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.

MEMORANDUM OF POINTS OF AUTHORITY AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A STAY PURSUANT TO 5 U.S.C. § 705

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

After a five-year formal rulemaking process, the Department of Transportation ("DOT") enacted a final rule (hereinafter referred to as the "Wheelchair Rule").[1] This rule requires domestic airlines to report incidents of mishandled wheelchairs and scooters checked on to flights by passengers with disabilities. The Wheelchair Rule was based on extensive public input from travelers, consumer and disability associations, airport authorities, and airlines. DOT received nearly 300 comments and held a public meeting to solicit additional input on the costs and benefits of the proposed rule. In enacting this rule, DOT made several determinations based on the record:

1. It is in the public interest to ensure that air travel is accessible to all passengers;

2. The Wheelchair Rule's reporting requirements further that policy goal;

3. Airlines could adjust their reporting systems to comply fully with the Wheelchair Rule within 14 months; and

4. The cost of complying with the Wheelchair Rule would not be lessened by giving airlines extra time to comply with the rule.

DOT has now reversed course. Four months after the Wheelchair Rule was published in the Federal Register and three months after it took effect, DOT enacted—without giving prior notice or providing the public with an opportunity to comment—a new rule (hereinafter referred to as the "Delay Rule") that extends the Wheelchair Rule's compliance date by one year.[2] DOT now thinks that airlines need more time to comply with the rule's requirements and that the public interest in providing individuals with disabilities with access to air travel should give way. But whereas the Wheelchair Rule is the product of the public and considered rulemaking process

[1] Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Components, 81 Fed. Reg. 76300 (Nov. 2, 2016).

[2] Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14437 (Mar. 21, 2017).

prescribed by the Administrative Procedure Act ("APA"), the Delay Rule is the mirror opposite. DOT did not seek public comment, consult with stakeholders in the rule, or hold a public meeting to obtain input. Instead, it acted on a bare plea for more time by industry representatives and invoked an inapplicable regulatory freeze instituted by the incoming Administration in its first days.

DOT's issuance of the Delay Rule is unlawful and, if allowed to stand, will thwart the important "public policy that air travel should be accessible to all members of the public" (81 Fed. Reg. at 76304) and irreparably harm travelers with disabilities by deferring for an additional year access to information that allows them to make informed travel decisions and fully participate in our highly mobile society. The Court therefore should grant Plaintiffs' motion for a stay pending judicial review of the Delay Rule and reinstate the compliance deadline in the original Wheelchair Rule.

BACKGROUND

I. DOT ENACTED THE WHEELCHAIR RULE AFTER A THOROUGH COMMENT PERIOD, THEN DELAYED IT WITHOUT PUBLIC NOTICE OR COMMENT.

On November 2, 2016, DOT published a final rule in the Federal Register. The culmination of a five-year formal rulemaking process, the Wheelchair Rule requires domestic airlines to track and report on incidents of mishandled wheelchairs and scooters checked on to flights by passengers with disabilities. *See* 81 Fed. Reg. at 76303-04.

Prior to publishing this rule, DOT reviewed 278 comments submitted by travelers, consumer and disability advocacy groups, airlines, and airport authorities. DOT also held a public hearing on the proposed rule. 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. The Reporting of Ancillary Airline Passenger Revenues,

Public Meeting Attendance List, RITA-2011-0001 (DOT). At that hearing and in subsequent public comments, the airlines told DOT that they would need 12-24 months to comply with the rule; that a January 1 compliance date would be preferable; and that the overall cost of complying with this rule would not be significantly decreased by taking more time to implement the new requirements. *See* 81 Fed. Reg. at 76304-76305; Compl. ¶¶ 33-34.

The Wheelchair Rule became effective on December 2, 2016, and DOT set a compliance date of January 1, 2018—14 months after the final rule was published in the Federal Register. DOT determined that a 14-month ramp-up period would give airlines adequate time to update their reporting systems. 81 Fed. Reg. at 76305.

