[ORAL ARGUMENT NOT YET SCHEDULED]
No. 17-1272

In the
United States Court of Appeals
for the
District of Columbia Circuit

In re Paralyzed Veterans of America, et al.

On a petition for writ of mandamus of a transfer order of the United States District Court for the District of Columbia
Case No. 17-01539

APPENDIX

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Table of Contents

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:17-cv-01539-JDB

PARALYZED VETERANS OF AMERICA et al v. U.S. DEPARTMENT OF TRANSPORTATION et al
Assigned to: Judge John D. Bates
Case in other court: USCA, 18-05016
Cause: 05:702 Administrative Procedure Act

Date Filed: 07/31/2017
Date Terminated: 12/27/2017
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Defendant

Plaintiff

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Defendant

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Kate Bailey
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Date Filed	#	Docket Text
07/31/2017	1	COMPLAINT against ELAINE L. CHAO, U.S. DEPARTMENT OF TRANSPORTATION (Filing fee $ 400 receipt number 0090-5055364) filed by PARALYZED VETERANS OF AMERICA, Larry J. Dodson. (Attachments: # 1 Civil Cover Sheet, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons)(Guzman, Javier) (Entered: 07/31/2017)
07/31/2017	2	MOTION to Stay by Larry J. Dodson, PARALYZED VETERANS OF AMERICA (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Guzman, Javier) (Entered: 07/31/2017)

07/31/2017	3	NOTICE *Exhibits in Support of Motion to Stay* by Larry J. Dodson, PARALYZED VETERANS OF AMERICA re 2 MOTION to Stay (Guzman, Javier) (Entered: 07/31/2017)
08/03/2017	4	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Karianne M. Jones, :Firm-Democracy Forward Foundation, :Address- P.O. Box 34553. Phone No. - 202-448-9090. Filing fee $ 100, receipt number 0090-5060390. Fee Status: Fee Paid. by Larry J. Dodson, PARALYZED VETERANS OF AMERICA (Attachments: # 1 Declaration, # 2 Text of Proposed Order)(Guzman, Javier) (Entered: 08/03/2017)
08/04/2017		Case Assigned to Judge John D. Bates. (zsb) (Entered: 08/04/2017)
08/04/2017	5	SUMMONS (4) Issued Electronically as to ELAINE L. CHAO, U.S. DEPARTMENT OF TRANSPORTATION, U.S. Attorney and U.S. Attorney General (Attachment: # 1 Consent Form)(zsb) (Entered: 08/04/2017)
08/04/2017		MINUTE ORDER: Upon consideration of 4 the motion for leave to appear pro hac vice, it is hereby ORDERED that the motion is GRANTED; it is further ORDERED that Karianne M. Jones may appear pro hac vice in this case on behalf of plaintiffs Paralyzed Veterans of America and Larry J. Dodson. SO ORDERED. Signed by Judge John D. Bates on 08/04/17. (lcjdb1) (Entered: 08/04/2017)
08/04/2017		MINUTE ORDER: It is hereby ORDERED that a status conference is scheduled for Tuesday, August 15, 2017, at 9:45 a.m. in Courtroom 30 to discuss scheduling in this case. Signed by Judge John D. Bates on 08/04/17. (lcjdb1) (Entered: 08/04/2017)
08/07/2017		Set/Reset Hearings: Status Conference set for 8/15/2017 at 09:45 AM in Courtroom 30A before Judge John D. Bates. (tb) (Entered: 08/07/2017)
08/14/2017	6	NOTICE of Appearance by Andrew Marshall Bernie on behalf of All Defendants (Bernie, Andrew) (Entered: 08/14/2017)
08/14/2017	7	NOTICE of Appearance by Jeffrey B. Dubner on behalf of LARRY J. DODSON, PARALYZED VETERANS OF AMERICA (Dubner, Jeffrey) (Entered: 08/14/2017)
08/15/2017	8	SCHEDULING ORDER. See text of Order for details. Signed by Judge John D. Bates on 08/15/17. (lcjdb1) (Entered: 08/15/2017)
08/15/2017		Minute Entry: Status Conference held on 8/15/2017 before Judge John D. Bates: See Scheduling Order previously entered. (Court Reporter Catherine Jones) (tb) (Entered: 08/16/2017)
08/16/2017	9	NOTICE *of Proof of Service* by LARRY J. DODSON, PARALYZED VETERANS OF AMERICA (Attachments: # 1 Declaration)(Guzman, Javier) (Entered: 08/16/2017)
08/16/2017		Set/Reset Deadlines: Cross Motionsdue by 10/6/2017. Response to Cross Motions due by 10/20/2017. Reply to Cross Motions due by 10/27/2017. Dispositive Motions due by 9/15/2017. Response to Dispositive Motions due by 10/6/2017. Reply to Dispositive Motions due by 10/20/2017. Responses due by 9/15/2017 Replies due by 10/6/2017. Summary Judgment motions due by 9/15/2017. Response to Motion for Summary Judgment due by 10/6/2017. Reply to Motion for Summary Judgment due by 10/20/2017. (tb) (Entered: 08/16/2017)
09/15/2017	10	MOTION to Dismiss for Lack of Jurisdiction by ELAINE L. CHAO, U.S. DEPARTMENT OF TRANSPORTATION (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Bernie, Andrew) (Entered: 09/15/2017)
09/15/2017	11	Memorandum in opposition to re 2 MOTION to Stay filed by ELAINE L. CHAO, U.S. DEPARTMENT OF TRANSPORTATION. (Attachments: # 1 Text of Proposed Order)

		(Bernie, Andrew) (Entered: 09/15/2017)
09/15/2017	12	NOTICE *of Filing of Certified List of Contents of the Administrative Record* by ELAINE L. CHAO, U.S. DEPARTMENT OF TRANSPORTATION (Attachments: # 1 Certified Index of the Contents of the Administrative Record)(Bernie, Andrew) (Entered: 09/15/2017)
10/05/2017	13	NOTICE *of Filing of Amended Certified List of Contents of the Administrative Record* by ELAINE L. CHAO, U.S. DEPARTMENT OF TRANSPORTATION (Attachments: # 1 Amended Certified Index of the Contents of the Administrative Record)(Bernie, Andrew) (Entered: 10/05/2017)
10/06/2017	14	MOTION for Summary Judgment by LARRY J. DODSON, PARALYZED VETERANS OF AMERICA (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order) (Guzman, Javier) (Entered: 10/06/2017)
10/06/2017	15	NOTICE *of Exhibits* by LARRY J. DODSON, PARALYZED VETERANS OF AMERICA re 14 MOTION for Summary Judgment (Guzman, Javier) (Entered: 10/06/2017)
10/06/2017	16	Memorandum in opposition to re 10 MOTION to Dismiss for Lack of Jurisdiction filed by LARRY J. DODSON, PARALYZED VETERANS OF AMERICA. (Attachments: # 1 Exhibit)(Guzman, Javier) (Entered: 10/06/2017)
10/06/2017	17	REPLY to opposition to motion re 2 MOTION to Stay filed by LARRY J. DODSON, PARALYZED VETERANS OF AMERICA. (Attachments: # 1 Exhibit)(Guzman, Javier) (Entered: 10/06/2017)
10/20/2017	18	REPLY to opposition to motion re 10 MOTION to Dismiss for Lack of Jurisdiction filed by ELAINE L. CHAO, U.S. DEPARTMENT OF TRANSPORTATION. (Bernie, Andrew) (Entered: 10/20/2017)
10/27/2017	19	REPLY to opposition to motion re 14 MOTION for Summary Judgment filed by LARRY J. DODSON, PARALYZED VETERANS OF AMERICA. (Guzman, Javier) (Entered: 10/27/2017)
11/28/2017	20	NOTICE of Appearance by Kate Bailey on behalf of All Defendants (Bailey, Kate) (Entered: 11/28/2017)
12/07/2017		MINUTE ORDER: Upon consideration of 2 plaintiffs' motion to stay, 10 defendants' motion to dismiss for lack of jurisdiction, and 14 plaintiffs' motion for summary judgment, and the entire record herein, it is hereby ORDERED that a motions hearing is scheduled for Monday, December 18, 2017 at 9:30 a.m. in Courtroom 30. Signed by Judge John D. Bates on 12/7/2017. (lcjdb1) (Entered: 12/07/2017)
12/12/2017		Set/Reset Hearings: Motion Hearing set for 12/18/2017 at 09:30 AM in Courtroom 30A before Judge John D. Bates. (tb) (Entered: 12/12/2017)
12/13/2017	21	JOINT APPENDIX by LARRY J. DODSON, PARALYZED VETERANS OF AMERICA. (Guzman, Javier) (Entered: 12/13/2017)
12/18/2017		Minute Entry: Motion Hearing held on 12/18/2017 before Judge John D. Bates re 2 MOTION to Stay filed by PARALYZED VETERANS OF AMERICA and LARRY J. DODSON, 10 MOTION to Dismiss for Lack of Jurisdiction filed by ELAINE L. CHAO and U.S. DEPARTMENT OF TRANSPORTATION, and 14 MOTION for Summary Judgment filed by PARALYZED VETERANS OF AMERICA and LARRY J. DODSON; Motions heard and taken under advisement. (Court Reporter Scott Wallace) (tb) (Entered: 12/18/2017)
12/21/2017	22	ORDER denying 2 plaintiffs' motion to stay, 10 defendants' motion to dismiss for lack of

