[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

PETITION FOR WRIT OF MANDAMUS

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STATEMENT REGARDING ORAL ARGUMENT

This petition for writ of mandamus presents an issue concerning the proper statutory construction of 49 U.S.C. § 46110(a). The issue presents two questions. First, in determining whether a direct-review provision applies, is an agency bound to the statutory citations it lists in a published final rule? Second, must the citations listed in the final rule at least arguably support the authority exercised in that rule?

Given the complexity of the questions to be addressed, Petitioners respectfully submit that oral argument may aid the Court's resolution of this matter.

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GLOSSARY

DOT	United States Department of Transportation
PVA	Paralyzed Veterans of America, Inc.

STATEMENT OF ISSUES

Whether the district court erred in transferring the case to this Court pursuant to 49 U.S.C. § 46110(a).

INTRODUCTION

The Department of Transportation ("DOT") published a final rule—the Delay Rule—delaying the compliance date of certain requirements for airlines to track and report incidents of wheelchair damaged on flights. It did so without first providing the public with notice or the opportunity to comment, and on the basis of a single sentence in an email from an airline lobbyist claiming that airlines were facing "challenges" meeting the original compliance date. Petitioners Paralyzed Veterans of America ("PVA") and Larry Dodson, a paralyzed Air Force veteran, filed suit in district court.

But instead of addressing the merits of Petitioners' claims, Respondents insisted that the case should have been filed first in the court of appeals in accordance with a direct-review provision, 49 U.S.C. § 46110(a). That direct-review provision, however, applies only to "order[s] issued . . . in whole or in part under," *inter alia*, a specific part of the Transportation Code, part A, Subtitle VII, Title 49 ("part A"). As authority for the Delay Rule, DOT cited three statutes: 49 U.S.C. §§ 329, 41101, and 41701. But sections 41101 and 41701—the only cited part A statutes—are wholly irrelevant to the Delay Rule, granting DOT the

authority to require certificates (49 U.S.C. § 41101) and establish airline classifications (49 U.S.C. § 41701). Indeed, DOT did not argue below that those two statutes actually supported the rule, instead contending that (1) a cited *regulation*, 49 C.F.R. § 1.27(n), triggered the direct-review provision; (2) two part A statutes that *had not been cited* in the Delay Rule, 49 U.S.C. §§ 41708 and 41709, triggered the direct-review provision; and (3) the *mere citation* of the part A statutes was sufficient—despite the irrelevance of those provisions—to trigger the direct-review provision.

Notwithstanding these maneuvers, one thing is clear: as the district court observed at oral argument, Respondents "messed up." App.48. Respondents failed to cite applicable statutory authority that brings the Delay Rule within the purview of section 46110(a). And their attempts to retroactively correct the error must be rejected. Because the Delay Rule is not subject to section 46110(a) jurisdiction, the district court was the proper forum, and this case must be returned there.

BACKGROUND

I. Legal Background.

"In this circuit, the normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals." *Am. Petrol. Inst. v. SEC* ("*API*"), 714 F.3d 1329, 1332 (D.C. Cir. 2013) (quoting *Nat'l*

Auto Dealers Ass'n v. FTC, 670 F.3d 268, 270 (D.C. Cir. 2012)). "Initial review occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." *Id.* (quoting *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007)).

Congress has provided for direct-review over certain agency actions related to air commerce and safety. *See* 49 U.S.C. § 46110(a). As relevant here, section 46110(a) provides for exclusive appellate jurisdiction over challenges to "order[s] issued … in whole or in part under" part A, Subtitle VII, Title 49 ("part A"). The term "order" includes a final rule. *See Nat'l Fed'n of the Blind v. U.S. DOT ("NFB")*, 827 F.3d 51, 55 (D.C. Cir. 2016). And the verb "issued" means the official publication of a document. *See Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 519 (D.C. Cir. 2011).

To determine under what authority an "order" is "issued," courts must look to a rule's citation of authority—a requisite part of any Federal Register publication of a final rule. 1 C.F.R. § 21.40 ("Each section in a document subject to codification must include, or be covered by, a complete citation of the authority under which the section is issued."). That citation of authority must identify both (a) the "[g]eneral or specific authority delegated by statute," and (b) any "[e]xecutive delegations … necessary to link the statutory authority to the issuing agency." *Id.* at 76300, 76305.

