No.

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

IN RE PARALYZED VETERANS OF AMERICA AND
JAMES THOMAS WHEATON, JR.,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO ELAINE L. CHAO,
UNITED STATES SECRETARY OF TRANSPORTATION

PETITION FOR WRIT OF MANDAMUS

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Tenth Circuit Rule 26.1, Petitioner Paralyzed Veterans of America ("PVA") make the following disclosures:

PVA is a non-governmental, congressionally-chartered nonprofit corporation. PVA has no parent or subsidiary. PVA has never issued shares or debt securities to the public, nor have its affiliates.

Dated: November 29, 2018

/s/ Karianne M. Jones
Karianne M. Jones

ENTRY OF APPEARANCE AND CERTIFICATE OF INTERESTED PARTIES

In accordance with Tenth Circuit Rule 46.1, the undersigned attorneys hereby appear as counsel for Paralyzed Veterans of America and James Thomas Wheaton, Jr., Petitioners, in the subject case.

Further, in accordance with Tenth Circuit Rule 46.1, the undersigned certify as follows:

There are no interested parties, or any such parties have heretofore been disclosed to the court.

Dated: November 29, 2018

Respectfully submitted,

/s/ *Karianne M. Jones*

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STATEMENT OF PRIOR AND RELATED APPEALS

The issues presented in this petition for writ of mandamus were previously presented in a petition for review filed in *Paralyzed Veterans of America v. U.S. Department of Transportation*, No. 18-9546 (10th Cir.) (filed July 31, 2018). This Court dismissed that petition for lack of jurisdiction under 49 U.S.C. § 46110 on September 26, 2018.

INTRODUCTION

Congress has clearly and unequivocally directed the United States Department of Transportation ("Department" or "DOT") to issue a proposed rule governing the availability of lavatories accessible to travelers with disabilities on single-aisle aircraft—the predominant type of aircraft flown commercially within the United States. And travelers with disabilities, including the members of Petitioner Paralyzed Veterans of America ("Petitioner" or "PVA") have made clear to DOT, time and again, that such a rule (sometimes referred to herein as the Lavatory Accessibility Rule) is essential to ensure that mobility-impaired travelers can fly safely and comfortably on commercial aircraft within the United States.

Nevertheless, the Department has flouted Congress's clear command and the mandatory deadline it imposed. And by removing the proposed rule from the Administration's unified regulatory agenda, the Department has made clear that it has no plans to act on the proposed rule anytime soon. Because the Department's refusal to act violates the law and injures Petitioners and other travelers with mobility

impairments, Petitioners respectfully request that this Court issue a writ of mandamus directing the Department to comply with Congress's mandate and issue a proposed rule governing single-aisle aircraft lavatory accessibility.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the petition pursuant to the All Writs Act, which authorizes the Courts of Appeals to issue extraordinary writs "in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). Here, the Court has jurisdiction over the mandamus petition in aid of its jurisdiction to review, pursuant to 49 U.S.C. § 46110, the final order that the Department of Transportation has unlawfully withheld. *See Fed. Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (court's mandamus authority "'is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected'") (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943)); *Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*") (court of appeals had jurisdiction over mandamus petition as "necessary to protect its prospective jurisdiction" to review

withheld final agency order under direct review statute) (citing, inter alia, *Dean Foods* and *Roche*). "Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction." *TRAC*, 750 F.2d at 76 (citing *Env'tl Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 593 (D.C. Cir. 1971)).

ISSUES PRESENTED FOR REVIEW

Whether the Court should issue a writ of mandamus directing the Secretary of Transportation to expeditiously commence the statutorily required rulemaking process for lavatory accessibility on single-aisle aircraft.

STATEMENT OF THE CASE

A. Legal Background and Regulatory History.

In 1986, Congress passed the Air Carrier Access Act ("ACAA" or "Act"), which prohibits discrimination in airline service on the basis of disability. 49 U.S.C. § 41705. The Act responded, in part, to Congress's concern about leaving "handicapped air travelers subject to the possibility of discriminatory, inconsistent and unpredictable treatment on the part of air carriers." S. Rep. No. 99-400 at 2 (1986).

The ACAA directed the Department to promulgate, "[w]ithin one hundred and twenty days," "regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers." Pub. L. No. 99-435, § 3, 100 Stat. 1080, 1080 (1986), Add.1. The Department convened an advisory committee to confer on what regulation the Department should issue to comply with that mandate. 55 Fed. Reg. 7879, 8009 (Mar. 6, 1990). The advisory committee included PVA, as well as other representatives from disability rights groups, airlines, and aircraft manufacturers. *Id.* at 8010.