On March 21, 2017, DOT, without any prior public comment, issued a new final rule extending the compliance date to January 1, 2019. The sole stated rationale for this delay was (1) a memo sent to agency heads by then White House Chief of Staff, Reince Priebus, and (2) conclusory requests by A4A and Delta Air Lines claiming that airlines were having unspecified "difficulties" meeting the 2018 compliance date. 82 Fed. Reg. at 14437.

In issuing this rule, DOT violated the APA by disregarding statutorily mandated rulemaking procedures, and acting arbitrarily, capriciously, and contrary to law. Pursuant to 5 U.S.C. § 705, Plaintiffs request this Court issue a stay of the Delay Rule, pending the outcome of this litigation.

II. PLAINTIFFS DERIVE SUBSTANTIAL BENEFITS FROM THE WHEELCHAIR RULE.

Each of the Plaintiffs has significant interests in the Wheelchair Rule and in ensuring that the compliance requirement goes into effect on January 1, 2018.

A. Paralyzed Veterans of America

Paralyzed Veterans of America ("PVA") is a membership organization that has served veterans with catastrophic disabilities for more than 70 years. Ex. A ("Zurfluh Decl.") at ¶ 2. It has approximately 20,000 members, each of whom is a military veteran with a spinal cord injury or

dysfunction. *Id.* at ¶ 4. PVA advocates for and assists its members in a variety of disability-related areas, including transportation. *Id.* at ¶¶ 1, 7-12. Among other things, PVA works with DOT and airlines to identify problem areas and develop training and procedures to improve airlines' service to individuals with disabilities. *Id.* at ¶ 9. It also advises its members in filing complaints with airlines and DOT against airlines that have mishandled their mobility devices. *Id.* at ¶ 10.

PVA submitted comments to DOT to help inform the Wheelchair Rule because it believed that the Wheelchair Rule would help both its members and PVA itself. *Id.* at ¶ 11. By allowing its members to make informed decisions, the Wheelchair Rule would both aid those members in avoiding injury and provide incentives for airlines to improve their performance. *Id.* at ¶ 12. It would allow PVA to reduce the resources it spends assisting members with travel difficulties, allowing it to focus on providing additional service to veterans in other areas. *Id.* And it would give PVA more insight into the areas that required the most improvement, allowing it to target its advocacy, training, and other assistance it provides airlines and their contractors and maximize the effectiveness of its interventions. *Id.*

B. Larry J. Dodson

Plaintiff Larry J. Dodson is a veteran of the U.S. Air Force who sustained a spinal cord injury a few years after returning from the Vietnam War. Ex. B ("Dodson Decl.") at ¶ 2. He has high-level quadriplegia and requires a power wheelchair for mobility purposes. *Id.* at ¶¶ 2-3. Mr. Dodson's wheelchair has been repeatedly mishandled by commercial airlines. *Id.* at ¶¶ 4-10. For example, on his last flight, his wheelchair was misplaced for approximately an hour, even though the flight was a direct one. *Id.* at ¶ 5. While Mr. Dodson waited, he was put in an aisle chair—a "glorified hand truck"—and then an ill-fitting manual wheelchair. *Id.* Spending an hour in unsuitable chairs and being transferred repeatedly by airline personnel left Mr. Dodson with lower-body discomfort and sores that took three days of bed rest to heal. *Id.* at ¶ 6. It also subjected him to humiliating public transfers, exposing his personal needs to strangers. *Id.* Mr. Dodson has also

had his chair damaged on multiple flights, leading to repairs, delays, and stress. *Id.* at ¶¶ 7-10. While he was not financially responsible for the cost of repairs, Mr. Dodson has no remedy for the lost productivity, stress, and humiliation. *Id.* at ¶ 11.

Every time Mr. Dodson considers flying, he must factor in the risk that his wheelchair will be mishandled, leaving him without his primary mobility aid. *Id.* at ¶¶ 4, 13. This has led him to forgo flying or take slower means of transportation, resulting in missed opportunities and significantly longer travel time. *Id.* at ¶¶ 13-15. For example, he recently drove from South Carolina to Ohio rather than fly, to avoid the problems he encounters in air travel. *Id.* at ¶ 14. He expects to face similar decisions in the future. *Id.* at ¶ 15.

