[ORAL ARGUMENT REQUESTED]

No. 18-1465

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re PARALYZED VETERANS OF AMERICA, *et al.*,

Petitioners.

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

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
ELAINE L. CHAO, in her official capacity as Secretary of Transportation,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF MANDAMUS

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STATEMENT OF RELATED APPEALS
PURSUANT TO 10TH CIR. R. 28.2(C)(1)

This Court dismissed petitioners' related petition for review in *Paralyzed Veterans of America v. U.S. Department of Transportation*, No. 18-9546 (10th Cir.), on September 26, 2018.

GLOSSARY

ACCESS Committee	Advisory Committee on Accessible Air Transportation
AIR Act	Wendell H. Ford Aviation Investment and Reform Act for the 21st Century
FAA	Federal Aviation Administration
PVA	Paralyzed Veterans of America

INTRODUCTION

For over three decades, the United States Department of Transportation has continuously addressed commercial airlines' obligations toward individuals with disabilities, which include requirements for accessible lavatories on aircraft. Those efforts continue today, and the Secretary of Transportation intends to issue a notice of proposed rulemaking addressing accessible lavatories on single-aisle aircraft no later than December 2, 2019. Petitioners—Paralyzed Veterans of America ("PVA") and a member of that organization—nonetheless petition this Court for a writ of mandamus to compel the Secretary to act sooner.

This Court should deny or dismiss the petition. There is no statute or regulation that requires the Secretary to promulgate a final rule governing lavatory access, and such a duty is a prerequisite to this mandamus action. To the extent that petitioners wish to compel the issuance of a *proposed* rule, this Court lacks jurisdiction to grant such relief. Consistent with this Court's prior order, *see* Dec. 19, 2018 Order, a mandamus petition to compel agency actions other than the limited class of final actions that may obtain direct review in this Court must be dismissed. In all events, mandamus relief is inappropriate where the Secretary is poised to issue a proposed rule, and the Court should alternatively deny relief on that basis as well.

STATEMENT OF JURISDICTION

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), over a petition for a writ of mandamus to compel the Secretary to promulgate a final rule in aid of the Court's jurisdiction under 49 U.S.C. § 46110(a), which authorizes the Court to review a final "order" of the Transportation Department that is issued pursuant to 49 U.S.C. §§ 40101 to 46507. As discussed below, this Court does not separately have jurisdiction to compel a proposed rule.

STATEMENT OF THE ISSUE

Whether this Court should issue a writ of mandamus to compel the Secretary to promulgate a final rule, or a proposed rule (assuming one is sought), governing accessible lavatories on single-aisle commercial aircraft.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. Air Carrier Access Act of 1986

1. In 1982, the federal government first promulgated rules prohibiting disability discrimination across the airline industry. *See* 47 Fed. Reg. 25,948 (June 16, 1982). The Supreme Court limited the coverage of those regulations in *U.S. Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986).

Congress responded by enacting the Air Carrier Access Act of 1986 ("ACAA"), requiring the Secretary of Transportation to "promulgate 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. At the "urg[ing]" of disability groups, the Department then commenced a regulatory-negotiation process—through which agencies convene advisory committees to develop proposed rules by consensus—even though the approach "would delay the issuance of" a final rule. 53 Fed. Reg. 23,574, 23,574 (June 22, 1988); *see* 5 U.S.C. § 561 *et seq.* (negotiated rulemaking procedures).

2. In 1990, the Secretary published a final rule ("1990 ACAA Rule"), which "prohibits discrimination by air carriers on the basis of handicap, consistent with the safe carriage of all passengers." 55 Fed. Reg. 8,008, 8,008 (Mar. 6, 1990); *see* 14 C.F.R. § 382.1 (1991) ("implement[ing] the Air Carrier Access Act of 1986"). Those regulations remain in effect today.

The 1990 ACAA Rule addressed aircraft lavatories. In present terms, "accessible lavatories" are those that: (1) permit individuals with disabilities to "enter, maneuver within as necessary to use all lavatory facilities, and leave, by means of the aircraft's on-board wheelchair"; (2) afford those individuals privacy; and (3) include "door locks, accessible call buttons, grab bars, faucets and other controls, and dispensers." 14 C.F.R. § 382.63(a) (2019). The 1990 ACAA Rule provided that new twin-aisle aircraft "must have accessible

lavatories," that all aircraft must provide an onboard wheelchair to reach all other lavatories on 48 hours' advance request, and that all aircraft with 60 or more seats and an accessible lavatory must carry an onboard wheelchair. 55 Fed. Reg. at 8,008; *see* 14 C.F.R. §§ 382.63, 382.65 (2019). The Department, however, was "unable to obtain sufficient information to make a sound decision" on whether "seats should be removed" in single-aisle aircraft "to accommodate the accessible lavatories." 55 Fed. Reg. at 8,021.