II. Factual Background.

1. In 2011, DOT proposed a rule to amend 14 C.F.R. § 234.6 in an effort to improve access to air travel for individuals with mobility disabilities, including by requiring airlines to report on incidents of mishandled or damaged wheelchairs and mobility devices. Reporting Ancillary Airline Passenger Revenues, 76 Fed. Reg. 41,726 (July 15, 2011). That proposal was published as a final rule in the Federal Register on November 2, 2016 (the "Wheelchair Rule"). Reporting Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments, 81 Fed. Reg. 76,300 (Nov. 2, 2016). The rule became effective on December 2, 2016, and, based on input received from airlines, set a January 1, 2018 compliance date for the reporting requirements. *Id.* at 76305.

On January 20, 2017, the White House issued a regulatory freeze memorandum directing agencies to postpone for 60 days rules that had been published in the Federal Register but had not yet become effective. App.42-44. Despite the fact that the memorandum was inapplicable to the Wheelchair Rule, which had already become effective, an industry lobbying group, Airlines for America ("A4A"), contacted DOT multiple times over the following weeks to request that the Wheelchair Rule be delayed pursuant to that memorandum. App.38-41. In its final communication to DOT, on March 2, 2017, A4A requested that the agency delay the Wheelchair Rule's implementation period by one year,

until January 2019, claiming for the first time that "[i]ndustry is facing some real challenges with both parts of this regulation and will need more time to implement it." App.41.

That same day, DOT announced without further explanation that "[a]fter carefully considering the [airlines'] requests," it would delay the compliance date for the Wheelchair Rule until January 1, 2019. Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date 82 FR 14,437 (Mar. 21, 2017) (the "Delay Rule"). The Delay Rule was published as a final rule, without public notice and comment, in the Federal Register on March 21, 2017. *Id.*

2. As relevant here, the citations of authority for 14 C.F.R. § 234.6, where the Wheelchair Rule regulation is codified, have been amended twice. Prior to the proposed Wheelchair Rule, the citations of authority for 14 C.F.R. § 234.6 read: "49 U.S.C. 329 and Sections 41708 and 41709." *See* 14 C.F.R. pt. 234 (2011). The proposed Wheelchair Rule "revised" that citation of authority to read: "49 U.S.C. 329 and chapters 41101 and 41701." 76 Fed. Reg. at 41730. And the published Wheelchair Rule again "revised" the citations of authority to read: "49 U.S.C. 329, 41101, and 41701." 81 Fed. Reg. at 76306.

The Delay Rule did not further revise the citations of authority. Instead, it listed as authority "49 U.S.C. 329, 41101, 41701. 82 Fed. Reg. at 14438. Section

329 gives the Secretary of Transportation the authority to "collect and collate" information necessary to improve the transportation system in the United States. Section 41101 provides that air carriers must obtain certificates to operate. And section 41701 allows the Secretary of Transportation to "establish reasonable classifications" for air carriers and "reasonable requirements" for each class. *Id.* Sections 41101 and 41701 are part A statutes (*see* 49 U.S.C. §§ 41101, 41701), but neither substantively supports Respondents' promulgation of the Delay Rule (*see infra* 22-23). Of the cited statutes, only section 329 was related to the action taken in the Delay Rule, but section 329 is not a part A statute. It, rather, is codified in a different subtitle of the Transportation Code that concerns, among other things, DOT's general duties and powers. 49 U.S.C. §§ 301-354.

In addition, directly above the signature of then-acting General Counsel Judith Kaleta, the Delay Rule stated: "[i]ssued this 2nd day of March 2017 in Washington D.C., under authority delegated in 49 C.F.R. 1.27(n)." Section 1.27(n) is an executive delegation of authority from the Secretary of Transportation to the General Counsel and allows the General Counsel to "conduct all departmental regulation of airline consumer protection and civil rights pursuant to" certain chapters within part A. *Id.*

III. Procedural Background.

On July 31, 2017, petitioners PVA and Mr. Dodson filed suit in the district court below, alleging that Respondents acted unlawfully by issuing the Delay Rule without notice and comment and based on a single sentence in an email from an airline lobbyist that airlines were facing unspecified implementation "challenges." *See* App.22. In addition, Petitioners moved to stay the Delay Rule. *See* App.2.