Mr. Dodson will see significant benefits when the reporting requirements of the Wheelchair Rule take effect. Knowing which airlines have the best record of handling wheelchairs and scooters will help him reduce the risk of mishandling of his wheelchair, which will allow him to fly more often, and with greater confidence, instead of avoiding trips or resorting to lengthy ground travel. *Id.* at ¶ 16. It will also help him understand what problems are most frequent, so that he can provide more useful directions to airline personnel when flying. *Id.*

ARGUMENT

I. THIS COURT SHOULD GRANT PLAINTIFFS' MOTION FOR A STAY OF THE DELAY RULE.

The APA authorizes this Court to stay agency action pending judicial review of a rule challenge. 5 U.S.C.§ 705.[3] Motions for such relief "are reviewed under the same standards used to evaluate requests for interim injunctive relief." *Affinity Healthcare Serv's, Inc. v. Sebelius*, 720 F.

[3] "On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

Supp. 2d 12, 15 n.4 (D.D.C. 2010) (citing *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)).

Courts thus consider four factors: (1) the likelihood that the movant will succeed on the merits, (2) the likelihood that the movant will suffer irreparable harm in the absence of preliminary relief, (3) the prospect that others will be harmed if the court grants the stay, and (4) the public interest in granting the stay. *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012). Importantly, the movant "need not prevail on each factor." *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 823 F. Supp. 2d 36, 43 (D.D.C. 2011). Instead, "courts may apply the factors on a 'sliding scale.'" *Id.*[4]

For the following reasons, a stay of the Delay Rule is warranted.

C. Plaintiffs are likely to succeed on the merits.

For two independent reasons, Plaintiffs are likely to succeed on the merits of its claims. First, the Delay Rule is a legislative rule. As such, DOT was required to go through notice-and-comment rulemaking in accordance with the APA. DOT's failure to do so amounts to a procedural violation, reversible under 5 U.S.C. § 706(2)(D).

[4] Some judges on the D.C. Circuit have suggested that the sliding scale test may no longer be good law in light of the Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 22 (2008). *See Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) (noting that "*Winter* could be read to create a more demanding burden, although the decision does not squarely discuss whether the four factors are to be balanced on a sliding scale"). However, the D.C. Circuit "has not yet needed to decide this issue" (*League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016)), and district courts thus continue to apply the sliding scale test. *See, e.g.*, *R.J. Reynolds*, 823 F. Supp. 2d at 43. The sliding scale test likewise remains good law in most other circuits post-*Winter*. *See, e.g.*, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35-38 (2d Cir. 2010); *Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *see also Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting) ("[C]ourts have evaluated claims for equitable relief on a 'sliding scale,' sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. This Court has never rejected that formulation, and I do not believe it does so today."). While the Court is free to apply the traditional sliding scale test, the issue is academic because Plaintiffs are entitled to a stay under either standard.

Second, DOT acted arbitrarily and capriciously in enacting the Delay Rule after having previously determined that airlines could update their reporting systems to comply fully with the Wheelchair Rule by January 1, 2018.

Each reason is discussed below.

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

If a rule is legislative in nature, an agency must go through notice-and-comment rulemaking under the APA prior to issuing the rule. *See* 5 U.S.C. § 553; *see also Soundboard Assoc. v. FTC*, --- F. Supp. 3d ---, 2017 WL 1476116, at *10 (D.D.C. Apr. 24, 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)).

The Wheelchair Rule is a legislative rule: it imposes new obligations upon airlines to report instances of mishandled wheelchairs, and in so doing, makes air travel more accessible for passengers with mobility disabilities. Once issued, DOT was "itself bound by the rule" until it was either amended or revoked through proper notice-and-comment procedures. *Clean Air Council v. Pruitt*, --- F.3d ---, 2017 WL 2838112, at *4 (D.C. Cir. July 3, 2017). By altering the compliance date, the Delay Rule is "tantamount to an amendment or rescission of [the Wheelchair Rule]." *Sierra Club*, 833 F. Supp. 2d at 27 (quoting *NRDC v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004)). Indeed, the Delay Rule itself acknowledges that the "Department of Transportation is *amending* its regulations by extending the compliance date of its final rule." 82 Fed. Reg. 14437 (emphasis added). Because DOT was amending a final rule, it was required to adhere to proper notice-and-comment procedures in issuing that amended rule. *See Sierra Club*, 833 F. Supp. 2d at 27 ("[D]elayed implementation of a rule normally constitutes substantive rulemaking that requires notice and an opportunity for comment.").