Follow-up efforts did not produce further rules. The Secretary solicited additional comments regarding single-aisle aircraft. *See* 55 Fed. Reg. 8,078 (Mar. 6, 1990). Those comments "revealed little agreement," and the Department realized that this "complex, controversial question [was] best answered through structured dialogue" between interested parties. 57 Fed. Reg. 39,414, 39,415 (Aug. 31, 1992). In 1992, the Secretary thus convened another advisory committee. *See* 57 Fed. Reg. 424 (Jan. 6, 1992). Yet that committee also was "[u]nable to reach consensus" on these "controversial access issues" because of "intransigent conflict" and a "relatively high level of disagreement and controversy among the stakeholders," ultimately "disband[ing] in 1996." SA151-52; *see* SA16 (committee report).[1]

[1] The Supplemental Addendum ("SA") includes a number of government documents. Also included (SA1-15) is a declaration from Blane Workie, who is

B. 2000 AIR Act

In 2000, Congress extended the ACAA to foreign airlines. *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR Act"), Pub. L. No. 106-181, § 707(c), 114 Stat. 61, 158 (2000). In implementing that provision, the Secretary issued a proposed rule addressing several disability topics. *See* 69 Fed. Reg. 64,364 (Nov. 4, 2004).

In 2008, the Secretary promulgated a final rule ("2008 AIR Act Rule"), but did not modify existing lavatory-access requirements. *See* 73 Fed. Reg. 27,614 (May 13, 2008). The Department reiterated that, ever since the 1990 ACAA Rule, it had "drawn a distinction between single-aisle and twin-aisle aircraft," because the "cabins of [twin-aisle] aircraft are physically larger, affording somewhat greater flexibility than single-aisle aircraft in placing accessible lavatory units," and because twin-aisle aircraft "tend to be used on longer-distance flights and carry more people, making the presence of accessible lavatories all the more important to passengers." *Id.* at 27,626. The issue remained "a matter of interest," however, such that the Department would "look carefully at ongoing

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the Assistant General Counsel for the Department's Office of Aviation Enforcement and Proceedings, which addresses the Department's current process on a lavatory-access proposed rule. Reviewing courts routinely consult such declarations, and other materials, in challenges to agency inaction. *See Irshad v. Johnson*, 754 F.3d 604, 606 (8th Cir. 2014); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 858-59 (D.C. Cir. 2008); *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997).

developments in this area to determine if future rulemaking proposals may be warranted." *Id.*

In May 2011, the Department updated its monthly Significant Rulemakings Report to account for several remaining issues following the 2008 AIR Act Rule. SA327. Generally, the monthly report "provides a summary and the status for all significant rulemakings that [the Department] currently has pending or has issued recently." SA968. The Department there stated its renewed interest in lavatory access, explaining that it would "ask for public comment on accessible lavatories on single-aisle aircraft." SA391; *see* SA433.

C. 2016 FAA Reauthorization Act

Four years later, the Department's June 2015 Report continued to list five disability issues. Those issues, under Regulation Identification Number 2105-AE12, were: medical oxygen; service animals; accessible lavatories on single-aisle aircraft; airlines' requirements for reporting disability-assistance requests; and legroom. SA537. The report separately included the issue of in-flight entertainment. SA541. The Department stated that it was exploring "a negotiated rulemaking"—similar to the 1990 ACAA Rule—on those topics. 80 Fed. Reg. 75,953, 75,954 (Dec. 7, 2015).

In May 2016, the Department convened the Advisory Committee on Accessible Air Transportation ("ACCESS Committee")—consisting of disability

groups (including PVA) and the airline industry—to conduct regulatory negotiations on service animals, lavatory access, and in-flight entertainment. *See* 81 Fed. Reg. 26,178 (May 2, 2016). The convening report explained that the "need for this rule is a matter of policy judgment," because "[n]o statute or court order unequivocally requires that the Department issue a rule." SA572. The report also cautioned "that negotiated rulemaking typically takes a bit longer than normal rule drafting, but it often makes up that time by producing a better proposal which shortens and streamlines the comment process." SA573.