The district court scheduled cross-motions for summary judgment and directed Respondents to file an opposition to Petitioners' stay motion. *See* App.3. Respondents, however, waived their right to file a motion for summary judgment and instead filed a combined motion to dismiss for lack of jurisdiction and opposition to Petitioners' stay motion. Defs.' Combined Mem. at 1 & n.1, No. 17-1539 (D.D.C.), Dkt. 10[1] ("Defendants have decided not to file a motion for summary judgment."). In opposing Petitioners' stay motion, Respondents did not dispute that Petitioners were likely to succeed on the merits. *See id.* at 12-14. Petitioners then filed a motion for summary judgment. *See* App.4. In response, Respondents filed a reply to the motion to dismiss, but expressly stated that they were not filing an opposition to Petitioners' summary judgment motion. *See* Reply in Support of Defs.' Mot. To Dismiss at 1 n.1, Dkt. 18. ("Defendants do not

[1] All "Dkt." references are to the docket in the district court prior to transfer, 17-1539 (D.D.C.).

address Plaintiffs' merits arguments that Defendants violated the APA and thus are not filing a separate response to Plaintiffs' motion for summary judgment.").

In sum, Respondents made no attempt before the district court to defend the merits of this case. *See* App.7 ("Before the Court, the Department defends neither the substance of the Extension Rule nor the procedures that were used to promulgate it."). Instead, Respondents only challenged jurisdiction, arguing that the district court lacked jurisdiction pursuant to 49 U.S.C. § 46110. Respondents principally argued that the citation in the Delay Rule to the executive delegation in 49 C.F.R § 1.27(n) was sufficient to trigger the direct-review provision because section 1.27(n) delegates to the General Counsel the authority to regulate pursuant to part A. Defs.' Combined Mem. at 9-11. Respondents alternatively argued that citation in the Delay Rule of two part A statutes (49 U.S.C. §§ 41101, 41701) triggered the direct-review provision, even if the cited statutes were wholly inapplicable to the Delay Rule, and that two applicable part A statutes (49 U.S.C. §§ 41708, 41709) triggered the direct-review provision, even if they were *not cited* in the Delay Rule. *Id.* at 10-11.

The district court denied without prejudice all motions and transferred the case to this Court pursuant to 28 U.S.C. § 1631. *See* App.6. In the accompanying opinion, the district court rejected Respondents' argument that the court could not look behind the cited part A statutes to determine whether those provisions "even

colorably support the rule" (App.13) and agreed with Petitioners that neither section 41101 nor section 41701 "even arguably supports" the Delay Rule (App.11). The Court also rejected Respondents' argument that the citation of 49 C.F.R. § 1.27(n) was sufficient to trigger the direct-review provision, noting that citation to § 1.27(n) "was meant only to identify the *delegated* authority that allowed the General Counsel to issue the Extension Rule on the Secretary's behalf." App.12-13.

The district court nonetheless found jurisdiction lacking. It first determined that, although it *could* look behind the cited statutes to ensure they arguably supported the action taken in the Delay, such a "peek" was not warranted when there had been no allegation of agency bad faith. App.13. The court then held that two uncited part A statutes—49 U.S.C. §§ 41708 and 41709—triggered section 46110(a) jurisdiction:

> 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.

App.19. The district court thus held that it lacked jurisdiction, and transferred this action to this Court. App.20.

STANDARD OF REVIEW

Mandamus is proper when (1) the petitioner has "no other adequate means to attain the relief he desires," (2) the petitioner has shown that his right to the issuance of the writ is "clear and indisputable," and (3) the court, in the exercise of its discretion, is "satisfied that the writ is appropriate under the circumstances." *Dhiab v. Obama*, 787 F.3d 563, 568 (D.C. Cir. 2015); *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004)), *cert. denied sub nom. U.S. ex rel. Barko v. Kellogg Brown & Root, Inc.*, 135 S. Ct. 1163 (2015).