This case is on all fours with *Clean Air Council v. Pruitt*, decided by the D.C. Circuit on July 3, 2017. At issue there was whether the Environmental Protection Agency ("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*, 2017 WL 2838112, at *2. EPA had published the methane rule in June 2016, with an effective date of August 2, 2016. *Id.* at *1. 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 section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B). 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*, 2017 WL 2838112, at *2. 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 *4-5.

So, too, here. Through the Delay Rule, DOT delayed the compliance date for the Wheelchair Rule by one year. In so doing, DOT reversed its previous determination that a 14-month ramp-up period struck the proper balance between allowing airlines sufficient time to implement new reporting systems in order to comply with the rule, and ensuring that airlines are working diligently towards implementing a rule designed to further the public policy of accessible air travel. *See* 81 Fed. Reg. at 76304. 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. DOT's failure to comply with such procedures is fatal to the rule itself. *See* 5 U.S.C. § 706(2)(D).

DOT did not—and cannot—argue to the contrary. In issuing the Delay Rule, DOT cited no authority for its circumvention of notice-and-comment procedures. It 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, interpretative rule, or statement of policy.[5] Nor did DOT invoke the "good cause" exception under 5 U.S.C. § 553(b)(B). Instead, the only authority DOT cites is a general DOT regulation, 49 C.F.R. § 1.27(n), which gives the General Counsel the ability to "[a]ssist and protect consumers in their dealings with the air transportation industry and conduct all departmental regulation of airline consumer protection and civil rights pursuant to . . . title 49 U.S.C." *See* 82 Fed. Reg. at 14437 (citing 49 C.F.R. § 1.27(n)). Apart from the fact that delaying the compliance date of a rule designed to assist travelers with disabilities can hardly be viewed as assisting and protecting them in their dealing with airlines, nothing in this departmental regulation gives DOT the authority to ignore the APA. *See, e.g.*, *Clean Air Council*, 2017 WL 2838112 at *4 (rejecting the EPA's post-hoc reliance on its "so-called inherent authority" to reconsider rules as a basis for foregoing notice-and-comment rulemaking).

This Court should reject any attempt by DOT to now seek to justify retroactively its 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. *SEC v. Chenery Corp.*, 332 U.S 194, 196 (1947) (emphasis added). Absent a contemporaneous invocation of an exception to notice-and-comment rulemaking, the Delay Rule cannot be upheld.

In any event, even if DOT 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 interpretative 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). DOT's decision to nevertheless do so is thus unsupportable.

[5] 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. 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" (*Electronic Privacy Information Center v. DHS*, 653 F.3d 1, 18 (D.C. Cir. 2011)). The Delay Rule is none of these. 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, DOT lacked good cause to justify circumvention of 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). 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 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:

> 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 87, 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." *Envt'l 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 Fed. Reg. at 14437)—a reason that does not give DOT "good cause" to bypass notice-and-comment procedures. Indeed, given that the compliance date was several months away at the time of the stay (and is several months away even now), notice and comment would have been entirely compatible with any solicitude toward the airlines' unspecified concerns. DOT's rationale is thus insufficient to warrant circumvention of notice-and-comment procedures.

For all these reasons, Plaintiffs are likely to succeed on the merits of its claim that DOT violated the APA by issuing the Delay Rule without adhering to notice-and-comment procedures.

2. In the alternative, DOT's 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 likely to succeed on the merits. This is because DOT's decision to delay the compliance date is arbitrary and capricious and must therefore be held unlawful. *See* 5 U.S.C. § 706(2)(A).

