated by statute." 1 C.F.R. § 21.40. When publishing documents in the Federal Register, an agency "is responsible for the accuracy and integrity of the citations of authority in the documents it issues," *id.* § 21.41(a); and the public is charged with constructive

[5] The Transportation Code, codified in title 49 of the U.S. Code, contains ten subtitles addressing various interstate transportation and infrastructure subjects.

knowledge of the contents of any notice published in the Federal Register, 44 U.S.C. § 1507. The Authority Citation for the Delay Rule listed three statutory provisions: 49 U.S.C. § 329, § 41101, and § 41701. 82 F.R. at 14438. Accordingly, to trigger the jurisdictional provision of section 46110(a), at least one of those statutes must *both* provide Defendants with the authority to issue the Delay Rule *and* itself trigger the jurisdictional provision in section 46110(a). Each fails in one respect or the other.

Section 329 grants the Secretary the authority to "collect and collate transportation information the Secretary decides will contribute to the improvement of the transportation system of the United States." 49 U.S.C. § 329(a). This includes the collection of information related to air travel. *See, e.g.*, 14 C.F.R. § 217.3 (citing section 329 for the authority to require air carriers to report on traffic statistics); 14 C.F.R. pt. 241, § 24 (citing section 329 for the authority to require airlines to report profit and loss data); 14 C.F.R. § 250.10 (citing section 329 for the authority to require airlines to report on instances of denying passengers confirmed space). Section 329 thus clearly provides DOT the authority to require airlines to report on incidents of mishandled wheelchairs, and, by extension, set the compliance date for such a requirement. It does not, however, independently trigger the jurisdictional provision because it is not in part A of subtitle VII. Instead, section 329 is a part of subtitle I, which is not mentioned in section 46110(a). Given the plain text of section 46110(a), no court has ever found that the jurisdictional bar it sets applies to an order issued under Subtitle I. Defendants do not contest this point.

The remaining two provisions cited in the Authority Citation are inapposite and thus cannot serve to trigger the jurisdictional provision of 46110(a).[6] Section 41101—titled "Requirement for a certificate"—provides that an air carrier must hold a certificate to provide air transportation (49 U.S.C. § 41101(a)) and specifies how a private citizen can provide air transportation as a common carrier for compensation (*id.* § 41101(b)). Section 41701 enables the Secretary of Transportation to establish "reasonable classifications for air carriers." 49 U.S.C. § 41701. But neither provides any authority relevant to promulgating a regulation that requires airlines to report on incidents of mishandled wheelchairs, or to delay such a rule. In fact, Defendants admit as much, calling the citation to these statutes a "scrivener's error." *See* Defs.' Br. 11.[7]

Inapposite as they are, sections 41101 and 41701 cannot be sufficient to trigger the jurisdictional provision in section 46110(a). Defendants nonetheless argue that an agency can

[6] Defendants ague that their reliance on inapposite statutes should be overlooked because "if Plaintiffs 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)." Defs.' Br. 11. But section 329 *does* provide authority to issue the Delay Rule. There is thus no inconsistency in arguing that the Delay Rule was validly issued, but not issued under a provision subject to section 46110(a). Whether a regulation triggers a jurisdictional bar is a wholly separate question from whether that regulation was issued without proper authority.

[7] It seems unlikely that the citation to sections 41101 and 41701 was a mere scrivener's error. DOT has at numerous points in this precise rulemaking process amended the Authority Citation. In the Notice of Proposed Rulemaking for the Wheelchair Rule, DOT revised the authority citation for Part 234: "The authority citation for Part 234 *is revised* to read as follows: Authority: 49 U.S.C. 329 and chapters 41101 and 41701." 76 FR at 41730 (emphasis added). And, in the Final Wheelchair Rule, DOT again amended the authority citation for Part 234: "The authority citation for part 234 *is revised* to read as follows: Authority: 49 U.S.C. 329, 41101, and 41701." 81 FR at 76306 (emphasis added). What is clear from these revisions is (1) DOT knows how to amend authority citations when it is necessary, and (2) DOT has paid close attention to this specific Authority Citation. In any event, why or how these statutory provisions were included in the Authority Citation is irrelevant (*see infra* 18-19).