In questions of statutory interpretation, this Court must "begin, as always with the statute's text." *Pub. Inv'rs Arbitration Bar Ass'n v. SEC*, 771 F.3d 1, 4 (D.C. Cir. 2014). When interpreting the language of a statute, "a literal reading of Congress' words is generally the only proper reading." *United States v. Locke*, 471 U.S. 84, 93 (1985). This is particularly true when interpreting judicial review provisions, which "must be construed with strict fidelity to their terms." *Stone v. INS*, 514 U.S. 386, 405 (1995); *see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (slip op.) ("The Court declines the Government's invitation to override Congress' considered choice by rewriting the words of the [direct-review] statute.").

SUMMARY OF ARGUMENT

Section 46110(a) applies only to an "order issued … in whole or in part under" part A. 49 U.S.C. § 46110(a). As the district court noted, the only statute cited in the published Delay Rule that even arguably authorized the Delay Rule was section 329, which is not a part A statute and does not trigger section 46110(a). *See* App.11-13. That should have ended the inquiry. The district court, however, did not stop there. It went on to hold that, for the purpose of determining jurisdiction, absent an allegation of bad faith on the agency's part, a court need not examine the statutes cited in a final rule to determine whether they conceivably authorized that rule. It then found jurisdiction lacking because DOT could have cited two *uncited* part A statutes—49 U.S.C. §§ 41708 and 41709—which would have triggered section 46110(a). Both conclusions misinterpret the relevant statutory phrase: "order issued … under" part A.

First, the verb "issued" as used in section 46110(a) means the act of public announcement or publication. *Avia Dynamics*, 641 F.3d at 519. Accordingly, the operative document for purposes of determining jurisdiction is the order that the agency "issued," *i.e.*, the final rule that was published in the Federal Register. The district court thus erred in looking beyond the four corners of the published Delay Rule to find that section 46110(a) jurisdiction was triggered.

Second, the challenged order must be issued "under" a part A statute. In the absence of any contrary Congressional indication, courts ascribe the ordinary dictionary definition to "under," interpreting it to mean "in accordance with," "by reason of authority of," or similar variations of that concept. *See, e.g.*, *D.C. Hosp. Ass'n v. District of Columbia*, 224 F.3d 776, 779 (D.C. Cir. 2000) (internal citations omitted). Interpreting "under" in that fashion necessarily involves considering the substance of a cited part A statute to determine whether a rule was issued in accordance with it. The district court thus erred in determining that an allegation of agency bad faith was necessary before the court could "peek" behind the cited statutes to determine whether they at least arguably authorized the rule itself.

Thus, reading the terms conjunctively, jurisdiction under section 46110(a) is determined by reference to the final rule as published in Federal Register and the statutory authorities cited therein. That interpretation is faithful to the text of the section, consistent with the default rule of district court jurisdiction, and furthers the objective of having "[j]urisdictional rules [that are] simple, easily ascertainable, and predictable." *Livnat v. Palestinian Auth.*, 851 F.3d 45, 56 (D.C. Cir. 2017). And under that interpretation, neither sections 41708 and 41709 (uncited in the Delay Rule), nor sections 41101 and 41701 (cited by inapplicable to the Delay Rule) triggered the direct-review statute. As a result, under the default

jurisdictional rule, jurisdiction rested properly in the district court. *See API*, 714 F.3d at 1332.

ARGUMENT

I. The Delay Rule Was Not "Issued … Under" Part A.

The district court erred in concluding that it lacked jurisdiction pursuant to 49 U.S.C. § 46110. That section applies *only* to "order[s] issued … in whole or in part under," *inter alia*, part A. 49 U.S.C. § 46110(a).