		jurisdiction, and 14 plaintiffs' motion for summary judgment and transferring case to the U.S. Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1631. See text of Order and accompanying Memorandum Opinion for details. Signed by Judge John D. Bates on 12/21/2017. (lcjdb1) (Entered: 12/21/2017)
12/21/2017	23	MEMORANDUM OPINION. Signed by Judge John D. Bates on 12/21/2017. (lcjdb1) (Entered: 12/21/2017)
12/22/2017	24	Case transferred to the USDC for the U.S. Court of Appeals for the District of Columbia Circuit, pursuant to Court Order entered 12/21/2017. Sent to Court electronically. (zrdj) Modified event/text on 12/27/2017 (znmw). (Entered: 12/22/2017)
01/16/2018	25	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 23 Memorandum & Opinion, 22 Order on Motion to Stay,, Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion for Summary Judgment, by LARRY J. DODSON, PARALYZED VETERANS OF AMERICA. Filing fee $ 505, receipt number 0090-5287561. Fee Status: Fee Paid. Parties have been notified. (Guzman, Javier) (Entered: 01/16/2018)
01/17/2018	26	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re 25 Notice of Appeal to DC Circuit Court. (znmw) (Entered: 01/17/2018)
01/25/2018		USCA Case Number 18-5016 for 25 Notice of Appeal to DC Circuit Court, filed by PARALYZED VETERANS OF AMERICA, LARRY J. DODSON. (zrdj) (Entered: 01/25/2018)
02/12/2018	27	TRANSCRIPT OF PROCEEDINGS before Judge John D. Bates held on 12-18-17; Page Numbers: 1-40. Date of Issuance:2-12-18. Court Reporter/Transcriber Scott Wallace, Telephone number 202-354-3196, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter.<P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 3/5/2018. Redacted Transcript Deadline set for 3/15/2018. Release of Transcript Restriction set for 5/13/2018.(Wallace, Scott) (Entered: 02/12/2018)

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Description:	Docket Report	**Search Criteria:**	1:17-cv-01539-JDB
Billable Pages:	5	**Cost:**	0.50

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARALYZED VETERANS OF AMERICA, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

Civil Action No. 17-1539 (JDB)

ORDER

Upon consideration of [2] plaintiffs' motion to stay, [10] defendants' motion to dismiss for lack of jurisdiction, and [14] plaintiffs' motion for summary judgment, and for the reasons given in the memorandum opinion issued on this date, it is hereby

ORDERED that plaintiffs' motion to stay is **DENIED** without prejudice; it is further

ORDERED that defendants' motion to dismiss for lack of jurisdiction is **DENIED** without prejudice; it is further

ORDERED that plaintiffs' motion for summary judgment is **DENIED** without prejudice; and it is further

ORDERED that this case is transferred in the interests of justice to the U.S. Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1631.

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: December 21, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARALYZED VETERANS OF AMERICA, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

Civil Action No. 17-1539 (JDB)

MEMORANDUM OPINION

In 2016, the Department of Transportation issued a final rule (the "Reporting Rule") that will require airlines to report the number of wheelchairs and scooters that are mishandled after being transported as checked luggage on passenger flights. Although the Reporting Rule was initially scheduled to take effect on January 1, 2018, the Department later issued another final rule (the "Extension Rule") that delayed the Reporting Rule's effective date by one year. Several months later, plaintiffs filed this action challenging the Extension Rule, arguing that it is arbitrary and capricious and that it should have been issued using notice-and-comment procedures.

Before the Court, the Department defends neither the substance of the Extension Rule nor the procedures that were used to promulgate it. Instead, the Department argues only that the Court lacks jurisdiction over plaintiffs' challenge, because a statute vests that jurisdiction exclusively in the federal courts of appeals. Indeed, the Department agrees that summary judgment should be entered for plaintiffs if there is jurisdiction here. But while plaintiffs' arguments against the Extension Rule may have merit, the Court's first consideration—and here, its only one—is jurisdiction. For the reasons that follow, the Court agrees with the Department that it lacks subject-matter jurisdiction over this case.

I. Background

In 2011, the Department of Transportation (the "Department") proposed a new rule that would require airlines to report the number of wheelchairs and scooters that are delayed, damaged, or lost after being transported as checked luggage on domestic passenger flights. See Reporting Ancillary Airline Passenger Revenues, 76 Fed. Reg. 41,726 (July 15, 2011). In its notice of proposed rulemaking, the Department noted that "[m]any 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." Id. at 41,728. The proposed rule, the Department explained, would enable a traveler to select an airline based on its track record of handling mobility devices and would encourage airlines to handle such devices with greater care.

After receiving hundreds of comments from airlines, industry groups, disability-rights organizations, and other members of the public, the Department issued the final Reporting Rule in November 2016. The rule will require air carriers to "report monthly to the Department . . . [t]he total number of wheelchairs and scooters that were enplaned in the aircraft cargo compartment for any domestic nonstop scheduled passenger flight," as well as the number of such bags that were "mishandled." 14 C.F.R. § 234.6(b)(2)–(3); see also 14 C.F.R. § 234.2 (defining a "[m]ishandled checked bag" as one that was "lost, delayed, damaged or pilfered"). Though the Reporting Rule took effect on December 2, 2016, it initially applied only to flights taking place on or after January 1, 2018. See Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments, 81 Fed. Reg. 76,300, 76,306 (Nov. 2, 2016) [hereinafter "Reporting Rule"]. This deadline was in response to comments from airlines that it would take "12 to 24 months" to come into compliance with the rule because of the need to "reprogram[] existing systems, install[] new equipment, and train[] employees." Id. at 76,305.

A few months later, without following the notice-and-comment procedures provided for in the Administrative Procedure Act ("APA"), see 5 U.S.C. § 553, the Department issued another final rule that extended the Reporting Rule's compliance deadline to January 1, 2019. See Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters; Extension of Compliance Date, 82 Fed. Reg. 14,437 (Mar. 21, 2017) [hereinafter "Extension Rule"] (codified at 14 C.F.R. part 234). The Extension Rule pointed to requests from Airlines for America ("A4A"), an industry group, and Delta Air Lines, Inc., both of which cited a January 20, 2017 memorandum circulated to executive agencies by then-White House Chief of Staff Reince Priebus, which instructed agencies to "temporarily postpone the effective dates of regulations that had been published in the Federal Register, but were not yet effective, until 60 days after the date of the memorandum." Id. at 14,437. A4A's request also stated that "industry is facing challenges with parts of this regulation and needs more time to implement it." Id.

In July 2017, over four months after the Extension Rule was issued, Paralyzed Veterans of America ("PVA"), a nonprofit organization, and Larry Dodson, a member of PVA, filed this lawsuit against the Department and the Secretary of Transportation in her official capacity (collectively, the "Department") seeking an injunction against the Extension Rule, so that the Reporting Rule would take effect on January 1, 2018 as originally scheduled. See Compl. [ECF No. 1] at 15. Dodson and PVA (collectively, "plaintiffs") have moved for a stay of the Extension Rule pending the resolution of this litigation, see Pls.' Mot. for a Stay Pursuant to 5 U.S.C. § 705 ("Pls.' Stay Mot.") [ECF No. 2], and for summary judgment, see Pls.' Mot. for Summ. J. [ECF No. 14]. They contend that the Extension Rule is procedurally invalid because it was promulgated without notice and comment, see Pls.' Combined Mem. in Supp. of Pls.' Mot. for Summ. J., Reply to the Mot. to Stay Pursuant to 5 U.S.C. § 705, and Opp'n to Defs.' Mot. to Dismiss for Lack of

Jurisdiction ("Pls.' Combined Mem.") [ECF Nos. 14-1, 16, 17] at 21–26, and substantively invalid because it is arbitrary and capricious, see id. at 26–28 (citing 5 U.S.C. § 706). The Department has elected not to address these arguments, see Reply in Support of Defs.' Mot. to Dismiss [ECF No. 18] at 1 n.1, and instead argues only that the Court lacks subject-matter jurisdiction over plaintiffs' suit. See Defs.' Mot. to Dismiss [ECF No. 10]; see also Defs.' Combined Mem. in Support of Defs.' Mot. to Dismiss and in Opp'n to Pls.' Mot. for Stay ("Defs.' Combined Mem.") [ECF Nos. 10-1, 11] at 1 n.1.

For the reasons given below, the Court agrees with the Department that it lacks jurisdiction. It will therefore transfer this case "in the interests of justice" to the U.S. Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 1631 and deny without prejudice the Department's motion to dismiss and the plaintiffs' motions for a stay and for summary judgment.[1]

II. Discussion

Under 49 U.S.C. § 46110, the federal courts of appeals have exclusive subject-matter jurisdiction over any challenge to a rule issued by the Secretary of Transportation in whole or in part under part A of subtitle VII of title 49 of the U.S. Code ("Part A").[2] Such review must be sought in an appropriate court of appeals "not later than 60 days" after the challenged rule is issued. Id. § 46110(a). The Department contends that § 46110 strips this Court of jurisdiction over plaintiffs' challenge to the Extension Rule.