Based on the recommendations of the advisory committee, the Department published a final rule to implement the ACAA's requirements. *See id.* In that rule, the Department required carriers to provide accessible lavatories on aircraft with more than one aisle. *Id.* at 8008; *see also* 14 C.F.R. § 382.63. The Department, however, "defer[red] a decision … concerning accessible lavatories in narrowbody and smaller aircraft." 55 Fed. Reg. at 8021. The Department recognized that having 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 comments." *Id.* The Department therefore published an Advanced Notice of Proposed Rulemaking to seek additional information on the issue. *Id.* at 8021, 8078. It also established an advisory committee to consider and make recommendations on, inter alia, the lavatory-accessibility issue. 57 Fed. Reg. 329,424 (Jan. 6, 1992). That committee, which included PVA, submitted its final report to the Department in 1996, finding that it would be feasible to provide accessible lavatories on single-aisle aircraft. *See* Nat'l Council on Disability, *Enforcing the Civil Rights of Air Travelers With Disabilities: Recommendations for the Department of Transportation and Congress* 49 (1999), https://ncd.gov/rawmedia_repository/3213b13f_6e73_47d5_a29c_65893fa2ee63.pdf (referencing 1996 final report).

In 2000, the ACAA was amended to cover foreign air carriers. *See* Pub. L. No. 106-181, § 707, 114 Stat. 61, 158 (2000). Thereafter, the Department published a final rule, amending the ACAA regulations to cover foreign carriers. 73 Fed. Reg. 27,613 (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 "given that single-aisle aircraft often make lengthy flights … it is clear that providing accessible lavatories on single-aisle aircraft would be a significant improvement in airline service for passengers with disabilities." *Id.* The Department, however, had concerns about the "revenue loss and other cost impacts" involved in providing accessible lavatories on single-aisle aircraft. *Id.* The Department thus stated that it would monitor "ongoing developments in this area to determine if future rulemaking proposals may be warranted." *Id.*

In November 2015, the Department published a notice of its intent to "explor[e] the feasibility of conducting a negotiated rulemaking concerning accommodations for air travelers with disabilities," including, inter alia, requiring accessible lavatories on single-aisle aircraft. *See* 80 Fed. Reg. 75,953, 75,953 (Dec. 7, 2015). This was in part due to the Department's recognition of the "industry trend toward greater use of single-aisle aircraft that are not equipped with accessible lavatories on medium and long haul flights." *Id.* at 75,954. 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 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 75,954-55.

In April 2016, the Department announced that it would move forward with establishing a negotiated rulemaking committee. 81 Fed. Reg. 20,265, 20,265 (Apr. 7, 2016). The members of the advisory committee, named the Accessible Air Transportation Advisory Committee ("ACCESS Committee" or "Committee"), were announced the following month. 81 Fed. Reg. 26,178 (May 2, 2016). The ACCESS Committee's membership consisted of disability rights organizations, including PVA, and 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 ["SNPRM"] referenced in the Secretary's Report on Significant Rulemakings." Pub L. No. 114-190, § 2108, 130 Stat. 615, 622 (2016), Add.2. The referenced report

identified the Department's intent to publish a supplemental notice of proposed rulemaking on, inter alia, the issue of accessible lavatories on single-aisle aircraft. Secretary's Report on Significant Rulemakings at 88 (June 2015), *available at* https://cms.dot.gov/regulations/2015-significant-rulemaking-archive.

In November 2016, the ACCESS Committee adopted a final resolution on lavatory accessibility, including a consensus draft of the provisions that would govern wheelchair accessibility. ACCESS Committee, *Resolution of the U.S. Department of Transportation ACCESS Committee* (Nov. 22, 2016), *available at* https://cms.dot.gov/sites/dot.gov/files/docs/ACCESS%20Committee%20Final%20Resolution.11.21.16.pdf. The following month, the Department issued a press release highlighting the agreement on the lavatories issue and stating that the Department "plans to issue a notice of proposed rulemaking based on this agreement in July 2017." Press Release, DOT, *DOT Negotiated Rulemaking Committee Agrees on Future Measures to Improve Accessibility of Aircraft Lavatories and In-Flight Entertainment* (Dec. 12, 2016) (hereinafter "DOT Press Release"), *available at* https://web.archive.org/web/20170701080115/https://www.transportation.gov/briefing-room/dot-

negotiated-rulemaking-committee-agrees-future-measures-improve-accessibility.[1] This would effectively have brought the Department into compliance with FAA Act of 2016's statutory mandate.

The Department has, however, failed to issue any such notice of proposed rulemaking regarding accessible lavatories on single-aisle aircraft. Instead, in its spring 2018 Regulatory Agenda, the Department moved the accessible lavatories issue to its long-term agenda. *See* RIN 2105-AE32, Unified Regulatory Agenda, Office of Management & Budget, Office of Information & Regulatory Affairs ("OIRA") (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2105-AE32. It then removed it altogether in the fall 2018 edition, clearly indicating that it has no plans to put forth any proposal for public comment anytime soon.