strip a district court of jurisdiction by citing wholly inapplicable statutory provisions, and that their inapplicability is a "merits question for the court of appeals." Defs.' Br. 11. But this would lead to patently inappropriate results, allowing agencies to manufacture appellate jurisdiction through sham citations (or at least inadvertently erroneous ones). Such forum-shopping practices are uniformly disfavored, whether carried out by a private plaintiff, a defendant, or the government itself. *See, e.g.*, *Defenders of Wildlife v. Jewell*, 74 F. Supp. 3d 77, 86 (D.D.C. 2014) ("Equitable princip[les] do not favor . . . strategic forum shopping."); *Greater Yellowstone Coal. v. Bosworth*, 180 F. Supp. 2d 124, 129 (D.D.C. 2001) (noting that "public-interest considerations that weigh against a transfer include the possibility that the defendants are forum shopping"); *see also Armentero v. INS*, 412 F.3d 1088, 1102 (9th Cir. 2005) (Berzon, J., dissenting) ("[J]ust as petitioners should not be permitted to forum-shop, the government should not be allowed to forum-shop either."). If forum-shopping is disfavored when attempted by an individual litigant in an individual case, it is all the more inappropriate when baked into a rule of general applicability through a citation with no effect other than putative forum-shifting.

In any event, Defendants are wrong that this type of merits question should be considered only after jurisdiction is settled. This is a factual question about whether Defendants properly invoked sections 41101 and 41701 to support the Delay Rule—the type of determination courts are often called upon to make in the course of deciding jurisdictional questions. *See, e.g.*, *Ramtulla v. Ashcroft*, 301 F.3d 202, 203 (4th Cir. 2002) (noting that courts have jurisdiction to review factual determinations that trigger jurisdiction-stripping provisions); *see also Ventura v. BEBO Foods, Inc.*, 595 F. Supp. 2d 77, 82 (D.D.C. 2009) (citing *Mwani v. bin Laden*, 417 F.3d 1 (D.C. Cir. 2005) ("[C]ourts may consider outside evidence to make factual determinations in disposing of a motion to dismiss for lack of personal jurisdiction.").

In sum, neither of the two part A statutory provisions cited in the Authority Citation is relevant to the Delay Rule, and thus neither can play a role in the jurisdictional analysis. The *only* statutory provision Defendants cited that *actually grants* them the authority to do what they did here is a statutory provision—49 U.S.C. § 329—that does not itself trigger the jurisdictional provision of section 46110(a). Plaintiffs' claims are thus properly in district court.[8]

B. Defendants' attempts to rewrite or ignore the Delay Rule should be rejected.

To avoid the consequence of the above—that neither part A statutory provision cited in the Authority Citation supports the Delay Rule—Defendants would instead have this Court look beyond the Authority Citation listed in the Federal Register to seek out other indications that the Delay Rule was promulgated under part A, Subtitle VII. But nothing outside the Authority Citation suffices to trigger the jurisdictional provision of section 46110(a).

As an initial matter, Defendants urge this Court to focus solely on the Delay Rule's citation of 49 C.F.R. § 1.27(n). Defs.' Br. 9. That regulation, titled "Delegations to the General Counsel," serves as a delegation by the Secretary of Transportation to the General Counsel of certain duties, including the power to enact rules and regulations pursuant to the statutory authority granted in certain provisions of part A, subtitle VII. *Id.* But the only function of a citation to an executive delegation is "to link the statutory authority [in the authority citation] to

[8] *National Federation of the Blind v. DOT*, 827 F.3d 51 (D.C. Cir. 2016) ("*NFB*") is wholly irrelevant to this case. There was no question in *NFB* that the rule at issue was promulgated under statutory authority that properly triggered the jurisdictional provision section 46110(a). Instead, the D.C. Circuit was presented only with the question of whether a rule issued after notice-and-comment proceedings is an "order" under section 46110(a). The Court held that such a rule is an "order." *NFB*, 827 F.3d at 55 ("[C]ourts sometimes have construed 'order' for purposes of special review statutes more expansively than its definition in the APA, notably to permit direct review of regulations *promulgated through informal notice-and-comment rulemaking*." (emphasis added) (quoting *City of Rochester v. Bond*, 603 F.2d 927, 933 n.26 (D.C. Cir. 1979)). Plaintiffs disagree with this holding but recognize that it binds this Court. Plaintiffs reserve their right, however, to challenge *NFB*'s holding on appeal if this Court determines it controls disposition of this case.

the issuing agency." 1 C.F.R. § 21.40(b). It does not provide its own, independent authority for a rule. In other words, citation of 49 C.F.R. § 1.27(n) does nothing more than signal to the public that the Acting General Counsel signed the Delay Rule because DOT was purporting to act under part A, subtitle VII. But it is the Authority Citation itself that identifies the *specific provisions* of Part A, subtitle VII that the agency thought gave it the statutory authority to act. As discussed above (*see supra* at 15-16) those specific provisions—49 U.S.C. §§ 41101 and 41701—are inapposite, inapplicable, and therefore do not trigger the jurisdictional provision in section 46110. There is no basis for disregarding these specific provisions, instead 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).[9]