"One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117,

2125 (2016). Reviewing courts must conduct a "thorough, probing, in-depth review" of an agency's reasoning. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Agency action is arbitrary and capricious when 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.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted). DOT stated two grounds for its decision to delay the Wheelchair Rule's compliance date: (1) a memorandum issued by then Assistant to the President and Chief of Staff, Reince Priebus, announcing a "Regulatory Freeze Pending Review"; and (2) unspecified implementation "challenges" faced by the airline industry. 82 Fed. Reg. at 14437. Both are baseless.

First, the Priebus memorandum cannot provide a reasoned basis for DOT's 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* Memorandum from Reince Priebus, Assistant to the President and Chief of Staff, for the Heads of Executive Departments and Agencies Regarding Regulatory Freeze Pending Review (Jan. 20, 2017) ("Priebus Memo"), ¶ 3, https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies (applying to "regulations that have been published in the OFR *but have not taken effect* . . ."). The Wheelchair Rule, by contrast, took effect on December 2, 2016. 81 Fed. Reg. at 76306. The memo is thus wholly inapplicable to the Wheelchair Rule. However, even if it were applicable, the memo itself 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." Priebus Memo, ¶ 3 (emphasis added). DOT, by contrast, delayed the Wheelchair Rule by an entire year without any notice and without providing any opportunity for comment. The memo by its own terms cannot support this decision.[6]

Second, DOT did not have sufficient evidence of implementation "challenges" to justify delaying the Wheelchair Rule's compliance date by an entire year. In fact, 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." Request for Extension of Implementation Period, Airlines for America, RITA-20001-0001-0296 (DOT). Such a conclusory assertion simply cannot be enough to give DOT carte blanche to delay implementation of rules. *Cf. Encino Motorcars, LLC*, 136 S. Ct. at 2127 ("[T]he Department's conclusory statements do not suffice to explain its decision.").

In sum, DOT acted arbitrarily and capriciously in deciding to delay the Wheelchair Rule's compliance date. Plaintiffs are likely to succeed on this claim, and this Court should therefore grant the request for a stay.

D. Plaintiffs will suffer irreparable injury absent a stay of the Delay Rule.

The irreparable harm that Plaintiffs will suffer, should this Court deny the motion for a stay, is "certain, great, actual, and imminent." *Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008).

Under the Wheelchair Rule, travelers with disabilities would begin having access to airlines' monthly mishandled wheelchair reports in early 2018. Absent a stay, that date is all but

[6] Nor would the Priebus Memo, even if it had been correctly followed by DOT, provide a basis by itself 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 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").

certain to come and go without these travelers getting the benefits of the rule. Instead, they will be forced to wait an additional year before they are able to make informed travel decisions based on information about an airline's ability to safely transport wheelchairs and scooters.

This delay will increase the risk that PVA's members, including Mr. Dodson, will travel on an airline that mishandles and damages their mobility aids. As the public comments filed during the comment period detail, damage to wheelchairs and scooters is a recurring problem in air travel. *See* Compl. ¶¶ 22-26; *see also* Dodson Decl. ¶¶ 4-10.[7] While airlines are required to cover the costs of repairs, they do not reimburse the lost time, lost opportunities, stress, and physical burdens caused by being without one's mobility device. *See, e.g.*, Dodson Decl. ¶ 11. Plaintiffs have no legal remedy for such harms, and therefore such injuries are irreparable. Delaying compliance with the Wheelchair Rule would increase the likelihood that Mr. Dodson will experience such harm and certainly increase the number of PVA's members who will experience it, both because they will be unable to determine which airlines to patronize and which to avoid and because airlines will not have that market incentive to improve their service. *See* 81 Fed. Reg. at 76304 (noting that the

[7] In a recent letter to Secretary Chao, Senator Tammy Duckworth recounted repeatedly experiencing similar harm:

> In the past year, I have had my personal wheelchair mishandled and damaged several times. I have spent hours filling out paperwork and working with the carrier to replace damaged parts. On a recent trip, I retrieved my wheelchair at the end of the jet bridge, but a titanium rod had been damaged during the flight and my chair literally broke apart while I was sitting in it. The airline was apologetic, but I was left without my primary wheelchair for over five days. I was lucky to have access to additional mobility devices during that time, but many consumers with disabilities do not.