B. Petitioners.

Petitioners are Paralyzed Veterans of America and Mr. James Thomas Wheaton, Jr. PVA is a congressionally chartered nonprofit organization that serves approximately 17,000 military veteran members

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[1] The Department appears to have removed this press release from its website sometime during the second half of 2018.

with spinal cord injuries or dysfunctions. Decl. of David L. Zurfluh ("Zurfluh Decl.") ¶ 4, Add.4. A key element of PVA's mission is to advocate for and assist members with transportation-related issues. *Id.* ¶¶ 2, 7-10, Add.3, 5-6. In addition, PVA regularly works with airlines to help them improve the customer experience of paralyzed veterans travelling by air. *Id.* ¶ 8, Add.5.

Mr. Wheaton, a U.S. Navy veteran, is a member of PVA and serves as the organization's National Treasurer. Decl. of James Thomas Wheaton, Jr. ("Wheaton Decl.") ¶¶ 1-2, Add.9. During his time in service, Mr. Wheaton was hit by a drunk driver and broke his spine at level C-6 and C-7, causing him to become paraplegic. *Id.* ¶ 3, Add.10. As part of his work for PVA, Mr. Wheaton flies on single-aisle aircraft approximately once a month. *Id.* ¶ 5, Add.10. Because of his paraplegia, Mr. Wheaton is unable to access the lavatories on these flights, causing him to have to avoid bladder or bowel movements for at least 3-5 hours, including flight time plus the time it takes for Mr. Wheaton to board and deplane (*id.* ¶ 7, Add.10-11)—a duration that is sometimes extended when an airline is unable to immediately deplane Mr. Wheaton (*id.* ¶ 8, Add.11).

PVA and Mr. Wheaton bring this petition for writ of mandamus to request that the Court issue an order compelling the Department to comply with its statutory duty to move forward in the rulemaking on lavatory accessibility for single-aisle aircraft.

SUMMARY OF THE ARGUMENT

Congress has twice required the Department to issue rules governing accessible lavatories on commercial aircraft: first, in the 1986 enactment of the ACAA, when it directed the Department to issue rules within 120 days implementing the ACAA's accessibility requirements, and second, in its enactment of the FAA Act of 2016, when it specifically directed the Department to propose the Lavatory Accessibility Rule by July 2017. The Department has flouted these requirements by failing to issue the Lavatory Accessibility Rule; moreover, in removing that rule from the Unified Regulatory Agenda, it has indicated unequivocally that it has no intention of moving forward on it anytime soon. Such recalcitrance in the face of a congressional mandate warrants mandamus.

Petitioners have standing to pursue this action, and this Court should intervene to compel the Department to comply with its statutory duties.

ARGUMENT

I. Petitioners Have Standing To Bring This Petition.

1. To establish constitutional standing, a petitioner must show (1) it has suffered a "concrete and particularized" injury that is "actual or imminent," (2) the injury "is fairly traceable" to the challenged action or inaction, and (3) it "is likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)). And Petitioners' injuries must also "fall within the zone of interests protected or regulated by the statutory provision … invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Petitioners here have standing on multiple grounds to challenge the Department's withholding of the Lavatory Accessibility Rule. Both Petitioners have been procedurally injured by being deprived of the opportunity to comment on the Rule. Mr. Wheaton has been denied accessible air travel as promised by the ACAA, and has suffered attendant physical, emotional and financial harm. And PVA has associational standing on behalf of its

members like Mr. Wheaton, and organizational standing to protect its mission.

2. Both PVA and Mr. Wheaton have suffered a cognizable procedural injury by being denied the right to comment on the accessible lavatories proposal—a proposal that Congress mandated the Department issue for public comment (Pub. L. No. 114-190, § 2108). *See Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1215 (10th Cir. 2017). That denial, coupled with PVA's and Mr. Wheaton's concrete interests (discussed below), suffices to confer standing. As the Supreme Court has recognized, "'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7. "To establish standing in such circumstances, a [petitioner] need show only that compliance with the procedural requirements *could* have protected its concrete interests." *New Mexico*, 854 F.3d at 1215 (internal quotation marks omitted). Certainly here, the right to comment on the legally required accessible lavatories proposed rule could have resulted in the Department issuing a final rule requiring accessible

lavatories on single-aisle aircraft—a result that undoubtedly would protect the concrete interests of both PVA and Mr. Wheaton.

In addition to this procedural injury, both Mr. Wheaton and PVA have suffered other cognizable injuries that are fairly traceable to the Department's conduct, and would be redressed by an order of this Court compelling agency action. For these independent reasons, both Mr. Wheaton and PVA have standing to pursue this case.

