IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re PARALYZED VETERANS OF AMERICA, JAMES THOMAS WHEATON, JR., Petitioners.	No. 18-1465

GOVERNMENT'S RESPONSE TO
PETITIONERS' MOTION TO LIFT THE STAY

Petitioners brought these mandamus proceedings to compel the United States Department of Transportation and the Secretary of Transportation to issue a proposed rule governing lavatory access on single-aisle aircraft. Petitioners alleged that a proposed rule was required by Section 2108 of the FAA Extension, Safety, and Security Act of 2016 ("2016 FAA Reauthorization Act"), Pub. L. No. 114-190, 130 Stat. 615. Based on the Secretary's repeated announcement of a projected December 2, 2019 timetable for issuing a proposed rule, this Court placed these mandamus proceedings in abeyance.

Now, based on a three-sentence description of the Transportation Department's proposed rule, petitioners surmise that the proposed rule will not conform with the 2016 FAA Reauthorization Act. Petitioners assert that a proposed rule that would, on its own terms, improve the accessibility of lavatories in fact "does not address 'accessible lavatories.'" Mot. 6. Petitioners are incorrect, and none of their premature concerns change the fundamental

calculus underlying this Court's stay. If petitioners are ultimately dissatisfied with what the Secretary proposes, they may participate in the notice-and-comment rulemaking and advocate for a different rule. Petitioners have not identified any changed circumstances or other reasons for this Court to lift the stay.

BACKGROUND

Section 2108 of the 2016 FAA Reauthorization Act provides that the Transportation Department shall issue a particular "supplemental notice of proposed rulemaking referenced in the Secretary's [June 2015] Report on Significant Rulemakings." The June 2015 Report then references a "rulemaking action [that] would consider … whether carriers should be required to provide accessible lavatories on certain new single-aisle aircraft." SA537.[1]

The Department separately convened the ACCESS Committee to study this issue. The Committee's consensus term sheet recommended standards for accessible lavatories on single-aisle aircraft with more than 125 passengers. SA602-05. For aircraft delivered three years following the final rule, the Committee recommended standards governing the interior of the lavatory—including toilet seats, assist handles, faucets, flush controls, and attendant call

[1] References to "SA" are to the Supplemental Addendum filed in connection with the government's response to the mandamus petition.

buttons—but the Committee did not recommend increasing the size of those lavatories. SA602-03. For certain aircraft delivered twenty years following the final rule (or for new aircraft design applications filed with the Federal Aviation Administration), the Committee recommended lavatories of a "sufficient size," along with other requirements. SA605.

Following the mandamus petition, the government informed this Court that the Department had, since November 2018, repeatedly announced a projected date of December 2, 2019 for issuing a proposed rule governing lavatory access on single-aisle aircraft. SA815 (November 2018 Report). Those announcements had stated that the Department would address "whether carriers should be required to provide accessible lavatories on certain new single aisle aircraft." SA936 (March 2019 Report). On May 20, 2019, this Court abated these proceedings and required the government to file periodic status reports until that date. *E.g.*, August 19, 2019 Status Report; July 5, 2019 Status Report.

In the July 5, 2019 Status Report, the government provided further details regarding the proposed rule. As the status report explained, the Department's public June 2019 Report had stated that the proposed rule "would require airlines to take steps to improve the accessibility of lavatories on single-aisle aircraft short of increasing the size of lavatories." July 5, 2019 Status Report, Exh. A, at 81 (June 2019 Report). Those efforts would "ensure the accessibility of

features within an aircraft lavatory, including but not limited to, toilet seat, assist handles, faucets, flush control, attendant call buttons, lavatory controls and dispensers, lavatory door sill, and door locks," and also would "consider standards for the on-board wheelchair to improve its safety/maneuverability and easily permit its entry into the aircraft lavatory." *Id.* Separate from that proposed rule, the Department would issue an advance notice of proposed rulemaking in December 2019 to "solicit comment and gather updated information on the costs and benefits of requiring airlines to make lavatories on new single-aisle aircraft large[r]," and "equivalent to th[ose] currently found on twin-aisle aircraft." *Id.* at 82.

DISCUSSION

Petitioners contend that, based on the three-sentence description in the Transportation Department's June 2019 Report, the Secretary's proposed rule would not satisfy its statutory mandate to propose a rule that "consider[s] … whether carriers should be required to provide accessible lavatories on certain new single-aisle aircraft." SA537; *see* 2016 FAA Reauthorization Act, § 2108. This is incorrect, and petitioners' preemptive concerns have no bearing on whether this Court should exercise its discretion to lift the stay.

1. Petitioners appear to concede (Mot. 9 n.3) that the Secretary could, under the 2016 FAA Reauthorization Act, "propos[e] a rule which declines to

extend the accessible lavatory requirement to single-aisle aircraft." The 2016 Act only requires the Department to "*consider* … *whether* carriers should be required to provide accessible lavatories on certain new single-aisle aircraft." SA537 (emphases added). As we previously explained (Resp. 22), consistent with the 2016 Act, the Department could propose that new single-aisle aircraft should *not* have accessible lavatories, with or without promulgating a final regulation.

Petitioners argue (Mot. 7-9) that because the Department is proposing to do *something* that "improve[s] the accessibility of lavatories," *see* June 2019 Report 81, such a proposal would not satisfy a statutory obligation under which the Department could propose to do *nothing* about accessible lavatories. But if the Department can "decline[] to extend the accessible lavatory requirement" altogether, Mot. 9 n.3, then it necessarily follows that the Department can also decline to extend some lavatory-access features but not others. And petitioners could not seriously prefer that the Department instead propose a rule that does nothing to improve lavatory access.