Defendants would also have this Court look to other provisions of the U.S. Code, to prior versions of the regulation, or to copies of 14 C.F.R. § 234.6 available on Westlaw. *See* Defs.' Br. 10-11. Under this theory, Defendants essentially admit that they did not validly issue the Delay Rule pursuant to a provision subject to section 46110(a), but argue that they theoretically could have based it on a provision that triggers the jurisdictional stripping provision. *See* Defs.' Br. 11. In other words, Defendants would turn the question from one of what the agency *did* to what it *could have done*. But the public is not required to scavenge federal depositories for all

[9] Defendants note that section 1.27(n) does not delegate to the General Counsel the authority to issue rules pursuant to section 329. Defs.' Br. 10. This is true—but it is an argument for finding the Delay Rule unlawful. *Am. Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8, 12 (D.D.C. 2011) ("[A] court may uphold agency action only where the record establishes that the official who took such action was authorized to do so."). It is not an argument for stripping this Court of jurisdiction. Notably, the Wheelchair Rule does not suffer this failing: it was issued directly by the Secretary of Transportation, who has statutory authority to issue rules under Section 329, and therefore did not need a delegation of authority. *See* 81 FR at 76306; *see also* 49 U.S.C. § 329(a) ("*The Secretary of Transportation* may collect and collate transportation information . . . ." (emphasis added)).

possible bases upon which an agency in fact issued or could have issued a rule. To the contrary, an agency is required to state accurately and precisely the authority under which it purports to act. 1 C.F.R. §§ 21.40, 21.41; *see Nat'l Air Transp. Ass'n v. McArtor*, 866 F.2d 483, 485 (D.C. Cir. 1989) ("An agency may not put up signs inducing a set of readers to turn aside and then claim they had constructive notice of what they would have found at the end of the road.").

Furthermore, Defendants' reliance on extra-record sources of authority is nothing but a "post hoc attempt to supply a foundation for the agency's regulation." *Zarr v. Barlow*, 800 F.2d 1484, 1491 (9th Cir. 1986) (holding that the Bureau of Indian Affairs was held to the consequences of the statutes it cited in the regulation's Authority Citation). Such a position, if accepted, would thwart two principles of administrative law: that agencies cannot retroactively justify their actions (*SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*") (emphasizing the "simple but fundamental rule of administrative law" that agency action must be judged "solely by the grounds" contemporaneously invoked by the agency); and that publications in the Federal Register serve to provide notice to affected parties about the contents of the document (*Taylor v. Huerta*, 856 F.3d 1089, 1094 (D.C. Cir. 2017) ("Congress has determined that publication in the Federal Register 'is sufficient to give notice of the contents of the document.'" (quoting 44 U.S.C. § 1507)).[10] Indeed, when publishing documents in the Federal Register, an agency "is responsible for the accuracy and integrity of the citations of authority in the documents it issues." 1 C.F.R. § 21.41(a).

These principles are all the more fundamental where the consequence of the retroactive justification would be to deny PVA and Mr. Dodson their day in court. This Court should give

[10] *See* 1 C.F.R. § 21.41(b) ("[An] issuing agency shall formally amend the citations of authority in its codified material to reflect any changes therein.").

"deference to the agency's express recitation of the source of its authority when it first promulgated the regulation" (*Zarr*, 800 F.2d at 1491), and hold Defendants to what they cited: three statutory provisions that do not trigger the section 46110(a).

* * * * * * *

The jurisdictional question here is, at its core, a question of notice, and of who should bear the burden when that notice is flawed. Publishing the Delay Rule in the Federal Register was supposed to provide notice to affected parties about their rights and obligations. Private 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. Nothing in the Delay Rule put PVA or Mr. Dodson 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. In such a case as this, the agency should bear the burden of its choices, even if putatively erroneous, not the public.

II. Defendants Violated The APA In Promulgating The Delay Rule.

Four months after the Wheelchair Rule was published in the Federal Register and three months after it took effect, Defendants enacted—without giving prior notice or providing the public with an opportunity to comment—the Delay Rule, extending the compliance date for the Wheelchair Rule's reporting requirements by one year.

Enactment of the Delay Rule was both procedurally inadequate and substantively unsupported. The Delay Rule is a legislative rule. As such, Defendants were required to go through notice-and-comment rulemaking in accordance with the APA. Defendants' failure to do so requires reversal under 5 U.S.C. § 706(2)(D). In addition, Defendants acted arbitrarily and capriciously, in violation of 5 U.S.C. § 706(2)(A), by enacting the Delay Rule based on a single

sentence in an email from A4A and after having previously determined that airlines could update their reporting systems to comply fully with the Wheelchair Rule by January 1, 2018.