3. Mr. Wheaton has standing based on the denial of his statutory right to accessible air travel, as well as the psychological, physical, and monetary injuries he experiences because he lacks access to lavatories on single-aisle aircraft.

Congress in the ACAA created a statutory right to accessible air travel for persons with disabilities, including Mr. Wheaton. *See* § 3, 100 Stat. at 1080, Add.1 (establishing that "prohibitions of discrimination against handicapped individuals shall apply to air carriers"). The Department is denying Mr. Wheaton that right through its unlawful delay of the rulemaking regarding the issue of accessible lavatories on single-aisle aircraft—a fact sufficient to confer standing. *See Zivotofsky v. Sec'y of State*, 444 F.3d 614, 619 (D.C. Cir. 2006) ("Although it is natural to

think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute.").

Mr. Wheaton has also suffered, and will continue to suffer, psychological, physical, and monetary injuries because he lacks access to lavatories on single-aisle aircraft. Because of the stress he experiences when flying, stress largely caused by his inability to access a lavatory, Mr. Wheaton sometimes opts for more time-consuming and more expensive means of transportation. Wheaton Decl. ¶ 12, Add.12 (describing an incident when Mr. Wheaton chose to drive sixteen hours to a PVA event in Minnesota, requiring an overnight stay). When air travel is unavoidable, however, Mr. Wheaton experiences significant anxiety and fear that he will have a bowel or bladder issue during a flight—an incident that would cause severe humiliation and embarrassment. *Id.* ¶¶ 8, 13-14, Add.11-12. He also risks the contraction of a medical condition, like a urinary tract infection, that often results when a person is forced to hold their bladder and bowel movements for an extended period of time. *Id.* ¶ 9, Add.11. As a result, Mr. Wheaton engages in a variety of

precautionary measures anytime he flies. Beginning a day before his flight, Mr. Wheaton severely limits his food and fluid intake in order to lessen the chance that he will have to relieve himself during a flight (*id.* ¶ 10) and wears a protective undergarment in case he does experience any bowel or bladder issue while on the aircraft—an experience which itself causes embarrassment (*id.* ¶ 11, Add.11-12).

Each of the above-identified injuries is caused by the Department's failure to move forward with the Lavatory Accessibility Rule and would be redressed by an order from this Court compelling its compliance with the statutory mandates. That the Department would have discretion as to any final rule it might adopt does not alter that analysis. *Cf. Lujan*, 504 U.S. at 572 n.7 ("[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered.").

4. PVA has associational standing based on the interests of its members. A petitioner asserting associational standing need only show

that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Each element is here met.

As discussed above, PVA members, like Mr. Wheaton, would have standing to sue in their own right. In addition to Mr. Wheaton, Hack Albertson is a U.S. Marine Corps veteran and member of PVA. Albertson Decl. of Hack D. Albertson ("Albertson Decl.") ¶¶ 1-2, Add.14-15. He has been, and will continue to be, injured by the Department's failure to issue the Lavatory Accessibility Rule.

Mr. Albertson flies on single-aisle aircraft approximately twenty-five times a year—primarily in fulfillment of his role as PVA National Vice President. Albertson Decl. ¶ 3, Add.15. Many of those flights exceed three hours. *Id.* ¶ 4, Add.15. Because he has no access to a lavatory on airplanes, Mr. Albertson will sometimes purchase flights with layovers in order to avoid the longer direct flights. *Id.* ¶ 7, Add.16. This

often ends up costing Mr. Albertson more money, particularly because selecting a flight with a layover sometimes results in him having to stay overnight at a hotel. *Id.* Mr. Albertson also chooses to drive when possible, which likewise increases his cost of travel. *Id.* ¶ 13, Add.18 (explaining that he has chosen to drive from his home in Indiana to Miami, Tampa, Richmond, and Washington, D.C.—trips that require an overnight stay).

In advance of flying, Mr. Albertson limits his food and fluid intake to minimize the chance that he will have a bowel or bladder issue during the flight. *Id.* ¶ 8, Add.16-17. He also brings a catheter to use during long flights. *Id.* ¶ 9, Add.17. When using a catheter to drain his bladder, Mr. Albertson tries to shield himself from sight by using either a blanket or the body of a travel companion. *Id.* Sometimes, however, flight attendants refuse to allow Mr. Albertson to use the catheter. *Id.* ¶ 10, Add.17. This often results in Mr. Albertson draining his bladder or bowels onto himself and the airline's seat. *Id.* Recognizing this possibility, Mr. Albertson tends to wear dark clothing when he travels, particularly because he is not always able to change clothes before having to attend meetings scheduled shortly after a flight lands. *Id.* Mr. Albertson has

also contracted urinary tract infections as a result of having to either hold his bladder for extended periods of time or use a catheter in an unsanitary location, e.g., the airline seat. *Id.* ¶ 13, Add.18.