Congress proceeded on its own track. In July 2016, Congress enacted the FAA Extension, Safety, and Security Act of 2016 ("2016 FAA Reauthorization Act"), Pub. L. No. 114-190, 130 Stat. 615. The Act provides that "[n]ot 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, 2015, and assigned Regulation Identification Number 2105-AE12." *Id.* § 2108. One year from enactment is July 15, 2017.

D. 2016 ACCESS Committee

Throughout 2016, the ACCESS Committee met with the understanding that, if they reached a satisfactory consensus "Term Sheet," the Department would "use the Term Sheet and any associated recommended regulations as the

basis for the Notice of Proposed Rulemaking to the maximum extent possible." SA597-98 (committee rules). The Department would then "be responsible for translating this Term Sheet into the language of a proposed rule, its supporting preamble, a Regulatory Impact Analysis, and all other appropriate materials necessary for the publication of a Notice of Proposed Rulemaking." SA597.

In November 2016, the ACCESS Committee reached consensus on lavatory access and in-flight entertainment, but not service animals. SA600. The Committee's term sheet set forth technical lavatory specifications for two classes of aircraft with more than 125 passenger seats. SA602-05. The Committee also requested that the Department, prior to a proposed rule, develop standards for onboard wheelchairs so that those standards could be incorporated into a lavatory-access proposed rule. SA604.

II. IMPLEMENTATION OF 2016 FAA REAUTHORIZATION ACT

A. Requirements For Proposed Rules

The preparation of a notice of proposed rulemaking can be a "time-consuming and complex" process. SA7. To start, the Department must prepare a Regulatory Impact Analysis that assesses "the potential costs and benefits of the regulatory action" and quantifies "the foreseeable annual economic costs and cost savings." SA847-48. "This analysis is conducted by economists and other experts, who rely on consultation with stakeholders, review of data, and other

research." SA7. Then, the Department must ensure compliance with other statutory and regulatory requirements, including by assessing the economic impact on small businesses under the Regulatory Flexibility Act. SA7.

The Department must also determine the "extent" to use the ACCESS Committee's term sheet, SA598, and the "appropriate scope" of a proposed rule, SA8, 848. The Department would then "translat[e] this Term Sheet into the language of a proposed rule, its supporting preamble, [and] a Regulatory Impact Analysis," and prepare "all other appropriate materials necessary" for a proposed rule. SA597. The draft proposed rule must be "reviewed by various offices and operating administrations within" the Department and by the Secretary, which may take several weeks. SA8, 12. The draft must also be reviewed by the Office of Management and Budget, which "generally has 90 days to complete its review." SA8, 12. Once the drafting and review is complete, the Department can publish the proposed rule.

B. Current Progress On Lavatory-Access Proposed Rule

The Department's Office of Aviation Enforcement and Proceedings is charged with the present rulemaking. SA1. The Office has made progress, including by engaging the John A. Volpe National Transportation Systems Center ("Volpe Center") to conduct the required economic assessments.

The Department "has always intended to issue" a proposed rule and "has never decided to abandon the rulemaking effort," but "several factors" have affected the Department's timing following the 2016 FAA Reauthorization Act. SA8. For several months, the Department awaited the ACCESS Committee's resolution, which arrived in November 2016. SA8-9. Soon after, the transition in Administrations "in early 2017 temporarily slowed progress on some of the Office's activities, as members of the Office devoted time to briefing new officials and those officials learned about the Office's activities." SA12. The transition meant that the Department did not publish monthly reports for much of 2017. *See* SA972. In August 2017, the Department resumed those publications, and the first new report announced an intention to continue pursuing the lavatory-access issue. SA720.

Subsequent progress was temporarily halted due to "a lack of resources." SA9. Because the Office of Aviation Enforcement and Proceedings "does not have an economist on staff, and other economists at [the Department] were unavailable to assist due to their own heavy workloads," the Office "could not even begin the significant economic analysis that must precede" a proposed rule. SA9. Eventually, in May 2018, the Office was able to enter into a contract "providing for the economic analysis" by the Volpe Center, which provides "research and technical expertise" to federal agencies, state and local

governments, and private companies. SA9. The Volpe Center is a component of the Department but is not funded through the Department's appropriations, and the contract thus requires the Department to pay funds to the Volpe Center (as the Department would with a private economist). SA9. "The Volpe Center began its work in July 2018, and that work is ongoing." SA9.