For each reason, this Court should grant Plaintiffs' motion for summary judgment.

A. The Delay Rule is a legislative rule that required notice and comment.

Under the APA, whenever an agency engages in rulemaking it must provide "[g]eneral notice of proposed rule making . . . published in the Federal Register" and "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c). This mandatory process is required for any legislative rule. *Soundboard Ass'n v. FTC*, --- F. Supp. 3d ---, 2017 WL 1476116, at *10 (D.D.C.), *appeal filed*, No. 17-5093 (D.C. Cir. 2017). A rule is legislative if it "affect[s] individual rights and obligations" (*Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979)) and "if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy" (*Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014)).

Once a final rule is issued, an agency is "itself bound by the rule" until it is either amended or revoked through proper notice-and-comment procedures. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017). "[D]elayed implementation of a final regulation normally constitutes substantive rulemaking that requires notice and an opportunity for comment." *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 17 (D.D.C. 2012). This is because a rule delaying implementation of a prior rule is "tantamount to an amendment or rescission" of that rule. *Id.* (quoting *NRDC v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004)); *see also Envtl. Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 814 (D.C. Cir. 1983) (concluding that the decision to defer processing of certain permits under a newly issued regulatory standard was unlawful because it "amounted in substance to a suspension of a regulation"). As the Delay Rule itself

acknowledges, it is an "amendment" to the Wheelchair Rule: "The Department of Transportation is *amending* its regulations by extending the compliance date of its final rule." 82 FR at 14437 (emphasis added). It therefore independently required notice-and-comment proceedings.

This case is on all fours with the D.C. Circuit's recent decision in *Clean Air Council*. At issue was whether the EPA could delay the compliance date for parts of a prior final rule (the "methane rule") without complying with notice-and-comment procedures. *Clean Air Council*, 862 F.3d at 5. EPA had published the methane rule in June 2016, with an effective date of August 2, 2016. *Id.* at 4. The rule mandated, in part, that regulated entities comply with certain monitoring requirements by June 3, 2017. *Id.* After publication of the rule, several industry groups filed administrative petitions seeking reconsideration under the Clean Air Act. On June 5, 2017, EPA published—without adhering to notice-and-comment procedure—a stay of parts of the methane rule, delaying the compliance date for the monitoring requirements by 90 days. *Clean Air Council*, 862 F.3d at 5. The D.C. Circuit held that the delay was itself a legislative rule subject to the APA's notice-and-comment procedures, and that, accordingly, the delay was issued in violation of the APA. *Id.* at 8-9; *see also Becerra v. U.S. Dep't of Interior*, No. 17–cv–02376, 2017 WL 3891678, at *11 (N.D. Cal. Aug. 30, 2017) (holding that an agency cannot delay the compliance date of a rule pursuant to 5 U.S.C. § 705 without going through notice-and-comment procedures); *California v. U.S. Bureau of Land Mgmt.*, No. 17-cv-3804, 2017 WL 4416409, at *9-10 (N.D. Cal. Oct. 4, 2017) (same).

So, too, here. Through the Delay Rule, Defendants delayed the compliance date for the Wheelchair Rule by one year. In so doing, DOT reversed its previous analyses regarding the amount of time needed to implement new reporting systems, the rights of individuals to receive

this information, and the importance of furthering the public policy of accessible air travel. *See* 81 FR at 76304-05. The Delay Rule is tantamount to a repeal of the Wheelchair Rule and was thus subject to the notice-and-comment procedures of the APA. Defendants' failure to comply with such procedures is fatal to the rule itself. *See* 5 U.S.C. § 706(2)(D).

Defendants did not—and cannot—argue to the contrary. In issuing the Delay Rule, Defendants cited no authority for its circumvention of notice-and-comment procedures. Defendants did not invoke an exception to notice-and-comment procedures under 5 U.S.C. § 553(b)(A) by labelling the Delay Rule a procedural rule, interpretive rule, or statement of policy.[11] Nor did Defendants invoke the "good cause" exception under 5 U.S.C. § 553(b)(B). This Court should reject any attempt by Defendants to justify retroactively thier flagrant violation of established APA procedure. As the Supreme Court has made clear, "[i]t is not the role of the courts to speculate on reasons that might have supported an agency's decision." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016). Instead, "[a] reviewing court . . . must judge the propriety of [agency] action *solely* by the grounds invoked by the agency" when it acted. *Chenery II*, 332 U.S. at 196 (emphasis added). Absent a contemporaneous invocation of an exception to notice-and-comment rulemaking, the Delay Rule cannot be upheld.