The sum of these realities is that flying causes Mr. Albertson severe stress, anxiety, and, sometimes, embarrassment, in addition to physical and monetary injuries. Such injuries have been, and continue to be, caused by the Department's refusal to issue the Lavatory Accessibility Rule.

The remaining elements of associational standing are certainly met here. Advocating for accessible air travel, and, more specifically, for accessible lavatories on single-aisle aircraft, is germane to PVA's mission. Zurfluh Decl. ¶ 7, Add.5 (stating that facilitating access to air travel for its members is "a core part of PVA's mission"). Indeed, PVA has participated in three advisory committees on the accessible lavatory issue, as well as submitted numerous comments to the Department on the importance of providing accessible lavatories on all aircraft. *Id.* ¶ 10, Add.5-6. And because PVA challenges the Department's unlawful withholding of legally required agency action, the participation of its members is unnecessary.

PVA thus has associational standing to sue on behalf of its members.

5. PVA also has organizational standing. "An organization has standing on its own behalf if it meets the standing requirements that apply to individuals." *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.3d 1394, 1396 (10th Cir. 1992) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982)). The Supreme Court has held that an organization meets such standing requirements if the challenged action "perceptively impaired" the organization's mission and activities in such a way as to cause a "drain on the organization's resources." *Id.* at 1397 (quoting *Havens Realty Corp.*, 455 U.S. at 379)).

The unlawful delay of the rulemaking regarding accessible lavatories on single-aisle aircraft perceptively impairs PVA's mission and activities. PVA works closely with airlines to advise on issues regarding airline accessibility, including lavatory accessibility. Zurfluh Decl. ¶ 8, Add.5. But airlines are unlikely to move forward with any accessible lavatory initiative with the lingering possibility of a rulemaking on lavatory accessibility in the future. Indeed, even the Department has acknowledged that in the context of enforcing the ACAA, "detailed

standards and requirements are essential." 73 Fed. Reg. at 27,615 ("If all that carriers are responsible for is carrying out, in their best judgment, general objectives of nondiscrimination and good service, or best practices and recommendations, or regulations that are not enforceable by the Department, then effective enforcement of the rights Congress intended to protect in the ACAA becomes impracticable."). Thus, the Department's continued delay on the matter impedes PVA's ability to work with, and encourage, airlines to make lavatories accessible. Such an impediment substantially hinders PVA's execution of its mission and certainly results in its expenditure of significant resources that would be better spent helping its members with other issues and problems. If the Department were to move forward with a rulemaking about lavatory accessibility on single-aisle aircraft, as it is legally required to do, PVA would be able to redirect the resources it is currently using to advocate about the issue. Zurfluh Decl. ¶ 12, Add.7.

Accordingly, PVA has organizational standing to pursue this petition on its own behalf.

II. Legal Standard.

"[W]rits of mandamus may be best known for their traditional application—compelling a government official to perform a nondiscretionary duty owed to a plaintiff." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1187 (10th Cir. 2009) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168-69 (1803)). Where the writ is sought to direct action by a government official (rather than a district court), "mandamus is appropriate where the person seeking the relief 'can show a duty owed to him by the government official to whom the writ is directed that is ministerial, clearly defined, and peremptory.'" *In re Est. of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (quoting *Carpet, Linoleum & Resilient Tile Layers, Loc. Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981)). In other words, if, "after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance, thus effectuating the congressional purpose." *Id.*

This sensible understanding of the Court's mandamus power is grounded in the principle that "[a]dministrative agencies do not possess

the discretion to avoid discharging the duties that Congress intended them to perform." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) (citing cases). Accordingly, in *Estate of Smith*, this Court held that the district court should have granted a writ of mandamus because the Medicaid Act required the Secretary of Health and Human Services to promulgate rules designed to ensure that funds are dispensed under that Act only to facilities that provide an appropriate level of care to Medicaid patients. 747 F.2d at 590-91. Although "[t]he statute vests broad discretion in the Secretary as to how that duty is best accomplished," failing to carry out the statutory duty at all was not an option, and thus mandamus was warranted. *Id.* at 591; *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("Even in mandamus cases, which inherently involve court discretion, we have often spoken in strong, and occasionally even absolute, language with regard to the court's duty to enforce agency action mandated by Congress.").

Similarly, in *Marathon Oil*, this Court held that mandamus was warranted to correct the Department of the Interior's delay in issuing shale mining permits and ordered the government to decide the

application within fifteen days.[2] 937 F.2d at 500-02. There, the Court held that "Congress intended the defendants to process oil shale mining patent applications," and thus, "the writ of mandamus ordering appellants to 'expeditiously complete administrative action' was entirely appropriate." *Id.* at 500 (quoting *Wilbur v. Krushnic*, 280 U.S. 306, 319 (1930)).