Ltr. from Senator Tammy Duckworth to Secretary of Transportation Elaine Chao (April 17, 2017), https://www.duckworth.senate.gov/sites/default/files/DoT%20Disability%20Protections%20Rule.pdf. As Senator Duckworth noted, the harm is most severe to individuals with limited economic means, including some of PVA's members.

Wheelchair Rule "provides further incentive to airlines to provide the training necessary to result in as little mishandling as possible to wheelchairs and scooters").

This, in turn, means that some of PVA's members will abstain from air travel entirely. They will thus be forced to turn down business opportunities, miss family events, and forego important medical treatments that would have required air travel. Or, in the alternative, they will be forced to use slower means of transportation, potentially requiring extra time off from work. After notice and comment—including a comment by A4A specifically questioning whether such concerns were valid—DOT explicitly recognized that the administrative record revealed a "widespread reluctance" to "travel by air due to wheelchair and scooter mishandling." 81 Fed. Reg. at 76304. The Wheelchair Rule was specifically implemented to address this harm, and delaying it will perpetuate that harm.

Delaying the implementation of the Wheelchair Rule will also force PVA to spend additional resources assisting veterans with mobility impairments. PVA advises its members on filing airline complaints, including complaints with DOT against airlines that have mishandled their wheelchairs and scooters, among other forms of assistance. Zurfluh Decl. ¶ 10. By reducing the frequency of such incidents and making recurring problems easier to bring to DOT's attention, the Wheelchair Rule would conserve PVA's resources and allow them to redeploy their efforts into other forms of support for their members. *Id*. ¶¶ 11-13.

Moreover, the Wheelchair Rule would allow airlines, DOT, and advocacy groups such as PVA to identify and redress systemic problems in the handling of wheelchairs and scooters. As PVA's executive director has explained, "The information this new reporting will track plays an important role in protecting the health of our members and identifying additional training needed across the air travel industry." Paralyzed Veterans of America Expresses Grave Concerns for Disabled Air Travelers, Paralyzed Veterans of America (Mar. 10, 2017), http://www.pva.org/about-us/paralyzed-veterans-of-america-looks-to-the-future-1. By delaying

that reporting, the Delay Rule will deny PVA the information it needs to develop and advocate solutions to recurring problems. *See also* Zurfluh Decl. ¶ 13.

Delay of the Wheelchair Rule thus denies for an additional year PVA and its members access to vital information about an airline's ability to handle wheelchairs and scooters, increases the likelihood that they and their property will be injured, and substantially burdens their access to air travel. These harms cannot be compensated at law, and therefore would result in irreparable injury to Plaintiffs and its members, including Mr. Dodson.[8]

E. Staying the Delay Rule will not harm other interested parties.

Other interested parties—most notably airlines, airports, and consumers—will not be injured by a stay of the Delay Rule.

Airlines will not be injured by a stay of the Delay Rule. It will neither impede their ability to meet the original compliance deadline, nor result in a higher cost of compliance. First, a stay would simply reinstate the status quo—airlines preparing to reach full compliance by January 1, 2018. This original compliance date was instituted based on extensive industry input. At a public hearing on the proposed rule, representatives from Delta Air Lines and American Airlines estimated that it would take 12 to 18 months to reach full compliance. Compl. ¶ 33. And Delta Air Lines and US Airways had advised DOT that a compliance date of January 1 would be preferable