In November 2018, based on that progress, the Department announced a projected date of December 2, 2019 for a proposed rule. SA815. The Department explained that the delay had resulted because "[a]dditional research and data analysis [was] necessary" and "[a]dditional coordination [was] needed for regulatory evaluation." SA815. The Department also maintained the issue on the government's Fall 2018 Unified Agenda, which lists the government's various planned rulemakings. SA836; *see* SA13 (noting issue appears in earlier 2017 and 2018 Unified Agendas).

The December 2, 2019 date remains in place, as the Department has continuously announced. SA936 (March 2019 Report); *see* SA13. The Department expects that, as the Volpe Center completes its analysis, the Department will "review that analysis and coordinate . . . on any further work that is deemed necessary" and "determine the most appropriate way to implement the [ACCESS] Committee's" request with respect to onboard wheelchairs. SA12. Then, the Department will determine the scope, draft the

text, and prepare the preamble of a proposed rule. SA12. Last, the Department will obtain review from other internal offices and from the Secretary (over several weeks) and obtain the necessary review by the Office of Management and Budget (over 90 days) before publishing. SA12-13.

C. 2018 FAA Reauthorization Act

The Department also has been satisfying other congressional rulemaking directives, enforcement mandates, and numerous additional obligations. *See* SA2-3, 9-11, 835, 965 (describing Department actions on congressional mandates).

Of particular relevance here, in May 2018, the Department issued an advance notice of proposed rulemaking regarding service animals, an issue addressed together with lavatory access in the 2016 FAA Reauthorization Act. *See* 83 Fed. Reg. 23,832 (May 23, 2018). Even though the ACCESS Committee had not reached consensus on service animals, the Department pursued that issue first because consumer complaints regarding service animals were "the fourth largest disability complaint area for airlines" between 2016 and 2017, and because two organizations had petitioned to commence the rulemaking process. *Id.* at 23,834-36; *see* 83 Fed. Reg. 23,804, 23,805 (May 23, 2018). Neither petitioners nor others have petitioned the Department regarding the lavatory-access issue. *See* 5 U.S.C. § 553(e); 49 C.F.R. § 5.11 (petition procedures).

Subsequently, in October 2018, Congress enacted the FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 437, 132 Stat. 3186, 3344-45, which expressly requires the Secretary to "issue a final rule" governing service animals within 18 months (by April 5, 2020) and provides substantive considerations for those regulations. By contrast, the 2018 Act only requires the Comptroller General to submit to Congress a report regarding aircraft lavatories. *Id.* § 426. The Act does not state that the Secretary shall issue a final rule on lavatory access.

III. PRIOR PROCEEDINGS

Petitioners are PVA and James Thomas Wheaton, Jr., who is PVA's National Treasurer and an individual with paraplegia. Add. 9-10. In July 2018, petitioners sought review in this Court of the Transportation Department's "failure to publish rules regarding accessible lavatories on single-aisle aircraft," invoking the Court's jurisdiction under 49 U.S.C. § 46110(a). Pet. 1, *Paralyzed Veterans of Am. v. U.S. Dep't of Transp.*, No. 18-9546 (10th Cir. July 31, 2018). Section 46110(a) provides that "a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under" 49 U.S.C. §§ 40101 to 46507—which includes the ACAA, as amended—"may apply for review of the order by filing a petition for review . . . in [a] court of appeals." The court of appeals "has exclusive jurisdiction" to review the order. 49 U.S.C. § 46110(c). In September 2018, this Court dismissed the petition for lack of

jurisdiction, concluding that the Department had "not issued any order—let alone a final order—and there is neither an agency number assigned to this proceeding nor an agency record to review." Order 3, *Paralyzed Veterans of Am.*, *supra* (Sept. 26, 2018).

In November 2018, petitioners filed the pending petition for a writ of mandamus. In December 2018, this Court *sua sponte* dismissed the petition without requiring a response. The Court interpreted the petition to be seeking to compel the Secretary "to issue proposed rules governing single-aisle lavatory accessibility on commercial airplanes." Dec. 19, 2018 Order. The Court stressed that, though "the All Writs Act, 28 U.S.C. § 1651(a), empowers this court 'to issue all writs necessary or appropriate in *aid* of [its] respective jurisdiction[],' . . . it is not itself a grant of jurisdiction." *Id.* Rather, with respect to compelling a proposed rule, "the district court has 'original jurisdiction of any action in the nature of mandamus to compel . . . any agency [of the United States] to perform a duty owed to the plaintiff.'" *Id.* (quoting 28 U.S.C. § 1361).