In short, this Court will issue a writ of mandamus to compel a government official to undertake action required by law. Therefore, and as discussed below, the Court should grant the writ here.

III. By Failing To Issue The Lavatory Accessibility Rule, the Department Has Violated A Clear Statutory Command.

The Secretary's unmet duty to issue the Lavatory Accessibility Rule dates back to the ACAA's passage in 1986 and was reiterated by Congress in 2016. The ACAA required the Department of Transportation, "[w]ithin one hundred and twenty days" of enactment, to issue "regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air

[2] This time period was added to the twenty-nine days that had elapsed before the Court stayed the district court's previous order requiring a decision within thirty days. 937 F.2d at 502.

carriers." § 3, 100 Stat. at 1080, Add.1. Despite this requirement, and the Department's recognition that the issue "clearly is important for passengers," the Department repeatedly and expressly deferred issuing regulations governing access to lavatories on airplanes with one aisle—planes that handle a substantial portion of domestic air travel. *See* 55 Fed. Reg. at 8021.

In July 2016, evidently tired of DOT's endless delay in complying with its mandate, Congress enacted the FAA Act of 2016, which unequivocally required the Secretary, no later than July 15, 2017, to issue a supplemental notice of proposed rulemaking covering accessible lavatories on single-aisle aircraft. § 2108, 130 Stat. at 622, Add.2. Also in 2016, the Department formed an advisory committee to propose a negotiated rule on the issue. 81 Fed. Reg. 26,178 (May 2, 2016). Members of this group included disability rights organizations, including Petitioner PVA, as well as representatives of major airlines and aircraft manufacturers. *Id.* at 26,179. The group reached a final resolution on lavatory 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." DOT Press Release, *supra* p. 8.

With this flurry of activity, it finally appeared that the Department would comply with its statutory obligation to issue the proposed rule. Yet all this progress ground to a halt when, in spring 2018, the Department moved the Lavatory Accessibility Rule to its long-term agenda and thereafter removed it altogether, signifying that it has no plans to move forward on the rule anytime soon. *See* RIN 2105-AE32, Unified Regulatory Agenda, Office of Management & Budget, Office of Information & Regulatory Affairs ("OIRA") (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2105-AE32. By Executive Order and an implementing memorandum, no regulations may be issued that do not appear in the most recent Unified Regulatory Agenda. *See* Exec. Order 13771 § 3(c) (Jan. 30, 2017) (providing that "no regulation shall be issued" if it was not included in the Unified Regulatory Agenda); *see also* Memorandum from Neomi Rao, Administrator, OIRA, *Re: Data Call for the Fall 2017 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory*

Actions (Aug. 18, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memranda/2017/2017_fall_agenda_data_call_08242017.pdf (same). The Department's decision to remove the Lavatory Accessibility Rule from the Unified Agenda reinforces its clear and definitive defiance of its statutory duty.

The Secretary's failure to issue rules governing accessibility of lavatories on single-aisle aircraft violates two specific statutory commands. First, it contravenes the ACAA's direction that "the Secretary of Transportation shall promulgate regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of *all* passengers on air carriers." § 3, 100 Stat. at 1080, Add.1 (emphasis added). And it violates Congress's even more specific command, in July 2016, that, "Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall issue the supplemental notice of proposed rulemaking referenced in the Secretary's Report on Significant Rulemakings, dated June 15, 2016, and assigned

Regulation Identification Number 2105-AE12." § 2108, 130 Stat. at 622, Add.2.[3]

Twice, then, Congress has made clear that the Secretary must issue rules governing accessibility of single-aisle airplane lavatories. And yet the Secretary has not only failed to act but has now made clear that the Department will not act, at least not anytime soon.

There can be no question that the statutes create a mandatory duty. They provide a specific timeframe by which the Secretary "shall" issue the rule.[4] Indeed, the Department has admitted that the 2016 FAA Act imposed a binding obligation. *See, e.g.*, RIN 2105-AE32,

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[3] *See* RIN 2105-AE12, Unified Regulatory Agenda, Office of Management & Budget, OIRA (Fall 2017), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=2105-AE12 (identifying accessible lavatories rulemaking and acknowledging that the "statutory deadline requiring the Department to issue a supplemental notice of proposed rulemaking regarding the items identified in RIN 2105-AE12 is July 15, 2017").

[4] The Department violated the 1986 ACAA when it failed to issue regulations addressing lavatory accessibility for "*all* passengers," including the substantial number of passengers who fly on single-aisle aircraft. § 3, 100 Stat. at 1080, Add.1 (emphasis added). But even if it could be argued that the ACAA itself did not create a specific duty to regulate the accessibility of lavatories on single-aisle aircraft, the 2016 FAA Act removed all doubt by identifying the subject rule down to the regulatory identification number.