But even if Defendants had articulated a basis for dispensing with notice-and-comment rulemaking, it would be unable to support that basis. The Delay Rule is not a procedural rule, an interpretive rule, or a statement of policy. *See* 5 U.S.C. § 553(b)(A). And no good cause existed to forego notice-and-comment procedures. *See* 5 U.S.C. § 553(b)(B). Defendants' decision nevertheless to do so is thus unsupportable.

[11] Nor could it because the Delay Rule was none of those things, as explained below.

First, the Delay Rule is not a procedural or interpretive rule, or a general statement of policy. A procedural rule is "primarily directed toward improving the efficient and effective operations of an agency, not toward a determination of the rights [or] interests of affected parties." *Batterton v. Marshall*, 648 F.2d 694, 702 n.34 (D.C. Cir. 1980). An interpretive rule "describes the agency's view of the meaning of an existing statute or regulation." *Mendoza*, 754 F.3d at 1021 (quoting *Batterton*, 648 F.2d at 702 n.34). And a policy statement "announce[s] an agency's intended future course or area for exploration" (*Batterton*, 648 F.2d at 702 n.34) and has no "present binding effect" (*Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 7 (D.C. Cir. 2011)). The Delay Rule is none of these. Instead, it affects the rights of airline passengers with mobility disabilities and the obligations of the airline industry; it substantively changes the original Wheelchair Rule; and it is on its face binding upon all regulated parties.

Second, Defendants lacked good cause to dispense with notice-and-comment procedure. The "good cause" exception applies only when the agency "finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). And "the onus is on the [agency] to establish that notice and comment is unnecessary." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983).

The D.C. Circuit has been clear: the "good cause" exception "is to be narrowly construed and only reluctantly countenanced." *United States v. Ross*, 848 F.3d 1129, 1132 (D.C. Cir. 2017) (internal quotation marks omitted); *accord, e.g.*, *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012); *see also Wash. Alliance of Tech. Workers v. DHS*, 202 F. Supp. 3d 20, 26 (D.D.C. 2016) ("Because notice-and-comment rulemaking is the primary means of assuring informed agency decisions, it

is well-established in this Circuit that any exception to the notice-and-comment requirement will be narrowly construed and only reluctantly countenanced." (internal quotation marks omitted)). The "good cause" exception is thus limited to extreme cases "where delay could result in serious harm" (*Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)):

> for example, air travel security agencies would be unable to address threats posing a possible imminent hazard to aircraft, persons, and property within the United States, or if a safety investigation shows that a new safety rule must be put in place immediately, or if a rule was of life-saving importance to mine workers in the event of a mine explosion.

Mack Trucks, 682 F.3d at 93 (internal citations and quotation marks omitted).

The Delay Rule is not an extreme case. It "does not stave off any imminent threat to the environment or safety or national security. It does not remedy any real emergency at all, save the 'emergency' facing [airlines'] bottom line." *Id.* The "good cause" exception does not apply simply because an agency decides it is "essential to take . . . action [] before the regulated community expend[ed] resources." *Envtl. Defense Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) (alterations in original). But that is precisely the case here. DOT cites unspecified industry "challenges" as a reason for delaying the compliance date of the Wheelchair Rule (82 FR at 14437)—a reason that does not give DOT "good cause" to bypass notice-and-comment procedures. In fact, given that the compliance date was several months away at the time of the stay, notice and comment would have been entirely compatible with any solicitude toward the airlines' unspecified concerns. Defendants' rationale is thus insufficient to warrant circumvention of notice-and-comment procedures.

For all these reasons, Plaintiffs are entitled to summary judgment on their claim that Defendants violated the APA by issuing the Delay Rule without adhering to notice-and-comment procedures.

B. In the alternative, Defendants' decision to delay the compliance date is arbitrary and capricious.

Even if this Court were to disagree that the Delay Rule is a legislative rule requiring notice and comment, Plaintiffs are still entitled to summary judgment. This is because Defendants' decision to delay the compliance date is arbitrary and capricious and must therefore be held unlawful. *See* 5 U.S.C. § 706(2)(A).

It is fundamental that an agency decision must not be arbitrary and capricious and "that an agency must give adequate reasons for its decisions." *Encino Motorcars*, 136 S. Ct. at 2125. Although an agency may change its policy positions, it must adequately explain the reason for the change and the rejection of its earlier factual findings. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). This is no less true when agencies engage in efforts to deregulate. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[T]he forces of change do not always or necessarily point in the direction of deregulation."). To the extent "Congress established a presumption from which judicial review should start, that presumption . . . [is] *against* changes in current policy that are not justified by the . . . record." *Id.* (emphasis in original). Reviewing courts must therefore conduct a "thorough, probing, in-depth review" of agency reasoning (*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)), and hold agency action arbitrary and capricious if the agency fails to articulate "a rational connection between the facts found and the choice made" or if it

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43 (internal quotation marks omitted).