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[1] "If a federal district court finds that it lacks subject matter jurisdiction, the court only has the authority to make a single decision: to dismiss the case, or in the interest of justice, to transfer it to another court pursuant to 28 U.S.C. § 1631." Nat'l Fed'n of the Blind v. U.S. Dep't of Transp., 78 F. Supp. 3d 407, 414–15 (citation and internal quotation marks omitted). At oral argument, the parties agreed that transfer would be the proper course of action should the Court determine that it lacked jurisdiction.

[2] See 49 U.S.C. § 46110(a) ("[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under this part . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business."); see also id. § 46110(c) (making this grant of jurisdiction exclusive); Nat'l Fed'n of the Blind v. U.S. Dep't of Transp., 827 F.3d 51, 55 (D.C. Cir. 2016) (clarifying "that section 46110(a) includes review of [the Department's] rulemakings").

Initially, the Department's case seems straightforward. The Extension Rule restates the authority citation for 14 C.F.R. part 234,[3] which cites three statutory provisions: 49 U.S.C. §§ 329, 41101, and 41701. See Extension Rule, 82 Fed. Reg. at 14,437. The latter two provisions, §§ 41101 and 41701, both appear in Part A. Thus, the Extension Rule was issued "in part" under Part A, and jurisdiction to review the rule lies in the courts of appeals.

But as plaintiffs point out, neither § 41101 nor § 41701 even arguably supports the Extension Rule. Section 41101, entitled "Requirement for a certificate," requires that an air carrier obtain a certificate from the Department before providing air transportation services to the public. And § 41701, entitled "Classification of air carriers," authorizes the Department to establish "reasonable classifications for air carriers." See Pls.' Combined Mem. at 15. Any connection between these two provisions and the Extension Rule is tenuous at best.[4] Moreover, although § 329 at least colorably supports the Extension Rule, see, e.g., 49 U.S.C. § 329(a) (authorizing the Department to "collect and collate transportation information [it] decides will contribute to the improvement of the transportation system of the United States"), § 329 does not appear in Part A. Thus, plaintiffs argue, the Extension Rule was not "issued under" Part A.

The Department's responses are twofold. First, the Department points to a sentence in the Extension Rule which states that the rule was issued by the Department's Deputy General Counsel "under authority delegated in 49 CFR 1.27(n)." Extension Rule, 82 Fed. Reg. at 14,437. Section 1.27(n) provides: "The General Counsel is delegated authority to . . . conduct all departmental regulation of airline consumer protection . . . pursuant to chapters 401 . . . , 411 . . . ,

[3] See 1 C.F.R. § 21.43(a)(2)–(2)(i) ("If a [regulation] amends only certain sections within a CFR part [and] . . . [i]f the authority for issuing [the] amendment is the same as the authority listed for the whole CFR part, the agency shall simply restate the authority [citation for that part]." (emphasis added)).

[4] At one point in its briefing, the Department characterized the citation to §§ 41101 and 41701 as a "scrivener's error," Defs.' Combined Mem. at 11, although it later walked that position back, see Defs.' Reply at 5 n.5 (pointing out that section 41701 authorizes the Department to establish "reasonable requirements for each class" of air carriers but claiming "not [to] address this question here").

413 . . . , 417 . . . , and 423" of title 49—five chapters that all appear in Part A. Thus, the Department reasons, because the General Counsel issued the Extension Rule under the authority delegated in § 1.27(n), and because § 1.27(n) delegates authority to issue only Part A rules, the Extension Rule must have been issued under Part A. See Defs.' Combined Mem. at 9.

This argument fails for at least two reasons. First, it does not account for the possibility that the Extension Rule finds support in neither § 329 (because the General Counsel lacks authority to issue rules under that provision) nor §§ 41101 and 41701 (because neither of those provisions supports the Extension Rule as a substantive matter). See Pls.' Reply to Mot. for Summ. J. ("Pls.' Reply") [ECF No. 19] at 7–8. As plaintiffs correctly point out, see id., the fact that § 1.27(n) limits the General Counsel's authority to Part A statutes simply suggests that the Extension Rule was not properly issued under any of its cited authority; it does not provide a reason to ignore the cited authority and look instead to authorities that are not cited in the rule.[5]

The Department's argument also ignores 1 C.F.R. § 21.43, which provides that if an agency amends a part of the Code of Federal Regulations, and if "the authority for issuing [the] amendment is the same as the authority for the whole C.F.R. part," then the amending document "shall simply restate" the authority citation for that part. Here, the Extension Rule "simply restat[ed]" the authority citation for 14 C.F.R. part 234. See Extension Rule, 82 Fed. Reg. at 14,438 ("The authority citation for part 234 continues to read as follows . . . ."). This suggests that the statutes cited in the authority citation were "the authority for issuing the amendment." It also suggests that the citation to § 1.27(n) was meant only to identify the delegated authority that

[5] Though plaintiffs offer this conclusion as a reason to avoid § 46110, they do not assert it as a ground upon which to invalidate the Extension Rule. This may be because the Extension Rule simply restates the authority citation for 14 C.F.R. part 234, which is the same authority on which the Reporting Rule relies. Compare Extension Rule, 82 Fed. Reg. at 14,438 with Reporting Rule, 82 Fed. Reg. at 76,303. Were the Court to invalidate the Extension Rule on this basis, then under the same logic, the Reporting Rule would also be invalid—a result that neither party advocates.

allowed the General Counsel to issue the Extension Rule on the Secretary's behalf. Thus, plaintiffs are correct that the Extension Rule's citation to § 1.27(n) does not identify the authority under which the rule was "issued" for purposes of § 46110.

Next, the Department argues that even if part 234's authority citation sets out the Extension Rule's statutory authority, § 46110 still applies because two of the statutes listed in the authority citation (§§ 41101 and 41701) appear in Part A. See Defs.' Reply at 4–8. This is so, the Department claims, even assuming that neither statute actually supports the Extension Rule, because "whether an agency action was duly authorized is a merits question of law to be decided by the court to which Congress conferred jurisdiction"—here, the courts of appeals. Id. at 7. But this argument also misses the mark. Plaintiffs do not ask the Court to determine whether the Extension Rule is valid under §§ 41101 and 41701, as the Department asserts, see id. at 5–8; rather, they urge the Court to determine whether those provisions even colorably support the rule. See Pls.' Reply at 7. And as plaintiffs correctly point out, courts often "peek at the merits" of a case to determine their jurisdiction. Pls.' Reply at 6 (quoting Prof'l Cabin Crew Ass'n v. Nat'l Mediation Bd., 872 F.2d 456, 459 (D.C. Cir. 1989) (federal courts lack subject-matter jurisdiction to review decisions of the National Mediation Board, an independent agency that mediates airline and railway labor disputes, unless there is a "showing on the face of the pleadings that the . . . decision was a gross violation" of the Railway Labor Act or the Constitution (citation omitted))); see Bell v. Hood, 327 U.S. 678, 682 (1946) (a claim may be dismissed for lack of federal-question jurisdiction where "the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction").

However, as a review of the relevant cases demonstrates, such a "peek" is not warranted here. Two cases—one cited by the parties, and one not—are particularly instructive. The first is

American Petroleum Institute v. SEC, in which a coalition of industry groups challenged a final rule promulgated by the Securities and Exchange Commission pursuant to a provision of the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank"). 714 F.3d 1329, 1331 (D.C. Cir. 2013). That provision, codified at section 13(q) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78m(q), directed the Commission to require certain companies to report payments made to foreign governments in connection with the extraction of oil, natural gas, and mineral resources from their territories. Id. In addition to section 13, the final rule (the "Resource Extraction Rule") cited sections 3(b), 12, 15, 23(a), and 36 of the Exchange Act as its statutory authority. See Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,417 (Sept. 12, 2012). The industry groups filed suit in both district court and the D.C. Circuit "out of an abundance of caution," Am. Petrol. Inst., 714 F.3d at 1332, and Oxfam America, an advocacy group, intervened in the D.C. Circuit proceedings. Oxfam argued that the court of appeals lacked jurisdiction because the applicable direct-review provision, section 25(b) of the Exchange Act, 15 U.S.C. § 78y(b), did not cover the Resource Extraction Rule's cited authorities. Id. at 1333–34.

The D.C. Circuit agreed and dismissed the industry groups' petition for review. True, the court noted, the Resource Extraction Rule cited section 15 of the Exchange Act as one source of statutory authority, and section 25(b) provided for direct review of rules issued under sections 15(c)(5) and (6). Id. at 1333. But the SEC had indicated in its brief that the part of section 15 that supported the rule was section 15(d). Id. This explanation "made perfect sense," moreover, because section 15(d) authorized the SEC to collect "[s]upplementary and periodic information" from issuers of securities, 15 U.S.C. § 78o(d), whereas subsections 15(c)(5) and (6) merely authorized certain regulations of brokers and dealers, see id. § 78o(c)(5)–(6). Thus, the court of

appeals concluded that the Resource Extraction Rule's citation to section 15 was insufficient to trigger direct review under section 25(b). Am. Petrol. Inst., 714 F.3d at 1333.