The Delay Rule is not such an order. The rule cites three statutory provisions as authority: 49 U.S.C. §§ 329, 41101, and 41701. 82 Fed. Reg. at 14438. But two of those statutes do not "even arguably support[]" the Delay Rule (App.11), and the only statute that arguably could support the rule is not a part A statute. Thus, none of the cited statutes triggers section 46110(a) jurisdiction. The district court recognized as much, yet, with no basis in law, relied on two uncited statutory provisions—49 U.S.C. §§ 41708 and 41709—to find that section 46110(a) had been triggered. This was improper. The jurisdictional analysis must be limited to an examination of the statutory provisions cited as authority in the challenged "order," that is, in the Federal Register publication of the Delay Rule.

That analysis here shows that this action belongs in district court and should be returned there.[2]

A. The jurisdictional analysis under section 46110(a) must be limited to the four corners of the Delay Rule as "issued," *i.e.*, as published in the Federal Register.

In determining that section 46110(a) was triggered, the district court looked beyond the four corners of the Delay Rule, as published in the Federal Register, to find two *uncited* part A statutes—49 U.S.C. §§ 41708 and 41709—which arguably could have authorized DOT to delay the compliance date of a reporting requirement. *See* App.19 ("The Court concludes that … [it] may treat the rule as issued 'under' the mistakenly omitted authority for purposes of ascertaining its jurisdiction under a direct-review statute."). But in doing so, the district court neglected a critical term in the relevant statutory phrase—the word "issued." Under section 46110(a), appellate jurisdiction extends only to orders "issued" under part A, not orders in some way "authorized" or "supported" by part A.

As this Court has held, the verb "issued" means the publication or public announcement of an agency action. *Avia Dynamics*, 641 F.3d at 519 (citing *Black's Law Dictionary* 830 (7th ed. 1990), which defines "issue" to mean "[t]o

[2] That the full operative phrase in section 46110(a) triggers circuit court jurisdiction where a rule is "issued . . . *in whole or part* under" a part A statute does not change the analysis here because, as explained below, neither part A statute cited by the published Delay Rule authorized any part of the rule's issuance. Thus, the rule cannot be said to have been issued under *any* part A authority, whether in whole or in part.

send forth" and 8 Oxford English Dictionary 137 (2d ed. 1989), which defines "issue" as "[t]o give or send out authoritatively or officially; to send forth or deal out in a formal or public manner; to publish"). This interpretation accords with at least three other circuits, which have held that the verb "issued" in a direct-review statute means the "act of public announcement," not "the act of arriving at a private decision within the agency." *Fla. Manufactured Hous. Ass'n, Inc. v. Cisneros*, 53 F.3d 1565, 1574 (11th Cir. 1995) (construing 42 U.S.C. § 5405(a)(1)), *cited in Avia Dynamics*, 641 F.3d at 519; *see also Ruskai v. Pistole*, 775 F.3d 61, 65 (1st Cir. 2014) (citing *Avia Dynamics* for the proposition that the verb "issuing" means "making a decision publicly available"); *Pub. Citizen Inc. v. Mineta*, 343 F.3d 1159, 1167 (9th Cir. 2003) (holding that the verb "issue" "contemplates some form of public notice").

As applied to a final rule, the act of public announcement is its publication in the Federal Register. *See Cisneros*, 53 F.3d at 1574 (rejecting the agency's "*post hoc* convenient litigation position" that a rule was "issued" before being published in the Federal Register (internal quotation marks omitted)); *Mineta*, 343 F.3d at 1167 ("[I]n keeping with the ordinary meaning of 'issue'… a regulation … is 'issued' on the date that the regulation is made available for public inspection."). Accordingly, under section 46110(a), the "order" to be reviewed is the final rule that was "issued," *i.e.* the Delay Rule published in the Federal Register on March

21, 2017. Thus, any consideration of whether section 46110(a) applies to the Delay Rule must be limited to the four corners of that publication and the statutory citations included therein.

This textual reading is consistent with the rules governing Federal Register publications, which hold agencies strictly responsible for the contents of those publications,[3] and which impute constructive notice of the content of those publications onto the general public.[4] And it further comports with the "simple but fundamental rule of administrative law" that an agency is prohibited from retroactively attempting to justify its actions (*SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947))—a principle which applies with no less force in the context of determining under what authority a rule is issued. *See Zarr v. Barlow*, 800 F.2d 1484, 1491 (9th Cir. 1986) (rejecting agency's "post hoc attempt to supply a foundation for the agency's regulation," instead holding the agency to its "express recitation of the source of its authority when it first promulgated the regulation").