Petitioners also dispute (Mot. 7-9) whether the precise contours of the proposed rule on single-aisle aircraft would provide protections consistent with the existing rule for twin-aisle aircraft. *See* 14 CFR § 382.63(a). Petitioners contend (Mot. 5) that addressing "accessibility features within lavatories" does not address "accessible lavatories" within the meaning of the current twin-aisle

rule. Petitioners misunderstand the governing law. The 2016 Act's command to issue a proposed rule does not define "accessible lavatories" or require the Department to impose the same definition in the single-aisle context as in the twin-aisle context. Even assuming the twin-aisle understanding of "accessible lavatories" applied, the terms of the proposed rule would address accessible lavatories consistent with that understanding. That is because the features within lavatories are part of what makes a lavatory accessible, even under the twin-aisle rule. *Compare* 14 CFR § 382.63(a)(3) ("The lavatory shall provide door locks, accessible call buttons, grab bars, faucets and other controls, and dispensers usable by qualified individuals with a disability, including wheelchair users and persons with manual impairments."), *with* June 2019 Status Report 81 ("This rulemaking would ensure the accessibility of features within an aircraft lavatory. including but not limited to, toilet seat, assist handles, faucets, flush control, attendant call buttons, lavatory controls and dispensers, lavatory door sill, and door locks.").

Petitioners also contend that the proposed rule would not "fully address[] lavatory accessibility," because a proposed rule that "stops 'short of increasing the size of the lavatories'" necessarily does not address the accessibility of lavatories. Mot. 2, 8 (emphasis added). But no regulation that governs accessible lavatories has included specifications for lavatory size, *see* 14 CFR § 382.63(a), as

even the ACCESS Committee appeared to recognize in recommending accessible-lavatory standards for most single-aisle aircraft that did not include changes in size, *see* SA602-03. The Department's twin-aisle regulations instead provide a functional description of how the lavatory must operate: an "accessible lavatory must permit a qualified individual with a disability to enter, maneuver within as necessary to use all lavatory facilities, and leave, *by means of the aircraft's on-board wheelchair*." *Id.* § 382.63(a)(1) (emphasis added); *see id.* § 382.65 (requirements for onboard wheelchairs). Here, the Secretary's proposed rule would "consider standards for the on-board wheelchair to improve its safety/maneuverability and easily permit its entry into the aircraft lavatory." June 2019 Report 81. Requiring onboard-wheelchair standards to permit an individual to enter, maneuver, use, and leave a lavatory, in addition to certain accessibility features, would make lavatories more functionally accessible. Proposing a rule imposing such requirements addresses lavatory access even as that concept is understood in the twin-aisle context.

2. Petitioners' premature disagreements with a proposed rule the Secretary has not yet issued only highlight why lifting the stay is not warranted, especially when the timetable for a proposed rule is December 2019. Petitioners will have every opportunity to suggest changes and make specific objections to the proposed rule during the notice-and-comment rulemaking period. If

petitioners want a final rule that increases the size of lavatories on single-aisle aircraft, they can provide such comments. The Secretary then will consider the comments and address them. The Secretary might adopt the initial proposed rule, or she might agree with petitioners' preferred approach in issuing a final rule. As we previously explained (Resp. 22), a "proposed rule [is] simply a proposal." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007).

Petitioners, in effect, request that this Court short-circuit the notice-and-comment period by ruling on their objections before a proposed rule has even been issued. This Court should reject their attempt to make an end-run around the ordinary process for objecting to a proposed rule. *See* June 2019 Report 82 (notice-and-comment period projected to end March 2020). Particularly in this context, petitioners must "exhaust[] all other avenues of relief"—including objecting to the proposed rule during the notice-and-comment period—before requesting that this Court issue a writ of mandamus. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984).

Nor does it make any sense to lift the stay and issue a writ of mandamus to compel a *different* proposed rule than what the Secretary is currently drafting. There is no reason to force the Secretary to issue a different proposal that she could promptly—within her discretion—then change, abandon, or withdraw. *See Long Island Care*, 551 U.S. at 175. Moreover, requiring the Department to draft

a different proposal at this late juncture could potentially delay the December 2019 timetable, when a draft proposed rule is "close to completion." August 19, 2019 Status Report 2. And it would be irresponsible for the Secretary to propose a rule on lavatory size—as petitioners seem to request—when the Department is still "gather[ing] updated information on the costs and benefits of requiring airlines to make lavatories on new single-aisle aircraft large[r]." June 2019 Report 82.

3. Each of the foregoing problems with mandamus relief underscores the government's arguments that such relief is not available. The 2016 FAA Reauthorization Act requires a proposed rule governing accessible lavatories, but does not provide a "clear and indisputable" right to particular specifications within a proposed rule, as petitioners now request. *United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264, 1276 (10th Cir. 2018) (quotation omitted). As we argued (Resp. 23-26), moreover, petitioners' disagreements with the particulars of a proposed rule highlight why this Court lacks jurisdiction to compel a proposed rule. Because petitioners cannot challenge a mere proposal in this Court under the relevant direct-review statute, 49 U.S.C. § 46110(a), mandamus proceedings in this Court to supervise that proposed rule are not available. And mandamus relief that oversees the precise details of particular proposals is

meaningless when petitioners' disagreements with any proposal can be fleshed out and addressed in the ordinary notice-and-comment period.

CONCLUSION

Petitioners' motion to lift the stay should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,911 words. This response also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Book Antiqua 13-point font, a proportionally spaced typeface.

/s/ Dennis Fan
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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2019, I electronically filed the foregoing status report with the Clerk of the Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Dennis Fan
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CERTIFICATE OF DIGITAL SUBMISSION

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