American Petroleum provides some support for plaintiffs' position, but it is not quite on all fours with this case. There, the question was what to do when a rule cites a larger statutory unit but only certain parts of that unit trigger direct review. Here, the situation is reversed: the Extension Rule cites two provisions (§§ 41101 and 41701) that both appear in a larger statutory unit (Part A), the whole of which triggers direct review. Because applying § 46110 does not require the Court to first identify which subparts of the Extension Rule's cited authorities really support the rule, the need to "peek" at the merits of plaintiffs' challenge here is less pressing.

Loan Syndications and Trading Ass'n v. SEC, 818 F.3d 716 (D.C. Cir. 2016), a case cited by neither party, is more closely on point. There, an industry group challenged a rule issued pursuant to a different provision of Dodd–Frank, codified at section 15G of the Exchange Act, 15 U.S.C. § 78o–11, which directed the SEC, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency to jointly promulgate a rule (the "Risk Retention Rule") requiring issuers of asset-backed securities to retain at least a five-percent share of the risk underlying any such securities. Loan Syndications & Trading Ass'n, 818 F.3d at 718. As in American Petroleum, section 15G did not appear in the Exchange Act's direct-review provision, section 25(b). Nonetheless, the industry group filed a petition for review of the Risk Retention Rule in the D.C. Circuit, arguing that other statutes cited in the various versions of the rule that appeared in the Federal Register (each of the four promulgating agencies had published its own version) triggered direct review. Id. at 721.

The D.C. Circuit rejected this argument. Although the four agencies had cited various statutory authorities in addition to section 15G (including parts of the Securities Act of 1933 and

the Bank Holding Company Act of 1956), and although some of these authorities did trigger direct review under other statutes, see id. at 721–22, the court of appeals nonetheless emphasized that the Risk Retention Rule was "a joint rule—a rule that neither party suggests the agencies had authority to promulgate on their own." Id. at 723. Because the industry group conceded that no statute besides section 15G—that is, neither the statutes cited in the rule's various Federal Register entries nor any other statute—even "colorably authorized the joint rule," id., the court held that it lacked subject-matter jurisdiction and transferred the case to district court, see id. at 724.[6]

Again, Loan Syndications provides some support for plaintiffs' position. Like Loan Syndications, this case involves a citation to multiple statutory authorities, two of which (§§ 41101 and 41701) trigger direct review but do not colorably support the Extension Rule, and the third of which (§ 329) colorably supports the Extension Rule but does not trigger direct review.[7] At first glance, therefore, Loan Syndications suggests that this Court should disregard the citations to §§ 41101 and 41701, look only to § 329, and conclude that it has jurisdiction.

But this case is also different from Loan Syndications in an important respect. Central to the D.C. Circuit's reasoning in that case was its conclusion that no statute other than section 15G even colorably authorized the joint rulemaking effort that produced the Risk Retention Rule. Here, the situation is exactly the opposite: all parties agree that the Department easily could have issued the Extension Rule under other Part A authorities and that, had it done so, jurisdiction would lie in

[6] The court also distinguished two prior cases in which the D.C. Circuit had held that it had direct-review jurisdiction. See id. at 722–23 (discussing International Brotherhood of Teamsters v. Pena, 17 F.3d 1478 (D.C. Cir. 1994), and Media Access Project v. FCC, 883 F.2d 1063 (D.C. Cir. 1989)). In those cases, the challenged rules cited both a specific statutory authority (which did not trigger direct review) and the promulgating agency's more general organic statute (which did). Direct review was proper in those cases, the Loan Syndications court explained, because "the agencies could colorably rely on broad grants of organic statutory authority." Id. at 723. But this was not so in Loan Syndications, where no statute besides section 15G colorably authorized the Risk Retention Rule.

[7] Plaintiffs claim that the Department has conceded that §§ 41101 and 41701 do not support the Extension Rule, although the Department does not agree. See Pls.' Reply at 2 & n.2. Though the Court ultimately need not (and therefore does not) resolve this dispute, the Court notes that if the Department had made such a concession, then this would be another parallel between this case and Loan Syndications.

the courts of appeals. In fact, the Department suggests (and plaintiffs do not really dispute) that the Extension Rule cited §§ 41101 and 41701 by mistake. Thus, the concern driving the D.C. Circuit in Loan Syndications is not present here: the Extension Rule could have been—and indeed, likely should have been—issued under statutory authority that would have triggered direct review.

There is ample evidence in the record to support this conclusion. Before the Department promulgated the Reporting Rule in 2016, the authority citation for part 234 cited 49 U.S.C. §§ 329 (entitled "Transportation information"), 41708 ("Reports"), and 41709 ("Records of air carriers"). Sections 41708 and 41709 both appear in Part A. Moreover, unlike §§ 41101 and 41701, both would likely support the Reporting Rule (and hence the Extension Rule). See 49 U.S.C. § 41708(b)(1)(A) (authorizing the Department to "require an air carrier . . . to file annual, monthly, periodical, and special reports with the Secretary in the form and way prescribed by the Secretary"); id. § 41709(a) (providing that the Secretary "shall prescribe the form of records to be kept by an air carrier . . . and the time period during which the records shall be kept").

The Department's 2011 notice of proposed rulemaking for the Reporting Rule proposed without explanation to amend part 234's authority citation by replacing §§ 41708 and 41709 with "49 U.S.C. . . . chapters 41101 and 41701." Reporting Ancillary Airline Passenger Revenues, 76 Fed. Reg. 41,726, 41,730 (July 15, 2011). Apparently recognizing that there are no "chapters 41101 and 41701" in title 49, the drafters of the final Reporting Rule changed the citation again, this time to its present form: "49 U.S.C. 329, 41101 and 41701." Reporting Rule, 82 Fed. Reg. at 76,306. And the Extension Rule, issued few months later, simply restated this citation. See Extension Rule, 82 Fed. Reg. at 14,437.

At oral argument, the Department suggested that the notice of proposed rulemaking had actually meant to expand part 234's authority citation—that is, to cite chapters 411 and 417 of title

49. This mistake was then compounded by the drafters of the final Reporting Rule, who "corrected" the citation not by changing the phrase "41101 and 41701" to "411 and 417," but rather by changing the word "chapters" to "sections." In light of the foregoing review of the Reporting Rule's drafting history, this explanation for the change—the only one offered by either party—"makes perfect sense." Am. Petroleum Inst., 714 F.3d at 1333. Why else would the Department have changed the citation from clearly applicable statutory authority (§§ 41708 and 41709) to clearly inapposite authority (§§ 41101 and 41701)?

Indeed, plaintiffs do not seriously dispute that the Extension Rule's citation to §§ 41101 and 41701 was a mistake. Instead, they argue that they should nonetheless be allowed to proceed for two reasons. First, they argue that the Department should suffer the consequences of its own error. See Pls.' Combined Mem. at 20. Plaintiffs frame the issue as one of notice, arguing that "[n]othing in the [Extension] Rule put [plaintiffs] on notice that it was validly promulgated under [P]art A . . . and, accordingly, that a jurisdictional provision directed [that] any challenge might need to be brought in the court of appeals within 60 days." See id. But this is not so. The Extension Rule clearly cited two Part A provisions, and plaintiffs have cited no authority that would have suggested in March 2017, when the Extension Rule was promulgated, that they could safely ignore those provisions for purposes of § 46110. Plaintiffs may have believed at the time that the citation to §§ 41101 and 41701 did not validly trigger § 46110, but they cannot say that they lacked notice that § 46110 might apply.

Second, plaintiffs argue that if district courts lack the power to disregard citations to authorities that do not even colorably support a rule, then an agency could "manufacture" jurisdiction simply by citing inapposite authorities that trigger the agency's preferred jurisdictional

route. Id. at 16. This argument has some force.[8] In a case where an agency appears to have attempted to manufacture jurisdiction using citations to inapposite statutory authority, plaintiffs' proposed approach—taking a "peek" at the rule's cited authorities and disregarding any plainly inapposite ones—might be warranted. In this case, however, the record suggests that the Extension Rule's citation to §§ 41101 and 41701 was not an intentional act of forum shopping, and plaintiffs do not contend otherwise. The parties do not dispute that had the Department wanted to ensure that § 46110 would apply to the Reporting Rule, it could have included a citation to one of the many on-point authorities that appear in Part A. Indeed, it could have simply left the authority citation for part 234—which previously cited §§ 41708 and 41709—unchanged.