The two cases cited by the district court support this textual reading of section 46110(a). In the first case, *API*, this Court considered a rule that cited six statutory provisions. 714 F.3d at 1333. Five of those authorities were inarguably

[3] *See* 1 C.F.R § 21.41(a) (An agency is "responsible for the accuracy and integrity of the citations of authority in the documents it issues").

[4] 44 U.S.C. § 1507, *quoted in Taylor v. Huerta*, 856 F.3d 1089, 1094 (D.C. Cir. 2017) ("Congress has determined that publication in the Federal Register 'is sufficient to give notice of the contents of the document.'").

subject to district court jurisdiction, while the sixth provision (section 15 of the Exchange Act) included some subsections that were subject to direct review and some that were not. *Id.* Even though the citation to section 15 could have triggered direct review, the Court looked behind the face of the citation to determine that the portions of section 15 that would have triggered direct review had nothing to do with the agency's rule. *Id.* In other words, the Court based jurisdiction on the portions of the cited statutory authority that could conceivably support the agency's action.

The second case, *Loan Syndications and Trading Association v. SEC*, 818 F.3d 716 (D.C. Cir. 2016), also dealt with a rule issued under the Exchange Act. In that case, several agencies had issued a rule that invoked section 78*o*-11 of the Exchange Act, which did not trigger direct review, as well as "other statutes, some of which contain direct-review provisions." *Id.* at 721. The Court reviewed these statutes in detail before concluding that section 78*o*-11 was the only cited statute that "colorably authorized" (*id.* at 723) the joint rule. *Id.* at 721-23. Because the only cited authority that could colorably authorize the joint rule was subject to district court jurisdiction, the Court concluded that the case should originate in district court. *Id.* at 724.

Neither *API* nor *Loan Syndications* looked outside the published rule; both compared the cited statutes to the agency action to determine which statutes were

relevant for jurisdictional purposes. Applied here, these cases clearly point toward district court jurisdiction, because the only cited statute that colorably authorized the Delay Rule is section 329. Neither case, nor any other case either party has found, suggests that a court should look *outside* the cited authorities—particularly where, as here, the cited authorities include an on-point statute like section 329.[5]

Accordingly, the district court erred in looking beyond the four corners of the Delay Rule as published in the Federal Register to search for statutes not cited by DOT but that could have supplemented section 329—in essence, rewriting section 46110(a) to apply to "orders" that *could have been* issued under part A. Because nothing in the Delay Rule itself triggered section 46110(a), as discussed below, the district court had jurisdiction to hear Petitioners' complaint.

B. Section 46110(a) is triggered *only* if the Delay Rule was issued "under" part A, *i.e.*, only if cited authorities arguably authorize the challenged rule.

Respondents failed to cite any statutory authority in the Delay Rule that triggers section 46110(a) jurisdiction. The Delay Rule's authority citation—a required part of the Federal Register publication (*see supra* 3)—lists three statutes

[5] Of course, the reliance on section 329 poses another problem for Respondents, as the district court observed: the officer who issued the Delay Rule was not delegated authority to issue rules under section 329. While this lacuna in executive delegation makes the Delay Rule invalid, it could be cured by the Secretary's ratification, *see generally Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017), and therefore cannot be jurisdictional. In any event, Petitioners do not challenge the Delay Rule's validity on that basis.

as the source of authority for issuing the Delay Rule: 49 U.S.C. §§ 329, 41101, and 41701. But none of these statutes trigger section 46110(a) jurisdiction. Section 329 indisputably authorizes rules related to collection of information, but is not a part A statute and therefore does not come within the purview of section 46110(a). And sections 41101 and 41701 do not provide Respondents with the authority to act as they did in the Delay Rule. For these reasons, section 46110(a) was never triggered and Petitioners' case must be heard in the first instance by the district court.