[8] Given the strength of Plaintiffs' claims on the merits (*see supra* pp. 6-13), a stay would be warranted based on the sliding scale test even if Plaintiffs' showing of irreparable injury were far lighter. Under the sliding scale approach, the "[p]robability of success is inversely proportional to the degree of irreparable injury evidenced." *Cuomo*, 772 F.2d at 974. Thus, "[a] stay may be granted with either a high probability of success and some injury, or *vice versa*." *Id.*; *see also, e.g.*, *Apotex, Inc. v. FDA*, No. 06-cv-627, 2006 WL 1030151 at *7 (D.D.C. Apr. 19, 2006) ("[A] court may grant the sought-after relief when the movant is very likely to succeed on the merits, in the face of a lesser degree of potential irreparable injury."). Indeed, "a greater likelihood of [the movant's] success will militate for a preliminary injunction unless particularly strong equities favor the [non-moving] parties." *R.J. Reynolds*, 823 F. Supp. 2d at 43 (quoting *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008)) (alterations in original). Because the irreparable injury requirement is independently satisfied, however, it is unnecessary to rely on the sliding scale approach.

"because it would provide a clear demarcation between data sets." 81 Fed. Reg. at 76305. In response to this input, DOT determined that the compliance date would be January 1, 2018—14 months after publication of the final rule—and concluded that this date "provides air carriers with adequate time to update their internal systems and reporting processes." *Id.*[9]

Second, stay of the Delay Rule will not impose a higher cost on airlines. Airline representatives in attendance at the public hearing on the proposed rule unanimously testified that a later compliance deadline would not lessen the overall cost of compliance. *See* Compl. ¶ 34. If the airlines are to be taken at their word, reinstating the January 1, 2018, compliance date through a stay of the Delay Rule will not result in airlines paying more to comply.

Airports will not be injured by a stay of the Delay Rule. In fact, the Airports Council International-North America ("ACI-NA")—the principal association for domestic airports—praised the rule: "Airports have always supported improving accessibility for passengers with disabilities as it has the added benefit of making the air transportation system even more accessible for all airport users. As a result, ACI-NA supports the Department's proposal to require more information about how well airlines meet the needs of passengers with mobility disabilities in order to understand accessibility problems." Comment of Airports Council International-North America, Docket No. RITA-2011-0001 (DOT).

Consumers will not be injured by a stay of the Delay Rule. To the contrary, consumer and disability advocacy groups submitted comments in support of the original Wheelchair Rule. The Consumer Travel Alliance, for example, stated that it "supports the DOT move to specify baggage reporting for mishandled and damaged wheelchairs and scooters used by passengers with disabilities." Comment of Consumer Travel Alliance, Inc., Docket No. RITA-2-11-0001 (DOT).

[9] While the airlines may complain that they ceased preparing for the January 1, 2018 date when the Delay Rule was issued, there is no reason to believe their preparation was materially affected by this brief lacuna. The stated purpose of the Delay Rule was to allow them more time to prepare to comply, not to relieve them of that obligation.

F. The public interest supports granting the stay.

As DOT explained: "It is public policy that air travel should be accessible to all members of the public, and the Department believes that this rule advances that policy goal." 81 Fed. Reg. at 76305. DOT has already determined that 14 months is a sufficient amount of time for airlines to implement the necessary system changes to comply with the new reporting requirements. And airlines have already informed DOT that extra time will not decrease the overall cost of complying with this rule. Now, however, "[i]n a 180 degree reversal of its former views as to the proper course," DOT has extended the compliance date for the Wheelchair Rule. *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (internal quotation marks omitted). DOT's only purported reasons for this new position are—as previously discussed (*see supra* pp. 11-13)—baseless.

Plaintiffs, as well as the larger disability community, have "the right to know which airlines provide the best service," and air carriers have "obligations and duties to passengers with disabilities." 81 Fed. Reg. at 76304. This public policy is reflected throughout federal law. *Cf.* 49 U.S.C. § 41705(a) (prohibiting air carriers from discriminating against individuals with physical impairments that substantially inhibit one or more major life activities). Further delay of the Wheelchair Rule is thus contrary to public policy. This Court should grant Plaintiffs' motion for a stay in order to ensure that individuals with mobility disabilities can learn the track record of air carriers they use and that airlines work diligently to make air travel more accessible for individuals with mobility disabilities.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for a stay of the Delay Rule pending judicial review and reinstate the January 1, 2018 compliance date in the original Wheelchair Rule.

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Respectfully submitted,

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