The Court concludes that where, as here, the record suggests that a rule mistakenly cites an inapposite statutory authority instead of some other, clearly applicable authority, and where there is no evidence (or even allegation) of bad-faith conduct on the part of the promulgating agency, the Court may treat the rule as issued "under" the mistakenly omitted authority for purposes of ascertaining its jurisdiction under a direct-review statute. This conclusion is in accord with the pragmatic approach taken by the D.C. Circuit in American Petroleum and Loan Syndications, where the court rejected a mechanical analysis of the challenged rules' authority citations and looked instead to the statutory authorities that actually supported the rules. It also comports with the D.C. Circuit's frequently articulated presumption in favor of direct review. See, e.g., Loan Syndications & Trading Ass'n, 818 F.3d at 719–20 (explaining that the D.C. Circuit "interpret[s] ambiguities in direct-review statutes in favor of appellate jurisdiction, absent a firm indication that

[8] The Department responds that agencies are unlikely to attempt such gamesmanship, because a citation to an inapposite statutory provision would jeopardize a regulation's validity in merits proceedings (whether in a district court or a court of appeals). See Defs.' Reply at 8 n.7. But as plaintiffs correctly point out, and as this case itself shows, an agency could cite both a rule's actual statutory authority and the authority that triggers the preferred jurisdictional provision. See Pls.' Reply at 4 n.5. The latter citation would confer jurisdiction (since § 46110 applies to statutes issued "in whole or in part" under Part A), and the former citation would save the rule on merits review.

Congress intended to locate APA review of agency action in the district courts" (alterations and internal quotation marks omitted)).[9] Finally, it avoids the untenable result of a district court exercising jurisdiction over a challenge to a rule that all parties agree could have been—and which the record suggests should have been—promulgated under statutory authority that would trigger direct review in the court of appeals.

III. Conclusion

Because the Extension Rule mistakenly cites 49 U.S.C. §§ 41101 and 41701 instead of chapters 411 and 417 (or alternatively, instead of §§ 41708 and 41709), and because the record suggests that the citation was not intended to invoke a jurisdictional provision that would not otherwise apply, the Extension Rule was "issued . . . under" Part A authority within the meaning of § 46110. The Court therefore lacks jurisdiction over this action, and it will transfer the case "in the interests of justice" to the U.S. Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 1631. The Court will therefore deny without prejudice [2] plaintiffs' motion for a stay, [10] the Department's motion to dismiss for lack of subject-matter jurisdiction, and [14] plaintiffs' motion for summary judgment. A separate order has been entered on this date.

/s/

JOHN D. BATES
United States District Judge

Dated: December 21, 2017

[9] See also Nat'l Auto. Dealers Ass'n v. FTC, 670 F.3d 268, 270 (D.C. Cir. 2012); Gen. Elec. Uranium Mgmt. Corp. v. Dep't of Energy, 764 F.2d 896, 903 (D.C. Cir. 1985). The D.C. Circuit has explained the reason for this presumption as follows: "Placing initial review of agency actions in the courts of appeals often makes good sense. Agencies typically compile records, rendering the district court's factfinding capacity unnecessary. And because appeals are all but guaranteed, requiring district court review may only add delay and expense." Loan Syndications & Trading Ass'n, 818 F.3d at 719 (alterations, citations, and internal quotation marks omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARALYZED VETERANS OF AMERICA,
801 18th Street, N.W.
Washington, D.C. 20006,

and

LARRY J. DODSON,
C/O Paralyzed Veterans of America
801 18th Street, N.W.
Washington, D.C. 20006,

Plaintiffs,

vs.

U.S. DEPARTMENT OF TRANSPORTATION,
1200 New Jersey Ave. SE
Washington, D.C. 20590,

and

ELAINE L. CHAO, in her official capacity as
SECRETARY OF TRANSPORTATION,
1200 New Jersey Ave. SE
Washington, D.C. 20590,

Defendants.

Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Paralyzed Veterans of America ("PVA") and Larry J. Dodson (collectively, "Plaintiffs") sue Defendants Elaine Chao, in her official capacity as Secretary of Transportation, and the U.S. Department of Transportation (collectively, "DOT"); and allege as follows.

Preliminary Statement

1. This case challenges DOT's violation of the Administrative Procedure Act ("APA") in issuing a final rule to delay the compliance date for domestic airlines to track and

report on incidents of mishandled wheelchairs and scooters checked onto flights by passengers with disabilities. DOT issued this rule without notice and comment, and its stated justification shows that the rule is arbitrary and capricious.

2. In October 2016, following a five-year rulemaking process that included public input by travelers, consumer and disability advocacy groups, airlines, and airport authorities, DOT issued a final rule requiring airlines to collect and report data on mishandled wheelchairs and scooters (hereinafter referred to as the "Wheelchair Rule").[1] DOT explained that the rule would fill a vital data gap for disabled passengers, thereby allowing them to make more informed travel decisions. The rule was hailed by travelers, non-profit advocacy groups, and industry associations. The Wheelchair Rule was published in the Federal Register on November 2, 2016, became effective on December 2, 2016, and set a compliance date of January 1, 2018, which DOT determined, based on industry input, provided adequate time for airlines to update their reporting systems. *See* 14 C.F.R. § 234.6.

3. On March 21, 2017, DOT, without any prior public comment, published a new final rule extending the compliance date to January 1, 2019 (hereinafter referred to as the "Delay Rule").[2] The sole stated rationale for this delay was two letters and an email received from airline companies citing a purported regulatory freeze by the Administration and unspecified "challenges" meeting the 2018 compliance date. The airlines in their correspondence did not specify any specific challenges encountered. DOT did not seek any public comment, and the new final rule is bereft of any explanation for how DOT determined that a delay in the compliance

[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).

date was warranted or whether and how it assessed the delay's impact on air travelers with disabilities.

4. In fact, delaying the Wheelchair Rule will harm Plaintiffs, the thousands of paralyzed veterans who constitute PVA's membership, and countless other Americans with mobility impairments. As DOT correctly recognized in issuing the Wheelchair Rule, mishandling of wheelchairs and scooters is a significant impediment to air travel for individuals who rely on such devices, with the "prospect of loss, damage or delay of such devices" leading to a "widespread reluctance" to travel by air. 81 Fed. Reg. at 76303-04. The Wheelchair Rule would ensure that travelers would know which airlines are more likely to mishandle their assistive devices and incentivize airlines to handle devices properly, providing a substantial benefit to paralyzed individuals that the Delay Rule delays without justification.

5. In issuing the Delay Rule, DOT violated the APA by improperly disregarding statutorily mandated rulemaking procedures, and acting arbitrarily, capriciously, and contrary to law.

Parties

6. Paralyzed Veterans of America ("PVA") is a congressionally chartered veterans service organization founded in 1946 and based in Washington, DC. A core tenet of PVA's mission is to be the leading advocate for, *inter alia*, civil rights and opportunities which maximize the independence of veterans of the armed forces who have experienced spinal cord injury or dysfunction. PVA currently has approximately 20,000 members nationwide.

7. Because of their physical disabilities, many of PVA's members require wheelchairs or scooters for mobility. Although airlines must generally allow a person with a disability to stow a manual wheelchair in the passenger cabin's storage area (if the aircraft

contains such an area) or strap it to a passenger seat, many manual wheelchairs are stowed in the cargo compartment. Power wheelchairs are also stowed in the cargo compartment. Thus, PVA's members must leave the safety of their wheelchairs or scooters and give them to airlines for transport. Many of PVA's members have had their wheelchairs or scooters damaged, lost, or otherwise mishandled during travel.

8. PVA advises members whose wheelchairs or scooters have been mishandled in submitting DOT and airline complaints and otherwise in dealing with incidents of mishandling. PVA also works with DOT and airlines to identify problem areas and train airline personnel and their contractors in serving people with disabilities.

9. Larry J. Dodson is a resident of North Augusta, South Carolina, who has high-level quadriplegia and requires a power wheelchair for mobility. His wheelchair has been mishandled by air carriers on numerous occasions, resulting in damage to the chair and delay, pain, and humiliation for Mr. Dodson. After his most recent flight, for example, the airline misplaced his wheelchair for approximately an hour, leaving him in an unsuitable chair where he could not do the pressure releases he needs to do to avoid pain and pressure sores. As a result, he was left with lower-body discomfort and sores that took three days of bed rest to heal.

10. Because of the difficulties air travel poses for him, Mr. Dodson frequently takes lengthier ground transportation instead of flying. If he had information about which airlines have the best track record of transporting wheelchairs—that is, the information that the Wheelchair Rule requires airlines to report—he would be able to choose those airlines and reduce the risk of damage or loss, making it significantly easier for him to fly.

11. Defendant Department of Transportation is a federal agency of the United States within the meaning of the APA, 5 U.S.C. § 551(1). It is headquartered at 1200 New Jersey Ave. SE, Washington, DC 20590.

12. Defendant Elaine Chao, in her official capacity as Secretary of Transportation, has her primary office at 1200 New Jersey Ave. SE, Washington, DC 20590.

Jurisdiction and Venue

13. This Court has authority 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.

14. Venue is proper in this District under 28 U.S.C. § 1391(e), as DOT's headquarters are located in Washington, D.C. and a substantial part of the events or omissions giving rise to plaintiff's claims occurred here.

Facts

DOT's Proposed Rule on Behalf of Airline Passengers with Disabilities

15. Pursuant to 49 U.S.C. §§ 329, 41708, and 41709, the Secretary of Transportation has the authority to require air carriers to collect and report information related to transportation that the Secretary decides will contribute to the improvement of the transportation system.