Unified Regulatory Agenda, OIRA (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2105-AE32 ("The statutory deadline requiring the Department to issue a notice of proposed rulemaking regarding the items identified in RIM 2105-AE12 (including accessible lavatories) is July 15, 2017."). And in any event, this Court has been pellucid about the meaning of the same language that appears in the FAA Act and the ACAA: "'*Shall' means shall*. The Supreme Court and this circuit have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (citing, inter alia, *United States v. Monsanto*, 491 U.S. 600, 607 (1989)). The FAA Act and the ACAA both provided that the Secretary "shall" engage in the required rulemaking—a duty that the Secretary has flouted. There can therefore be no question that the Secretary has violated a mandatory statutory duty by failing to issue the Lavatory Accessibility Rule.

As Petitioners have shown that the Secretary has unlawfully failed to issue a rule that Congress has twice required by statute, the Court should issue a writ of mandamus directing the Secretary to

proceed expeditiously with rulemaking. "If, after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance, thus effectuating the congressional purpose." *Est. of Smith*, 747 F.2d at 591 (citation omitted); *see also Marathon Oil Co.*, 937 F.2d at 499 (court appropriately issued writ directing government to "expeditiously complete administrative action"). *Cf. Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (claim for unlawfully withheld agency action is stated "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*").

IV. Under The *TRAC* Analysis, Mandamus Relief Is Warranted.

Although this Court has been clear that mandamus is warranted when an agency fails to comply with a mandatory duty—as is the case here—the D.C. Circuit has instead articulated a non-exclusive list of factors that it considers when deciding whether mandamus relief is warranted in the case of agency inaction. *See TRAC*, 750 F.2d at 70. The Court has previously rejected the government's attempts to urge it to adopt *TRAC*. *See Forest Guardians*, 174 F.3d at 1188-89 (rejecting

application of *TRAC* factors in considering a claim for injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 706(1), where the agency misses a statutory deadline by which it was supposed to have acted). But even if the Court were to consider the *TRAC* factors, they clearly militate in favor of mandamus relief here.

The first and most important factor is that "the time agencies take to make decisions must be governed by a "rule of reason." *TRAC*, 750 F.2d at 80 (citations omitted); *see also In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (calling the first *TRAC* factor the "most important"). The remaining five are:

> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is "unreasonably delayed."

TRAC, 750 F.2d at 80 (citations omitted). And while "[t]here is no *per se* rule as to how long is too long to wait for agency action, … a reasonable time for agency action is typically counted in weeks or months not

years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (citations omitted). Applying these factors to the present case makes clear that mandamus relief is warranted.

1. The "most important" factor of the *TRAC* analysis clearly cuts in favor of granting Petitioners' mandamus request. Congress has imposed upon the Department a clear timetable for action that, under *TRAC*'s second factor, provides content to the first factor's "rule of reason": the ACAA's 120-day deadline and the FAA Act's one-year deadline. Yet the Department has complied with neither. That necessarily makes the delay unreasonable and requires this Court's intervention. *See Forest Guardians*, 174 F.3d at 1190 ("[W]hen Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld.").

2. The third and fifth factors likewise weigh in favor of mandamus relief. There can be no question that the Lavatory Accessibility Rule affects human health—it governs whether carriers are required to provide mobility-impaired travelers with an accessible lavatory that

would allow them to perform the most basic of bodily functions while flying, thus ensuring their safety. Without that rule, travelers with disabilities, like Mr. Wheaton and Mr. Albertson, are forced to undertake a variety of physical precautions, including by limiting food and fluid intake and by wearing protective undergarments; they risk the potentially serious medical problems that can accompany an extended period of time without access to a lavatory, like contracting a urinary tract infection; and they fear, and sometimes experience, the embarrassment of having a bladder or bowel issue while on a flight. *See supra* pp. 15-19. These distinctly human realities go to the heart of the Lavatory Accessibility Rule. The Department's abdication of its congressionally-imposed duty to issue such a rule thus affects human health and welfare in an undeniable and significant way. Under *TRAC*'s third and fifth factors, this fact strongly supports mandamus relief. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 193 (D.C. Cir. 2016); *see also In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 552 n.6 (D.C. Cir. 1999) (noting that the fifth factor can overlap with the third factor).

Moreover, the interests prejudiced by the Department's delay include not only those of travelers with disabilities, but also those of PVA

and other stakeholders who are required to endure the continued uncertainty over whether, and when, the Department will issue the mandated rule, and when it does, what it will say. Such uncertainty prevents industry stakeholders from adopting new policies or making investments that could improve the industry and the safety of air travel for all travelers—a reality the Department has itself acknowledged, *see* 73 Fed. Reg. at 27,615 (observing that in the context of enforcing the ACAA "detailed standards and requirements are essential").