1. The citation to sections 41101 and 41701 did not suffice to trigger jurisdiction under 49 U.S.C. § 46110(a).

Because section 329 is not a part A statute, the only basis for direct-review jurisdiction comes through the citation to 49 U.S.C. §§ 41101 and 41701. However, the mere citation of these part A statutes is insufficient to trigger section 46110(a) jurisdiction. Section 46110(a) applies only to "order[s] issued . . . *under*" a part A statute. This means that a rule is subject to section 46110(a) jurisdiction only if the Federal Register publication of that rule lists part A statutes that in fact authorize the rule itself.

"The word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. INS*, 502 U.S. 129, 135 (1991). But each definition mandates some connection to, or adherence with, the object to which the word "under" refers, *i.e.*, the object of the prepositional phrase. And absent

Congressional indication to the contrary, courts will not overturn the "strong presumption that the legislative purpose [of a statute] is expressed by the ordinary meaning of the words used." *Ardestani*, 502 U.S. at 136 (internal citations and quotations omitted). Thus, in that circumstance, courts consistently interpret "under" to mean some variation of "'subject to' or 'governed by' (*id*. at 135), or "required by, in accordance with, or bound by" (*D.C. Hosp. Ass'n*, 224 F.3d at 779 (alterations adopted)); see *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (interpreting "under" to mean "pursuant to, in accordance with, or as authorized or provided by") (Kennedy, J., dissenting).

Applied here, Congress' use of the preposition "under" suggests its intention that there be some connection or relation between the Delay Rule and the cited statutes under which the rule is purportedly issued. In other words, section 46110(a) would be triggered only if the Delay Rule is at least arguably authorized by or in compliance with authority granted by the cited part A statutes. *Cf. Bell v. Hood*, 327 U.S. 678, 682-83 (1946) (noting that a suit premised on 28 U.S.C. § 1331 jurisdiction must be dismissed "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely

for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous").[6]

This interpretation is further buttressed by the constitutional principle of separation of powers. Congress, not the Executive Branch, possesses the constitutional authority to assign jurisdiction amongst the federal courts (within constitutional limits). *See Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("Congress decides what cases the federal courts have jurisdiction to consider."). Thus, agencies should not be presumed to have the authority to manipulate the jurisdiction of the federal courts by citing (intentionally or not) to inapposite statutes that come within the purview of different jurisdictional provisions. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute

[6] That does not mean that a court must determine the merits of a matter in determining whether it has jurisdiction to hear it. A court may properly inquire to the merits in an abbreviated fashion as part of a jurisdictional determination. *See, e.g., Scottsdale Capital Advisors Corp. v. Fin. Indus. Regulatory Auth., Inc.*, 844 F.3d 414, 421 (4th Cir. 2016) (explaining that when jurisdiction is claimed under *Leedom v. Kyne*, 358 U.S. 184 (1958), a court "conduct[s] a cursory review of the merits to determine if the agency acted clearly beyond the boundaries of its authority" (internal quotation marks omitted)); *Van Orden v. Laird*, 467 F.2d 250, 252 (10th Cir. 1972) ("In the course of determining whether the case at bar is one in which there exists jurisdiction to review the [agency] action, we have given at least a cursory evaluation of the merits of appellant's claim."); *see also Prof. Cabin Crew Ass'n v. Nat'l Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir. 1989) (explaining that to determine whether jurisdiction exists to review National Mediation Board decision, courts "peek at the merits" to determine whether presumption of non-reviewability applies).

would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). Instead, courts should, as they do in other jurisdictional contexts (*see Bell*, 327 U.S. at 682-83), ensure at least an arguable connection between the cited statutes that purportedly trigger appellate jurisdiction and the authority asserted in the final rule.

Accordingly, section 46110(a) here stripped the district court of jurisdiction over this case only if sections 41101 or 41701 (the part A statutes cited in the issued order) at least arguably authorize the Delay Rule. As the district court correctly concluded, they do not. App.11 (concluding that neither section 41011 nor 41701 "even arguably support[]" the Delay Rule). Section 41101—titled "Requirement for a certificate"—provides that an air carrier must hold a certificate to provide air transportation and specifies how a private citizen can provide air transportation as a common carrier for compensation. 49 U.S.C. §§ 41101(a), (b). Section 41701 authorizes the Secretary to establish "reasonable classifications for air carriers when required because of the nature of the transportation provided by them," as well as "reasonable requirements for each class" the Secretary so establishes. 49 U.S.C. § 41701(1)-(2). But neither provides any authority relevant to the agency action at issue in the Delay Rule: the imposition of reporting requirements. The reports mandated by the Wheelchair Rule do not relate to the