DOT stated two grounds for its decision to delay the Wheelchair Rule's compliance date: (1) the Regulatory Freeze Memo; and (2) unspecified implementation "challenges" faced by the airline industry. 82 FR at 14437. Both are baseless. The Regulatory Freeze Memo cannot provide a reasoned basis for Defendants' decision to extend the compliance date of the Wheelchair Rule by one year. The Memo, issued to agency heads on January 20, 2017, applied only to regulations that had been published in the Federal Register but had not yet taken effect. *See* AR 206 (applying to "regulations that have been published in the OFR *but have not taken effect*" (emphasis added)). The Wheelchair Rule, by contrast, took effect on December 2, 2016. 81 FR at 76300. The Memo is thus wholly inapplicable to the Wheelchair Rule. Moreover, even leaving aside the Memo's limitation to rules that "have not taken effect," it directs agency heads to delay rules by 60 days and to, "[*w*]*here appropriate and as permitted by applicable law, . . .* consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period." AR 206 (emphasis added). Defendants, by contrast, delayed the Wheelchair Rule by an entire year without notice-and-comment. Thus, the Memo by its own terms cannot support this decision.[12]

Additionally, Defendants' reliance on claims that the industry was unable to meet the original compliance date lacks support. The *only* evidence in the record of such "challenges" is a single sentence in a one-paragraph email sent by A4A stating: "Industry is facing some real challenges with both parts of this regulation and will need more time to implement it." AR 198.

[12] Nor would the memo, even if it applied to the Wheelchair Rule, provide a basis for the department to bypass notice and comment in issuing the Delay Rule. *See Abraham*, 355 F.3d at 189-90, 204-05 (holding that the initial 60-day delay of a previously published final rule without adhering to notice-and-comment procedures violated the APA, despite the agency's reliance on a memo from President George W. Bush's Chief of Staff directing agency heads to "postpone the effective dates of any federal regulations already published in the Federal Register, but not yet effective, for a period of sixty days").

Such a conclusory assertion simply cannot be enough to give Defendants carte blanche to delay implementation of rules. *Cf. Encino Motorcars*, 136 S. Ct. at 2127 ("[T]he Department's conclusory statements do not suffice to explain its decision.").

Notably absent from the Delay Rule's justification is any explanation as to why Defendants were departing from their previous finding that airlines would be able to meet a January 1, 2018 compliance date. But this flies in the face of Supreme Court precedent, which states that "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 516. Moreover, the Delay Rule nowhere acknowledges the benefits the public would have felt had airlines been held to the original January 1, 2018 compliance date—confirmed by the fact that the certified index of the administrative record does not refer to the almost-300 comments submitted in the initial rulemaking (Dkt. 12-1, 13-1). Defendants have thus wholly failed to consider one side of the equation: the benefits to the public of keeping the original compliance date. *See California*, 2017 WL 4416409, at *11 (holding that defendant acted arbitrarily and capriciously for failing to consider those who would benefit from implementation of the rule at issue).

In sum, Defendants acted arbitrarily and capriciously in deciding to delay the Wheelchair Rule's compliance date. For this independent reason, Plaintiffs are entitled to summary judgment.

III. Plaintiffs have been, and will continue to be, irreparably injured by the Delay Rule—injuries sufficient to confer standing.

In opposing Plaintiffs' stay motion, Defendants confine their argument to the purported lack of irreparable harm, thereby conceding the likelihood of success on the merits, balance of equities and public interest factors. Defs.' Br. 12-14; *Klugel v. Small*, 519 F. Supp. 2d 66, 72

(D.D.C. 2007) ("It is well established in the D.C. Circuit that when a party does not address arguments raised by a movant, the court may treat those arguments as conceded."). The Court, however, need not reach the question of irreparable harm if it grants Plaintiffs' motion for summary judgment. But if the Court does proceed with adjudicating the stay motion, Plaintiffs rely on the memorandum filed in support of that motion for their recitation of the irreparable harm caused by Defendants' actions (*see* Dkt. 2-1) and make only brief remarks here in response to the argument raised by Defendants.

Notably, Defendants do not dispute that any of the harms that PVA and Mr. Dodson have suffered and will suffer, if cognizable, are *irreparable*. Instead, Defendants make a single point: that neither PVA nor Mr. Dodson have been, or will be, injured in a way sufficient to confer standing. This, according to Defendants, means neither PVA nor Mr. Dodson have shown irreparable harm. Not so.