Because of their desire to achieve the certainty of an industry-wide rule, representatives of these stakeholders on the ACCESS Committee developed, at the Department's request, a consensus on the content of the Lavatory Accessibility Rule—a consensus that the Department promised to adopt. *See* 80 Fed. Reg. at 75,954-55; ACCESS Committee, Meeting 1 Minutes at 9 (May 2018) ("In the event the Committee reaches consensus on a package of recommendations in a given issue area (such as … accessible lavatories…) and DOT has not cast a dissenting vote on the consensus …, DOT agrees to use the [consensus proposal] and any associated recommended regulations as the basis for the Notice of Proposed Rulemaking to the maximum extent possible."),

https://www.transportation.gov/sites/dot.gov/files/docs/Minutes%20-%201st%20Plenary%20Meeting.pdf; DOT Press Release, *supra* p. 8 ("The Department plans to issue a notice of proposed rulemaking based on this agreement in July 2017."). The Department should not be allowed to ignore the recommendations of a group of stakeholders that the Department itself convened for the precise purpose of negotiating a consensus draft of the Lavatory Accessibility Rule, particularly in the face of its statutory duty to issue such a rule.

3. The fourth factor directs a court to consider any competing agency priorities. Certainly, the Department has to date provided no explanation as to why competing priorities prevent it from complying with its statutorily mandated duty to issue the Lavatory Accessibility Rule. And, indeed, it would be hard-pressed to do so given the significant effect this rule could have on increasing accessibility to air travel—a policy goal the Department has on numerous occasions emphasized is a top priority.[5] Moreover, this Court should look with some skepticism on any

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[5] 73 Fed. Reg. at 27,625 ("Particularly given that single-aisle aircraft often make lengthy flights (e.g., across North America, some transoceanic flights), it is clear that providing accessible lavatories on single-aisle aircraft would be a significant improvement in airline service for

argument by the Department that is grounded in the general notion that rulemaking is resource-intensive. Though perhaps true generally, in this case, the Department has a draft of the Lavatory Accessibility Rule that was prepared, and agreed to, by the members of the ACCESS Committee—members who further agreed "not to take a position materially inconsistent" with the consensus draft "during the public comment period of the proposed rule."[6] In short, the Committee has done much of the spadework here, and the Department's rulemaking burden is thus substantially diminished.

And, although under *TRAC*'s sixth factor, a court need not find impropriety to grant relief, "the issue of impropriety" is intertwined with the fourth factor's "sensitivity to the agency's legitimate priorities." *In re Barr Labs, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). "Where the agency has manifested bad faith, as by … asserting utter indifference to

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passengers with disabilities."); 81 Fed. Reg. 76,300, 76,305 (Nov. 2, 2016) ("It is public policy that air travel should be accessible to all members of the public.").

[6] ACCESS Committee, Meeting 1 Minutes at 9 (May 2018), https://www.transportation.gov/sites/dot.gov/files/docs/Minutes%20-%201st%20Plenary%20Meeting.pdf.

a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities." *Id.* The Department's manifest bad faith here is striking. Not only has the Department missed its statutory deadline to issue the Lavatory Accessibility Rule, or, at the very least, publish the SNPRM required by the FAA Act of 2016, the Department has taken the Lavatory Accessibility Rule off its Unified Regulatory Agenda, making clear its intention to simply ignore Congress's command (*see supra* p. 26). This it cannot do. *See Marathon Oil*, 937 F.2d at 500 ("Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform."). In light of the Department's outright refusal, any claim of competing agency priorities cannot excuse the Department's failure thus far to comply with Congress's mandate. This Court should intervene. *See id.*; *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court issue a writ of mandamus to compel the Department to act in compliance with its statutory obligations and issue the Lavatory Accessibility Rule.

Dated: November 29, 2018

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pending before this Court is a petition for writ of mandamus that presents the question whether the Department of Transportation has violated its legal duty to propose for public comment the Lavatory Accessibility Rule. This in turn requires the Court to consider a lengthy statutory and regulatory history, as well as arguments as to the appropriate legal standard to apply in deciding the case.

Petitioners respectfully submit that oral argument may aid the Court's resolution of this matter.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(g), the undersigned counsel for Petitioners certifies that this brief:

(i) complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 7,084 words, including footnotes and excluding the parts of the brief exempted by FRAP 32(f) and Circuit Rule 32(e)(1); and

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

Dated: November 29, 2018

/s/ *Karianne M. Jones*
Karianne M. Jones

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2018, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM-ECF system.

Dated: November 29, 2018

/s/ *Karianne M. Jones*
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