16. In accordance with this legislative authority, the Secretary of Transportation has adopted regulations for the collection and reporting of data regarding mishandled wheelchairs and scooters that are entrusted to domestic airlines by disabled passengers and transported in aircraft cargo compartments. 14 C.F.R. § 234.6.

17. On July 15, 2011, the DOT published a notice of rulemaking in the Federal Register proposing, *inter alia*, to amend the regulations related to data reporting requirements for mishandled wheelchairs and scooters (hereinafter referred to as the "Proposed Rule").[3]

18. Under the Proposed Rule, domestic air carriers would be required to report the total number of wheelchairs and scooters transported in aircraft cargo compartments and the total number of mishandled wheelchairs and scooters.

19. DOT proposed this rule to improve access to air travel for individuals with mobility disabilities. 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 Fed. Reg. at 41728.

20. 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.*

Public Comment on the Proposed Rule

21. DOT's proposed rule generated 278 public comments from members of the airline industry; industry associations; consumer rights, disability, and veterans service organizations; and individuals with disabilities.

[3] Reporting Ancillary Airline Passenger Revenues, 76 Fed. Reg. 41726 (July 15, 2011).

22. DOT received comments from individuals with disabilities sharing personal stories about their experiences travelling with wheelchairs and scooters. For example, one commenter explained:

> I have cerebral palsy and am severely limited in my ability to move. My motorized wheelchair was damaged [in the amount of] approximately $2000 in June when it was mishandled by Delta Airlines staff (loading the chair on the flight to Washington DC). During my August 2011 trip, I was personally injured when United Airlines staff mishandle[d] me when they were loading me onto the plane (flight to Washington DC). Also, on the flight back to Oklahoma City my chair was completely disassembled by United Airlines staff and has resulted in approximately $1500 in damage to the chair.

Comment of Jason Price, Docket No. RITA-2-11-0001 (DOT).

23. Another commenter described repeated damage to and loss of his wheelchair:

> I have been a traveler with a disability for the past 23 years, thanks to a spinal cord injury I received in January of 1988. The severity of my disability requires me to use a power wheelchair for mobility, and during that period I have traveled on over 150 flights throughout the country. During that time I have also experienced instances of damage to my equipment, injury to myself, loss of vital wheelchair parts, or extensive delays when disembarking from the airplane in about a third of those trips. . . . On two occasions, my wheelchair[] was left at the departing airport when I return[ed] to Sacramento from Washington, DC and Honolulu, Hawaii. Despite written instructions not to carry the chair, I watched airline employees attempt to carry it up the stairs to a jetway and in the process have the batteries and extensive wiring harness ripped from the chair as the pieces bounced back down the stairway. That left me without my wheelchair for three days while I was attending a meeting, and also cost [the] airline over $5,000 to repair.

Comment of Michael Clifton Collins, Docket No. RITA-2-11-0001 (DOT).

24. Another commenter, recounting his experiences, praised the proposal: "This is a great and needed proposal! Over the last 15 years of flying I have had my power wheelchair damaged (to[o] many times to count), disassembled and left on the Tarmac for me to put back together, blown up when batteries were not handled correctly and lost!" Comment of Dennis Frederick Lang, Docket No. RITA-2-11-0001 (DOT).

25. DOT also received comments from veterans with disabilities sharing personal stories about mishandled mobility devices. As one veteran explained, "[n]umerous veterans have

complained about their mobility devices being damaged or not coming back at all." Comment of Ronald D. Brimmer, U.S. Marine Disabled Veteran, Docket No. RITA-2-11-0001 (DOT).

26. And Plaintiff PVA wrote strongly in support of the proposed 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." Regrettably, there is no current way to gather information on the full magnitude of the problem of mishandled wheelchairs/scooters. Current required reporting of problems with wheelchairs is so general that lost or broken wheelchairs are lumped in with complaints of missing requests for wheelchair transfer within a terminal. Mishandling of personal wheelchairs (indeed all personal mobility devices) is egregious enough to merit separate reporting and investigation. Without a robust data collection requirement, complaints of mishandled mobility devices remain single events and may never accrue to the level of pattern or practice, the Department's primary basis for investigating complaints. Also, adequate data will provide the basis for administrative oversight of air carriers' training obligations under the ACAA.

Comment of Paralyzed Veterans of America, Docket No. RITA-2-11-0001 (DOT).

27. DOT received comments from airports supporting the proposed rule. For example, Airports Council International-North America ("ACI-NA"), the principal association for domestic airports, whose members emplane 95% of all domestic airline passenger traffic, commented that "[a]irports 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-2-11-0001 (DOT).

28. One airline industry organization, Airlines for America ("A4A"), submitted a comment, which claimed "that the Department had no basis for concluding that passengers with disabilities are reluctant to travel by air due to wheelchair mishandling, and that the proposal lacked a public policy justification." 81 Fed. Reg. at 76303. US Airways, however, individually commented that it did not object to the rule. *Id.* at 76303-04.

DOT Holds a Public Hearing on the Proposed Rule

29. On April 27, 2012, DOT published a notice of public meeting on the Proposed Rule in the Federal Register. 77 Fed. Reg. 25105. The meeting was held at DOT's headquarters on May 17, 2012.

30. The meeting was run by DOT representatives from the Office of the Secretary and Office of Economic & Strategic Analysis, the Research and Innovative Technology Administration and Office of the Chief Counsel, and the Office of the General Counsel. The Reporting of Ancillary Airline Passenger Revenues, Public Meeting Attendance List, RITA-2011-0001 (DOT).

31. Attendees included representatives from A4A, Alaska Airlines, American Airlines, ACI-NA, American Society of Travel Agents, Consumer Travel Alliance, Delta Air Lines, Financial Industry Regulatory Authority, Interactive Travel Services Association, JetBlue Airways, Regional Airline Association, Sabre, Sackler Policy Services, LLP, Southwest Airlines, Spirit Airlines, United Airlines, and US Airways. *Id.*

32. During this meeting, DOT heard extensively about each airline's system for collecting data on mishandled wheelchairs and scooters. DOT also heard extensively about the anticipated costs of complying with the requirements of the proposed rule.

33. Airlines were asked to estimate how long they would need to come into full compliance with the requirements of the proposed rule. Delta Air Lines estimated that it would take 12 to 18 months, and that the compliance date should begin on the first of a year. The Reporting of Ancillary Airline Passenger Revenues, Transcript of Public Meeting, RITA 2011-0001, 78:21-22–79:1-5 (May 17, 2012). American Airlines agreed with that estimation. *Id.* at 79:22–80:1-2.

34. US Airways (77:11-12), Delta Air Lines (78:16-17), American Airlines (80:3-4), and United Airlines (80:6-8) each stated that having extra time to implement the requirements of the proposed rule would not reduce the overall cost of compliance.

DOT Issues the Wheelchair Rule

35. On November 2, 2016, DOT published the Wheelchair Rule. The rule took effect on December 2, 2016. *See* 81 Fed. Reg. at 76300.

36. DOT adopted the changes to wheelchair and scooter data collection proposed in the original 2011 proposed rule and discussed in the 2012 Public Meeting.

37. DOT explained that the Wheelchair Rule would "fill[] a data gap" and "provide passengers with disabilities with a metric that they may use to compare air carriers and to make informed travel decisions." 81 Fed. Reg. at 76300, 76304.

38. DOT addressed the airlines' assertion that there was no basis for concluding that persons with mobility disabilities are discouraged from traveling due to the prevalence of mishandled wheelchairs and scooters, explaining "that the public comments received from air

travelers with disabilities and disability rights organizations are representative of a widespread reluctance." *Id.* at 76304.

39. DOT further 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 . . . and we continue to think that consumers with disabilities have the right to know which airlines provide the best service and have a right to select their air carriers based on that knowledge." *Id.*

40. In considering the compliance date for the Wheelchair Rule, DOT noted that "most carriers commented that they would need 12 to 24 months [following publication of the rule] to comply because of time necessary for reprogramming existing systems, installing new equipment, and training employees." *Id.* at 76304-05.

41. DOT also noted that Delta Air Lines and US Airways had commented that a compliance date of January 1 would be preferable "because it would provide the clearest demarcation between data sets." *Id.* at 76305.

42. DOT determined that the compliance date would be January 1, 2018—14 months after publication of the final rule—and stated that this date "provides air carriers with adequate time to update their internal systems and reporting processes." *Id.*

DOT Issues a New Final Rule Delaying the Compliance Date

43. On November 29, 2016, then President-elect Donald J. Trump stated his intent to nominate Elaine Chao to for Secretary of Transportation. She was confirmed on January 31, 2017.

44. On January 20, 2017, then Assistant to the President and Chief of Staff, Reince Priebus, issued a memorandum to agency heads announcing a "Regulatory Freeze Pending

Review."[4] With respect to "regulations that have been published in the [Federal Register] but have not taken effect," Priebus asked agencies to postpone the effective date by 60 days "as permitted by law." Priebus further requested that "[w]here appropriate and as permitted by applicable law, [agency heads] should consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period."