A. Plaintiffs have standing to challenge the Delay Rule.

The harm Plaintiffs have suffered and will suffer because of the Delay Rule are more than sufficient to establish standing.[13] There can be no doubt that Plaintiffs have been, and will be, injured by the Wheelchair Rule's delayed compliance date. In promulgating the Wheelchair Rule, DOT interpreted 49 U.S.C. § 329 to require that airlines report information about incidents

[13] The "irreducible constitutional minimum of standing" has three elements: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To assert standing on its own behalf, PVA must demonstrate the same elements of injury, causation, and redressability. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1092-93 (D.C. Cir. 2015) ("*PETA*"). To establish associational standing to bring a case on behalf of its members, PVA must establish "(a) its members would otherwise have standing to sue in their own right; (b) the interests [PVA] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

of mishandled wheelchairs on domestic flights. As DOT explained, the disability community has "*the right to know* which airlines provide the best service," and air carriers have "obligations and duties to passengers with disabilities." 81 FR at 76304 (emphasis added). DOT determined that requiring airlines to report on incidents of mishandled and lost wheelchairs "advances that policy goal." *Id.*

Plaintiffs had a distinct interest in obtaining such information. The Wheelchair Rule would have facilitated Mr. Dodson and PVA members' ability to travel by air, both because the information provided via the Wheelchair Rule's reporting requirement would allow for more informed decision-making and because it would work as an incentive to airlines to improve wheelchair handling practices. Dodson Decl. ¶ 22; C. Brown Decl. ¶ 20; S. Brown Decl. ¶ 24. And it would have enabled PVA to tailor its education, training, and advocacy efforts, and to expend fewer resources helping its members file complaints against airlines and DOT because instances of wheelchair damage would decrease. Zurfluh Decl. ¶ 14.

Delay of the reporting requirements thus distinctly, and cognizably, injure PVA and its members, including Mr. Dodson. Until the reporting requirements are implemented, Mr. Dodson and PVA members may be forced to forego air travel, and thereby forced to bear the consequences that accompany a life in which air travel is inaccessible—such as missed work opportunities, missed family events, missed medical appointments, or the expenditure of time and energy needed to travel to such events by slower means of transportation. *See, e.g.*, L. Dodson Decl. ¶ 22 ("I expect that there will be … events in 2018, which will require me to choose between flying and putting myself at risk; spending additional time driving; or foregoing the event altogether."); S. Brown Decl. ¶ 22 (noting that he has "repeatedly declined to take trips that I otherwise would have taken, or have opted for lengthier ground transportation"); C. Brown

Decl. ¶ 16 (same). Or, should air travel be unavoidable, Mr. Dodson and PVA members will likely suffer wheelchair damage, and the physical, mental, and emotional harms that accompany such damage. In addition, PVA will continue expending resources to advocate, train, and educate on a broad scale, and to provide assistance when airlines damage PVA members' wheelchairs. Zurfluh Decl. ¶ 14.

The Delay Rule thus causes Plaintiffs an informational injury. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21-22 (1998) (finding that injury-in-fact consisted of plaintiffs' "inability to obtain information" that they were entitled to by law). Its promulgation absent mandatory notice-and-comment procedures causes Plaintiffs a procedural injury. *See Elec. Power Supply Ass'n v. Fed. Energy Regulatory Comm'n*, 391 F.3d 1255, 1262 (D.C. Cir. 2004) ("[I]n cases involving alleged procedural errors, the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." (internal quotation marks omitted)). And its effect of requiring PVA to expend more resources causes PVA a programmatic injury. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding that a plaintiff organization had an injury-in-fact where it could show that defendant's actions caused a "concrete and demonstrable injury to the organization's activities" that is "more than simply a setback to the organization's abstract social interests.").[14] Each injury is sufficient to confer standing.

[14] *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), upon which Defendants rely to suggest a lack of standing, is inapposite. Defs.' Br. 13. There, a group of attorneys and human rights and other organizations challenged a provision of the Foreign Intelligence Surveillance Act of 1978 that authorized surveillance of non-U.S. persons who are reasonably believed to be outside the United States. *Clapper*, 568 U.S. at 402-07. The Court found that the challengers lacked standing because their theory of injury—that there was an objectively reasonable likelihood that their communications would be acquired by the government at some future time—was too speculative and depended on an attenuated and lengthy causal chain. *Id.* at 410-14. Here, in contrast, both Plaintiffs have already suffered procedural and informational injury,

B. The Delay Rule irreparably injures Plaintiffs.

In addition to establishing standing, the injuries discussed above—the choice of Mr. Dodson and other PVA members between avoiding air travel or risking wheelchair damage, and PVA's expenditure of resources—constitute irreparable harm. Defendants' arguments to the contrary each fails.

