

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PARALYZED VETERANS OF
AMERICA; and JAMES THOMAS
WHEATON, JR.,

Petitioners,

v.

U.S. DEPARTMENT OF
TRANSPORTATION; ELAINE
CHAO, in her official capacity as
SECRETARY OF
TRANSPORTATION; and the
UNITED STATES OF AMERICA,

Respondents.

Case No.

PETITION FOR REVIEW

Pursuant to the Air Carrier Access Act (“ACAA”), 49 U.S.C. §§ 41705(a), 46110(a); the FAA Extension, Safety, and Security Act of 2016, Pub. L. No. 114-190, § 2108, 130 Stat. 615, 622; the Administrative Procedure Act, 5 U.S.C. §706(1); and Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioners Paralyzed Veterans of America (“PVA”) and Mr. Wheaton hereby seek judicial review of the Department of Transportation’s failure to publish rules regarding accessible lavatories on single-aisle aircraft.

This Court has jurisdiction under 49 U.S.C. §46110(a), which directs to the United States Court of Appeals review of “final orders” issued under, *inter alia*, 49 U.S.C. § 41705. *See Env’t Defense Fund v. U.S. Nuclear Regulatory Comm’n*, 902 F.2d 785, 786-87 (10th Cir. 1990) (citing *Telecommunications Res. & Action Cntr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984)). Venue lies in this Court under 49 U.S.C. § 46110(a) because Mr. Wheaton resides in Golden, Colorado.

In 1986, Congress passed the ACAA, which prohibits discrimination in airline service on the basis of disability. 49 U.S.C. § 41705. The ACAA further directed the Department to promulgate, “[w]ithin 180 days,” “regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers.” Pub. L. 99-435. In 1990, the Department published a final rule to implement the requirements of the ACAA. *See* 55 Fed. Reg. 8008 (March 6, 1990). In that rule, the Department required aircraft with more than one aisle to provide accessible lavatories. *Id.* at 8020; *see also* 14 C.F.R. § 382.63. The Department, however, “defer[red] a decision ... concerning accessible lavatories in narrowbody and smaller aircraft.” *Id.* The Department recognized that accessible lavatories on such aircraft “clearly is important for passengers.” *Id.* But the Department determined it needed further information about the “cost and feasibility concerns raised by carrier commenters.” *Id.* The Department therefore published an Advanced Notice of Proposed

Rulemaking to seek additional information on the issue. *Id.*; *see also* 55 Fed. Reg. 8078 (March 6, 1990). It also established an advisory committee to consider and make recommendations on, *inter alia*, the lavatory-accessibility issue. 57 Fed. Reg. 329 at 424 (Jan. 6, 1992). That committee submitted its final report to the Department in 1996, finding that it would be feasible to provide accessible lavatories on single-aisle aircraft.

In 2000, the ACAA was amended to include foreign air carriers. *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Pub. L. 106-181, § 707, 114 Stat. 61, 158 (Apr. 5, 2000). Thereafter, the Department published a final rule, amending the ACAA regulations to cover foreign carriers. 73 Fed. Reg. 27,614 (May 13, 2008). During that rulemaking proceeding, the Department was again asked to extend the lavatory accessibility requirement to single-aisle aircraft. *See id.* at 27,625. The Department acknowledged that “[p]roviding accessible lavatories on single-aisle aircraft remains a matter of interest to the Department” and stated it would monitor “ongoing developments in this area to determine if future rulemaking proposals may be warranted.” *Id.*

In November 2015, in an effort to move forward with a rulemaking about whether to require accessible lavatories on single-aisle aircraft, the Department published a notice of its intent to “explore the feasibility of conducting a negotiated

rulemaking concerning accommodations for air travelers with disabilities.” *See* 80 Fed. Reg. 75,593. The Department stated that it would invite representatives of interested parties to participate on the advisory committee. The Department further promised that if consensus was reached on, *inter alia*, a rule requiring accessible lavatories on single-aisle aircraft, it would “issue a proposed rule consistent with that consensus for public comment under established rulemaking procedures.” *Id.* at 75,595.

In April of 2016, the Department announced that it would move forward with establishing a negotiated rulemaking committee. 81 Fed. Reg. 20,265, 20,265 (April 7, 2016). The members of the advisory committee, named the Accessible Air Transportation Advisory Committee (“ACCESS Committee,” “Committee”), were announced the following month. 81 Fed. Reg. 26,178 (May 2, 2016). Members of the ACCESS Committee included disability rights organizations, including Petitioner PVA, as well as representatives of major airlines and aircraft manufacturers. *Id.* at 26,179.

In July 2016, Congress enacted the FAA Extension, Safety, and Security Act of 2016 (“FAA Act of 2016”), which directed that no later than July 15, 2017, the Secretary of Transportation “shall issue the supplemental notice of proposed rulemaking referenced in the Secretary’s Report on Significant Rulemakings.” Pub L. No. 114-190, § 2108, 130 Stat. 615, 622 (July 15, 2016). The referenced report

identifies the Department's intent to publish a supplemental notice of proposed rulemaking on, *inter alia*, the issue of accessible lavatories on single-aisle aircraft.

In November 2016, the ACCESS Committee adopted a final resolution on lavatory accessibility, including provisions regarding wheelchair accessibility.

ACCESS Committee, *Resolution of the U.S. Department of Transportation*

ACCESS Committee (Nov. 22, 2016). The following month, the Department issued

a press release highlighting the agreement on the lavatories issue and stating that

“[t]he Department plans to issue a notice of proposed rulemaking based on this agreement in July 2017.” *Access Advisory Committee*, Dep't of Transp.,

<https://transportation.gov/access-advisory-committee>. This would have complied with the statutory deadline imposed by the FAA Act of 2016.

In the spring of 2018, the Department moved the accessible lavatories issue to the long-term agenda, seemingly signifying that it has no plans to put forth any proposal for public comment until at least spring 2019.

Section 706(1) of the APA requires courts to compel agency action “unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1); *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999). Such is required here. The Department has continued to delay issuing rules about lavatory accessibility on single-aisle aircraft since it first “defer[red] decision” on the issue in 1990. The Department has unreasonably delayed its adoption of the ACCESS Committee's

consensus agreement. And the Department has contravened Congress's mandate to publish, at least, a supplemental notice of proposed rulemaking by July 2017.

Accordingly, Petitioners respectfully request this compel the Department to act. 5 U.S.C. 706(1) (a court "shall ... compel agency action unlawfully withheld or unreasonably delayed").

Dated: July 31, 2018

Respectfully submitted,

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