45. On January 24, 2017, the Acting Director for the Office of Management and Budget ("OMB"), Mark Sandy, issued a follow-up memorandum to agency heads regarding implementation of a regulatory freeze.[5] With respect to published rules that had not yet taken effect, Sandy stated that "[t]o the maximum extent possible, [agency] explanations for postponement should be individualized to the regulation being postponed."

46. Neither memorandum is applicable to the November 2, 2016, Wheelchair Rule issued by DOT because that rule had taken effect on December 2, 2016.

47. Between January 27, 2017, and March 2, 2017, DOT received two letters and an email from A4A and Delta Air Lines, requesting an extension of the compliance date for the Wheelchair Rule.

48. On January 27, A4A wrote to DOT that a delay in the compliance date was consistent "with the spirit" of Priebus's memorandum. A4A followed up by email on March 2, again invoking Priebus's memorandum and asserting that the airline "[i]ndustry is facing some

[4] 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), https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies.
[5] Memorandum from Mark Sandy, Acting Director, OMB, to Heads and Acting Heads of Executive Departments and Agencies, "Memorandum: Implementation of Regulatory Freeze" (Jan. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/01/24/implementation-regulatory-freeze.

real challenges with both parts of this regulation and will need more time to implement it." A4A also stated that they would be back in touch with "more information in the near future."

49. On February 10, Delta Air Lines requested an extension in the compliance date as "consistent with" the Priebus memoranda.

50. On March 21, 2017, DOT published a final rule in the Federal Register delaying the compliance date by one year, to January 1, 2019. The Delay Rule took immediate effect. 82 Fed. Reg. at 14437.

51. DOT issued the Delay Rule without providing notice or the opportunity for public comment.

52. The only grounds stated by DOT for extending the compliance date are the Priebus memo and the requests from A4A and Delta Air Lines. *Id.*

53. This delay will have an adverse effect on veterans with mobility disabilities. As PVA's Executive Director recently explained:

> Paralyzed Veterans of America has grave concerns over the delays of this key component to providing disabled travelers with basic civil rights. . . . Our members are tired of incurring damage to their persons and wheelchairs when they travel by air, only to be caught in a web of inconvenient reporting and bureaucracy that results in little to no restitution. 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.

54. Senator Tammy Duckworth has likewise expressed concern about the irreparable harm that individuals with disabilities will suffer as a result of this rule:

> 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), *available at* https://www.duckworth.senate.gov/sites/default/files/DoT%20Disability%20Protections%20Rule.pdf.

Claims for Relief

Count One (Violation of APA - Failure to Comply with Mandatory Rule Making Procedure)

55. Plaintiff repeats and incorporates by reference each of the foregoing allegations as if fully set forth herein.

56. DOT's promulgation of the Delay Rule extending the compliance date for airlines to collect and report data on mishandled wheelchairs and scooters constitutes rulemaking within the meaning of the APA, 5 U.S.C. § 551(5), and was therefore subject to the notice and comment requirements of 5 U.S.C. § 553.

57. DOT's promulgation of the Delay Rule without providing notice and an opportunity for public comment was without observance of procedure required by law, in violation of the APA, 5 U.S.C. § 706.

58. DOT's promulgation of the Delay Rule without publishing the rule 30 days prior to the effective date of the rule was without observance of procedure required by law, in violation of the APA, 5 U.S.C. § 706.

Count Two (Violation of APA - Arbitrary and Capricious Action)

59. Plaintiff repeats and incorporates by reference each of the foregoing allegations as if fully set forth herein.

60. The grounds cited by DOT do not justify the Delay Rule.

61. In deciding to delay the effective date of the Wheelchair Rule, DOT therefore acted arbitrarily, capriciously, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706.

WHEREFORE, plaintiffs pray that this Court:

1. declare that defendants violated the APA in issuing the Delay Rule and that it is therefore unlawful;

2. vacate the Delay Rule and reinstate the original Wheelchair Rule;

3. award plaintiffs their costs, attorneys' fees, and other disbursements for this action; and

4. grant any other relief this Court deems appropriate.

Dated: July 31, 2017

Respectfully submitted,

/s/ *Javier M. Guzman*
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(D.C. Bar No. 462679)
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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. 17-01539 (JDB)

JOINT APPENDIX

Javier M. Guzman, Bar No. 462679
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Airlines for America®

We Connect the World

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January 27, 2017

Judy Kaleta, Deputy General Counsel
Blane Workie, Assistant General Counsel
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Applicability of the January 20 Reince Priebus Memorandum – Regulatory Freeze Pending Review

Dear Judy and Blane,

I am writing to request that the Department announce by February 1 it is extending the effective dates, implementation dates or response dates of several regulatory actions that are covered by the January 20, 2017 memorandum to department heads directing a "Regulatory Freeze Pending Review" (the "Memorandum"). The purpose of the freeze is to ensure that new Department heads or their designees have an opportunity to review and approve any new or pending regulations.

Three items listed below have fast-approaching deadlines -- comments on the proposed rule for mobile phone use (February 13), the implementation of certain provisions of Passenger Protection Rule III (February 15), and responses to the Request for Information on distribution practices (March 31). I therefore would appreciate knowing by February 1 if the Department will extend the implementation and comment dates for these regulatory actions.

The regulatory freeze is not limited to final rules. For purposes of the directive, the term "regulation" is defined to mean "regulatory action" as used in EO 12866 and it is to be broadly construed to include "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking." It also covers "any agency statement of general applicability and future effect" setting forth agency policy on, or interpretation of, a statutory or regulatory issue.

Paragraph 3 of the Memorandum applies to regulations that have been published in the Federal Register but not yet taken effect. It requires that the effective date of such regulations be postponed 60 days from January 20, 2017.

Paragraph 3 must be construed liberally to give effect to the broad purpose and intent of the Memorandum. Clearly, in the case of final rules, the effective date, or implementation date if different than the effective date, should be delayed a minimum of 60 days. In the case of a notice requesting comment

on a proposed action, or requesting the submission of views or information, the Memorandum's directive to postpone the effective date should be applied to the due date for comments or submissions. Specifically, the Department should suspend the comment or response period until the Secretary or her designee has had an opportunity to review and approve (or disapprove) the regulatory action. This approach is consistent with the spirit of the Memorandum and will allow the Secretary time to review such regulatory actions and, importantly, not cause interested parties to waste resources by filing comments, views or information should the Secretary or her designee decide to terminate the regulatory action. If the Secretary or her designee approves the continuation of the regulatory action, a new 60 day comment or response period should be issued.

The DOT "regulatory actions" listed below are covered by the Memorandum. Consistent with Paragraph 3 of the Memorandum, the effective date or implementation date of final rules should be delayed at least 60 days, and for other regulatory actions the due date for comments or submissions should be delayed until 60 days after the Secretary has approved their continuation:

1. Final Rule: Enhancing Passenger Protections III, provisions concerning codeshare disclosure requirements and prohibition of undisclosed flight display bias (implementation date February 15, 2017). Docket No. DOT–OST–2014–0056

2. Final Rule: Reporting Data for Mishandled Baggage and Wheelchair Damage (effective date December 2, 2016; implementation date January 1, 2018). Docket No. DOT–RITA–2011–0001

3. Supplemental Notice of Proposed Rulemaking: Transparency of Airline Ancillary Service Fees (comment period closes March 20, 2017). Docket No. DOT-OST-2017-0007

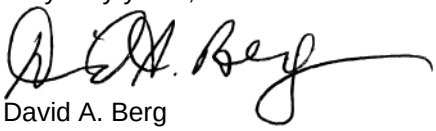
4. Request for Information: Exploring Industry Practices on Distribution and Display of Airline Fare, Schedule, and Availability Information (comment period closes March 31, 2017). Docket No. DOT–OST–2016–0204

5. Notice of Proposed Rulemaking: Use of Mobile Wireless Devices for Voice Calls on Aircraft (comment period closes February 13, 2017). Docket No. DOT-OST-2014-0002

This list is not comprehensive and other pending regulatory actions may be covered by the Memorandum. The Advance Notice of Proposed Rulemaking on refunding baggage fees for delayed checked bags is not listed because paragraph 4 of the Memorandum excludes regulations subject to a statutory deadline. It also appears that the recently published Notice of Proposed Rulemaking to expand the list of drugs tested in transportation programs falls under the Memorandum's safety exception.

Thank you for considering our request. We look forward to your prompt response. Please contact me if you have any questions.

Very truly yours,



David A. Berg

From: Mullen, Doug [mailto:DMullen@airlines.org]
Sent: Monday, February 27, 2017 5:19 PM
To: Workie, Blane (OST)
Cc: Dols, Jonathan (OST); Graber, Kimberly (OST); Berg, Dave
Subject: SNPRM Comment Period

Blane,

It was nice to see you on Friday at the ABA Forum. I'm writing to ask if DOT will extend the comment period for the SNPRM on Transparency of Airline Ancillary Service fees for 30 days while the Department takes additional time to analyze the Regulatory Freeze Pending Review Memorandum.