First, Defendants insist that Mr. Dodson's claim that until the Wheelchair Rule's reporting requirements are implemented, he will fly on an airline more likely to damage his mobility aid was at best speculative. Defs.' Br. 12-13. Yet, the certainty of this assertion was borne out when, on August 3, 2017 (3 days after filing the motion for a stay), Mr. Dodson—out of necessity (Dodson Decl. ¶ 13)—flew from New Mexico to Georgia with Delta Air Lines, and had his wheelchair damaged yet again. Dodson Decl. ¶¶ 13-14. This is not a case of *possible* future injury, as Defendants maintain. A damaged or lost wheelchair is an almost certain consequence of Mr. Dodson—or other PVA members—choosing to fly without information about an airline's record of handling wheelchairs.

Second, Defendants misapprehend Plaintiffs' point that the certain risk of mishandling forces individuals like Mr. Dodson to take slower, more arduous ground transportation over flying. *See* Defs.' Br. 13 (suggesting that Mr. Dodson and other PVA members are trying to "manufacture standing"). The point is that the Delay Rule forces a Hobson's choice on individuals with disabilities: either expose oneself to likely physical injury or wheelchair damage, or subject oneself to delays and costly, time-consuming ground travel. Where government action forces an individual to choose between taking an action and risking harm, or

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and PVA has already suffered a diversion of resources in attempting to counter the negative effect to its members of the Delay Rule.

taking "affirmative steps to avoid the risk of harm," he suffers a cognizable injury. *Meese v. Keene*, 481 U.S. 465, 475 (1987). To the extent Defendants are arguing that efforts to minimize damage to one's wheelchair is "voluntary," Defs.' Br. 13, they stretch that term beyond recognition. For individuals with quadriplegia, preserving the availability of one's wheelchair is a necessity, not a choice. Wheelchairs are not luxury items; they are essentials. To have a wheelchair damaged or lost during air travel is like having "your legs broken when you arrive at your destination." Zurfluh Decl. ¶ 7. Avoiding this outcome by abstaining from air travel can thus hardly be said to be a voluntary choice.

Third, Defendants assert that there is no causal connection between PVA's desire to have more information about how airlines handle (or mishandle) wheelchairs and its mission to assist and advocate for paralyzed veterans, and to educate lawmakers and airlines about issues regarding travel by paralyzed veterans. *See* Defs.' Br. 13-14. But, as discussed above (*see supra* 30-31), the causal connection is clear: The Wheelchair Rule's reporting requirements would provide PVA with the information it needs to better tailor its advocacy and education efforts, and better allocate resources. They would make it possible for PVA to show patterns of conduct in complaints to DOT and airlines, where they can currently only show individual anecdotal incidents. And, as DOT recognized in promulgating the Wheelchair Rule in the first place, the requirements would incentivize better handling of wheelchairs, reducing the number of incidents PVA must respond to.

In addition to being cognizable, Plaintiffs' harms are irreparable. While Defendants may believe it is too speculative to be considered by a court, they do not and cannot deny that Mr. Dodson and other PVA members have missed meetings, suffered days of immobilization, and endured the stress and humiliation that comes from losing one's main form of mobility. *See*

supra 7-8, 10-11. As discussed in Plaintiffs' memorandum in support of their motion for a stay (Dkt. 2-1, at 14-15), such harms are irreparable. Indeed, often the only compensation offered for such harm is a voucher for airline miles. *See, e.g.*, S. Brown Decl. ¶ 15 (recounting that an airline offered Mr. Stan Brown "a voucher for 500 miles" to compensate for the physical, emotional, and mental stress he endured when forced to use a duct-taped wheelchair). The delay of the Wheelchair Rule's reporting requirements makes such harms likely to happen again, should Mr. Dodson or other PVA members choose to fly. Additionally, PVA has no adequate remedy at law for the detriment to its ability to focus its efforts and resources on the particular airlines and particular practices that are the most harmful to paralyzed veterans. *See* Dkt. 2-1, at 14-15. Defendants do not even try to suggest otherwise.

For all these reasons, the Delay Rule causes Plaintiffs irreparable injury.

CONCLUSION

Plaintiffs respectfully request this Court deny Defendants' motion to dismiss for lack of jurisdiction, and grant Plaintiffs' motion for summary judgment, or, in the alternative, grant Plaintiffs' motion for a stay pursuant to 5 U.S.C. § 705.

Dated: October 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2017, the foregoing was served electronically on all parties via the Court's CM/ECF system.

Dated: October 6, 2017 /s/ *Javier M. Guzman*