certification or classification of air carriers, nor is noncompliance with reporting requirements grounds for revoking a classification or license under sections 41101 or 41701. Instead, Congress explicitly identified the penalties for failing to make required reports. An airline may be assessed monetary penalties of up to $25,000 (49 U.S.C. § 46301(a)(1)), or, if the failure is intentional, may be assessed criminal fines (*id.* § 46310(a)(1)).

Because the part A statutes cited in the Delay Rule do not "even arguably support[]" the Delay Rule, section 46110(a) jurisdiction was never triggered. The district court thus erred in transferring the case to this Court.

2. The Delay Rule's citation to 49 C.F.R. § 1.27(n) does not suffice to trigger section 46110(a) jurisdiction.

Respondents argued below that section 46110(a) jurisdiction was triggered by the citation in the Delay Rule to an agency regulation delegating authority from the Secretary of Transportation to the General Counsel, 49 C.F.R. § 1.27(n). Defs.' Combined Mem. at 9-11. Section 1.27(n) provides: "The General Counsel is delegated authority to . . . conduct all departmental regulation of airline consumer protection" pursuant to five part A chapters. According to Respondents, "because the General Counsel issued the Extension Rule under 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." App.12 (describing Respondents' position).

The district court correctly rejected this argument. The only function of a citation to an executive delegation is "to link the statutory authority [in the authority citation] to the issuing agency." 1 C.F.R. § 21.40(b). It "does not provide a reason to ignore the cited authority and look instead to authorities that are not cited in the rule." App.12. Respondents' argument thus fails because, as the district court explained, "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)." *Id*.

3. The district court erred in determining that it could not "peek" behind the Delay Rule's authority citation.

The district court agreed with Petitioners that a "peek" into the statutory citations listed as authority for a final rule may be necessary to prevent an agency from manufacturing jurisdiction. App.18-19 (noting that Petitioners' argument "has some force"). The court went on, however, to hold that such a peek is only necessary in the extremely narrow and limited circumstances when a plaintiff can demonstrate that an agency acted in bad faith. App.19 ("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.").

This was error. The district court provided no reasoned basis for drawing a distinction between circumstances in which an agency cites inapposite statutes in a bad-faith attempt to forum shop and circumstances in which an agency inadvertently cites inapposite statutes. Nor could it. In either situation, the separation of powers concern is the same. The Executive Branch cannot unilaterally create appellate jurisdiction, even if it does so inadvertently. *See Bowles*, 551 U.S. at 212. In addition, the district court's approach would impose a prohibitive burden on challengers to a rule, requiring them to demonstrate that an agency acted with the intention of manipulating jurisdiction by citing to inapposite statutory authority in a final rule. This would often be impossible without jurisdictional discovery, grafting time-consuming discovery proceedings into an agency's intent onto what Congress intended to be a straightforward analysis of the administrative record.

Instead, a court should ensure that the cited authority in a final rule *both* comes within the purview of a direct-review statute *and* at least arguably provides substantive support for the action taken in that final rule. *Cf. Bell*, 327 U.S. at 682-83. Because in this case neither section 41101 nor section 41701 "even arguably supports" the Delay Rule, neither statute can trigger the section 46110(a) jurisdiction, and the case is properly heard by the district court in the first instance.

* * * * * * *

In sum, the challenged "order"—the Delay Rule—cited no part A statute that triggered section 46110(a) jurisdiction. The district court erred in determining otherwise.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' Petition for Writ of Mandamus, remand to the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 21(d), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,063 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Times New Roman font in a size equivalent to 14 points or larger.

Dated: March 1, 2018 /s/ *Javier M. Guzman*

CERTIFICATE OF SERVICE

I hereby certify that that the foregoing was electronically served upon counsel of record via the Court's CM/ECF system.

/s/ *Javier M. Guzman*