We noticed in a Travel Tech letter to you and Judy dated February 3rd that Travel Tech does not oppose a 30-day extension to the comment period for the DOT SNPRM on Transparency of Airline Ancillary Service Fees. Providing additional time will give all parties more time to develop comments, answer DOT questions, and provide material that will assist the Department in making a better-informed decision in this rulemaking, if it goes forward. Providing this additional time is not controversial and most likely welcomed by all parties given Travel Tech's statement.

We appreciate the Department addressing and extending the compliance date for certain Enhancing Passenger Protections III final rule provisions (codeshare disclosure and undisclosed flight display bias) and await your decision on application of the Memorandum for the following regulatory actions:

- Final Rule: Reporting Data for Mishandled Baggage and Wheelchair Damage (effective date December 2, 2016; implementation date January 1, 2018). Docket No. DOT–RITA–2011–0001
- Supplemental Notice of Proposed Rulemaking: Transparency of Airline Ancillary Service Fees (comment period closes March 20, 2017). Docket No. DOT-OST-2017-0007
- Request for Information: Exploring Industry Practices on Distribution and Display of Airline Fare, Schedule, and Availability Information (comment period closes March 31, 2017). Docket No. DOT–OST–2016–0204

Please let me know if you would like to discuss.

Best regards,
Doug

Doug Mullen
Associate General Counsel
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From: Mullen, Doug [mailto:DMullen@airlines.org]
Sent: Thursday, March 02, 2017 10:08 AM
To: Workie, Blane (OST)
Cc: Berg, Dave
Subject: Mishandled Baggage and Wheelchair Final Rule

Blane,

As a follow up to our January 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.

We will be in touch with more information in the near future.

Best regards,
Doug

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The White House

Office of the Press Secretary

For Immediate Release January 20, 2017

Memorandum for the Heads of Executive Departments and Agencies

FROM: Reince Priebus
Assistant to the President and Chief of Staff

SUBJECT: Regulatory Freeze Pending Review

The President has asked me to communicate to each of you his plan for managing the Federal regulatory process at the outset of his Administration. In order to ensure that the

President's appointees or designees have the opportunity to review any new or pending regulations, I ask on behalf of the President that you immediately take the following steps:

1. Subject to any exceptions the Director or Acting Director of the Office of Management and Budget (the "OMB Director") allows for emergency situations or other urgent circumstances relating to health, safety, financial, or national security matters, or otherwise, send no regulation to the Office of the Federal Register (the "OFR") until a department or agency head appointed or designated by the President after noon on January 20, 2017, reviews and approves the regulation. The department or agency head may delegate this power of review and approval to any other person so appointed or designated by the President, consistent with applicable law.

2. With respect to regulations that have been sent to the OFR but not published in the Federal Register, immediately withdraw them from the OFR for review and approval as described in paragraph 1, subject to the exceptions described in paragraph 1. This withdrawal must be conducted consistent with OFR procedures.

3. With respect to regulations that have been published in the OFR but have not taken effect, as permitted by applicable law, temporarily postpone their effective date for 60 days from the date of this memorandum, subject to the exceptions described in paragraph 1, for the purpose of reviewing questions of fact, law, and policy they raise. Where appropriate and as permitted by applicable law, you should consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period. In cases where the effective date has been delayed in order to review questions of fact, law, or policy, you should consider potentially proposing further notice-and-comment rulemaking. Following the delay in effective date

    a. for those regulations that raise no substantial questions of law or policy, no further action needs to be taken; and

    b. for those regulations that raise substantial questions of law or policy, agencies should notify the OMB Director and take further appropriate action in consultation with the OMB Director.

4. Exclude from the actions requested in paragraphs 1 through 3 any regulations subject to statutory or judicial deadlines and identify such exclusions to the OMB Director as soon as possible.

5. Notify the OMB Director promptly of any regulations that, in your view, should be excluded from the directives in paragraphs 1 through 3 because those regulations affect

critical health, safety, financial, or national security matters, or for some other reason. The OMB Director will review any such notifications and determine whether such exclusion is appropriate under the circumstances.

6. Continue in all circumstances to comply with any applicable Executive Orders concerning regulatory management.

As used in this memorandum, "regulation" has the meaning given to "regulatory action" in section 3(e) of Executive Order 12866, and also includes any "guidance document" as defined in section 3(g) thereof as it existed when Executive Order 13422 was in effect. That is, the requirements of this memorandum apply to "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking," and also covers any agency statement of general applicability and future effect "that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue."

This regulatory review will be implemented by the OMB Director. Communications regarding any matters pertaining to this review should be addressed to the OMB Director.

The OMB Director is authorized and directed to publish this memorandum in the Federal Register.

REINCE PRIEBUS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARALYZED VETERANS OF AMERICA, et al.,	)	Civil Action No. 17-1539
Plaintiffs,	)	December 18, 2017
v.	)	9:30 a.m.
UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,	)	Washington, D.C.
Defendants.	)	

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE JOHN D. BATES,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiffs:

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issued even partly under party authority, and the rule plaintiffs challenged was it should hold under the authority delegated from Part A to the Department of Transportation general counsel.

The D.C. Circuit has repeatedly explained that any ambiguity over where review lies must be resolved in favor of the Court of Appeals. And their --

THE COURT: But it's pretty messy here about the authority references in the notice of proposed rule making the final rule, the amendment to the rule, and in the 2017 234. It all refer to provisions that -- don't you think they actually should refer to, or do you think those are correct authority references? What's the Department's view on that?

MS. BAILEY: First of all, Your Honor --

THE COURT: I'm talking about in particular, not the 329 reference, but the references to 41101 and 41701.

MS. BAILEY: If I understand Your Honor's question correctly, what is the Department's position on whether or not those statutes were cited purposefully or inadvertently?

THE COURT: That's one way to put it.

MS. BAILEY: We didn't develop the argument that those sections particularly were the basis for the final rule because the final rule expressly relied on section 1.27(n). However, plaintiffs were incorrect to say that we conceded that those sections don't apply. We just didn't take a position on whether or not they apply. However, it does appear --

THE COURT: It's interesting. I mean, for the most part, when you look at these kinds of provisions and the authority citation, it's to a statutory authority citation, but you're relying on a little regulatory citation about delegation of authority within the Department of Transportation.

MS. BAILEY: That's correct, Your Honor. Because the general counsel issued the rule pursuant to the authority that was delegated wholly from Part A. Section 1.27(n) delegated the authority that comes -- the general counsel issued the rule under the authority delegated in 1.27(n), and that authority delegated came entirely from chapter 417, which is in Part A.

So the rule expressly, on its face, was issued under Part A authority. So there's no reason to look past the citation to 1.27(n). Even if Your Honor wished to look at the citation to the authority for Part 234 as a whole, sections 41101 and 41701 are also Part A authority. So any way you approach that issue.

THE COURT: I know they're Part A authority, but they don't really provide a basis either for this rule or the amendment or indeed for 234, and previously, of course, the authority reference in 234 was not to those two statutory provisions. It was to other statutory provisions that do seem to find the authority.

MS. BAILEY: Sections 41708 and 41709 do appear to be -- or are more directly on point. However, it's not clear that 41701 has no applicability. Section 41701 authorizes the

and 41701.

THE COURT: I understand that that's -- that little wrinkle. But I still don't see any explanation for why this has happened, and there are some fairly important parts to the regulations that 14 CFR 234 aren't there. I mean, all the on time performance reports are under that section, aren't they, for the airlines?

MS. BAILEY: Yes, sir, they're certainly --

THE COURT: And you think the on time performance reports really have as their authority 41101, which is entitled "Requirement for a Certificate," requiring an air carrier to obtain a certificate or 41701, which is entitled "Classification of Air Carriers," which authorizes the Department to establish reasonable classification for air carriers?

It just seems like this has been messed up by the Department of Transportation. That's what it appears like to an outside observer, and maybe I should get off of that and let you go on and tell me why, notwithstanding this mess, the jurisdiction lies in the Court of Appeals.

MS. BAILEY: Your Honor, it's certainly possible that the citation to 41101 and 41701 were inadvertent, but that doesn't change the jurisdictional analysis.

First of all, we're not talking about an entirely different statute. We're talking about a different section number within the same chapter of the same statute that the

threshold jurisdictional inquiry where the Court of Appeals only has jurisdiction were the regulation valid. That just flips the analysis on its head.

THE COURT: So what should I do if I find jurisdiction in District Court?

MS. BAILEY: If Your Honor disagrees with our jurisdictional argument, we did not brief the merits, and so --

THE COURT: Oh, really. I didn't realize that.

MS. BAILEY: Yes, Your Honor. Because we did not brief the merits, if this Court disagrees on jurisdiction, then summary judgment would have to be granted for plaintiffs.

THE COURT: All right. So you're not arguing to me that I should allow you to do further briefing or anything. You're conceding that summary judgment should be granted for the plaintiffs --

MS. BAILEY: We're not --

THE COURT: -- if I find jurisdiction?

MS. BAILEY: We're not conceding the merits of the case. We are aware that we were given the opportunity to move for summary judgment, we did not do so, and because we did not do so --

THE COURT: And you did not oppose their motion.

MS. BAILEY: That is correct. So the proper remedy would be to grant summary judgment. We made the arguments that were best available in our briefs.