Petitioners requested panel rehearing. Petitioners clarified that, because "*a rule* would be issued, at least in part, under the [ACAA]," their "legal challenge to *such a rule* would be reviewable only in the court of appeals pursuant to 49 U.S.C. § 46110" and "the court of appeals also has exclusive jurisdiction to hear a case challenging the Department's unlawful failure to issue *such a rule*." Reh'g

Pet. 7-8 (emphases added). Based on those representations, the Court granted rehearing and ordered the government to respond to the mandamus petition. *See* Feb. 5, 2019 Order.

SUMMARY OF ARGUMENT

The Transportation Department has repeatedly announced that the Secretary intends to publish a notice of proposed rulemaking addressing accessible lavatories on single-aisle aircraft no later than December 2, 2019. SA815, 936. The Department's substantial progress and concrete timeline make mandamus relief inappropriate. As this Court has emphasized, mandamus "is a 'drastic remedy' that is 'invoked only in extraordinary circumstances.'" *United States v. Copar Pumice Co.*, 714 F.3d 1197, 1210 (10th Cir. 2013) (quotation omitted). This is not such a circumstance.

A. Petitioners first invoke (Pet. 2) the Court's mandamus jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to compel a final rule that would be reviewable in this Court under 49 U.S.C. § 46110(a). That relief is unavailable. There is no statute or regulation that requires the Secretary to promulgate a final rule. Petitioners point to the 1986 ACAA, but Transportation regulations already implement the ACAA and the ACAA does not mandate any particular action with respect to lavatory access. Petitioners then turn to the 2016 FAA Reauthorization Act, but that Act only requires the Secretary to publish a

proposed rule. A proposed rule is not a final rule, and Congress nowhere mandated a final rule governing lavatory access.

B. Because the mandamus petition was reinstated based on representations that petitioners challenge the Secretary's "unlawful failure to issue such a rule," Reh'g Pet. 8, the government does not understand petitioners to be independently invoking this Court's mandamus jurisdiction to compel a *proposed* rule on lavatory access. In any event, that relief is also unavailable. This Court correctly concluded in its prior order that it does not have mandamus jurisdiction to compel a proposed rule, rather than a final rule. *See* Dec. 19, 2018 Order. Because the All Writs Act, 28 U.S.C. § 1651(a), provides an "aid" to this Court's jurisdiction to review the Department's final actions, mandamus petitions to compel agency actions other than those final actions must proceed as ordinary litigation. As the D.C. Circuit has explained, because it "is [the court of appeals'] interest in protecting its future jurisdiction that gives rise to jurisdiction," a mandamus action in this Court is unavailable where the requested agency action "is not reviewable in this Court." *Moms Against Mercury v. FDA*, 483 F.3d 824, 827 (D.C. Cir. 2007).

C. Even assuming this Court has jurisdiction to compel the issuance of a proposed rule, it should exercise its discretion to deny mandamus relief here. Contrary to petitioners' assertions, the "plain language of the All Writs Act

establishes the permissive, non-mandatory, nature of the court's power to issue an injunction." *Bailey v. State Farm Fire & Cas. Co.*, 414 F.3d 1187, 1189 (10th Cir. 2005). The Department has made substantial progress in preparing a proposed rule, including by engaging the Volpe Center to begin the required economic analyses almost a year ago, in May 2018. The Department intends to use the next few months awaiting the completed analysis, determining the terms and preamble of the proposed rule, and obtaining various governmental reviews. The Department remains committed to issuing a proposed rule, and the Court should give the Secretary an opportunity to fulfill that commitment before resorting to the writ of mandamus.

STANDARD OF REVIEW

Under the All Writs Act, the Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). A writ of mandamus, however, "is a 'drastic remedy' that is 'invoked only in extraordinary circumstances.'" *Copar Pumice*, 714 F.3d at 1210 (quotation omitted). Before the writ "may issue, the petitioner must satisfy three conditions: the party seeking [the] writ must have no other adequate means for [the] relief sought, the party's right to the writ must be clear and undisputable, and the issuing court must be satisfied that the writ is appropriate." *Id.*; *see Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004).

ARGUMENT

THE PETITION FOR A WRIT OF MANDAMUS SHOULD BE DENIED OR DISMISSED

A. The Petition Should Be Denied Because Petitioners Do Not Identify A Clear, Indisputable Duty To Issue A Final Rule

Petitioners contend (Pet. 11) that mandamus relief is warranted to compel the Secretary of Transportation "to issue the Lavatory Accessibility Rule." Petitioners assert (Pet. 1) a "Lavatory Accessibility Rule," if promulgated, would govern "the availability of lavatories accessible to travelers with disabilities on single-aisle aircraft." This Court should deny the petition.

1. Courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). Petitioners thus invoke (Pet. 2) this Court's mandamus jurisdiction in aid of its future jurisdiction to review certain "order[s]" of the Transportation Department under 49 U.S.C. § 46110(a). *See Telecommunications Research & Action Ctr. V. FCC*, 750 F.2d 70, 75-77 (D.C. Cir. 1984) ("*TRAC*"). "The term 'order' includes 'rules' for purposes of § 46110," *Paralyzed Veterans of Am. v. U.S. Dep't of Transp.*, 909 F.3d 438, 443 (D.C. Cir. 2018), where the rule has "the quintessential feature of agency decisionmaking suitable for judicial review: finality," *Tulsa Airports Improvement Trust v. FAA*, 839 F.3d 945, 949 (10th Cir. 2016) (quotation omitted). This Court may therefore review whether the Secretary has prevented the Court from exercising its

Section 46110(a) jurisdiction by failing to issue a final rule. *Environmental Def. Fund v. U.S. Nuclear Regulatory Comm'n*, 902 F.2d 785, 786-87 (10th Cir. 1990).

The fundamental defect in the petition is that the Secretary does not have a duty to issue a final rule governing accessible lavatories on single-aisle aircraft. The writ of mandamus "is intended to provide a remedy for a [petitioner] . . . only if the [respondent] owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). "The importance of the term 'nondiscretionary' cannot be overstated—the judiciary cannot infringe on decision-making left to the Executive branch's prerogative." *Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995).

This Court has thus repeatedly emphasized that "the petitioner's right to the writ must be 'clear and indisputable.'" *United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264, 1276 (10th Cir. 2018) (quoting *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1187 (10th Cir. 2009)). The "mandamus remedy [is] normally limited to enforcement of a specific, unequivocal command, the ordering of a precise, definite act . . . about which [an official] had no discretion whatever." *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (quotations omitted). A petition asserting agency action unlawfully withheld or unreasonably delayed "can proceed only where a [petitioner] asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64-65.

There is no statute or regulation that requires the Secretary to issue a final rule governing lavatory access on single-aisle aircraft. The petition should be denied on that basis alone.

2. Petitioners nonetheless contend (Pet. 11, 29-30) that "Congress has twice required the Department to issue rules governing accessible lavatories on commercial aircraft": (1) "in the 1986 enactment of the ACAA" and (2) "in its enactment of the FAA [Reauthorization] Act of 2016." This is mistaken.

The ACAA contains no specific, mandatory directive to promulgate a final rule governing accessible lavatories. That Act required the Secretary to "promulgate regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers." ACAA § 3. The Secretary then promulgated regulations that prohibited "discrimination by air carriers on the basis of handicap, consistent with the safe carriage of all passengers." 55 Fed. Reg. at 8,008. Those rules expressly "implement the Air Carrier Access Act of 1986," 14 C.F.R. § 382.1 (1991), and remain in effect today, 14 C.F.R. § 382.1 (2019). They require accessible lavatories on twin-aisle aircraft, onboard wheelchairs to reach all lavatories on all aircraft upon a traveler's request, and onboard wheelchairs on all aircraft with 60 or more seats and an accessible lavatory even absent a request.

Id. §§ 382.63, 382.65 (2019). The ACAA went no further, and petitioners do not challenge the 1990 ACAA Rule as being inconsistent with the statute.

Petitioners argue (Pet. 28 n.4) that the Department "violated the 1986 ACAA when it failed to issue regulations addressing lavatory accessibility for '*all* passengers.'" Petitioners misquote the statute. The ACAA's "all passengers" phrase imposes a *qualification* on disability protections, as the Act requires "non-discriminatory treatment of qualified handicapped individuals *consistent with safe carriage of all passengers* on air carriers." ACAA § 3 (emphasis added). In any event, the 1990 ACAA Rule provides methods for all passengers to reach lavatories on all aircraft.

The 2016 FAA Reauthorization Act also contains no specific, mandatory directive to promulgate a final rule governing accessible lavatories. Section 2108 of that Act required the Secretary to "issue the supplemental notice of proposed rulemaking referenced in the Secretary's [June 2015 Report], and assigned Regulation Identification Number 2105-AE12." The June 2015 Report, in turn, described a "rulemaking action [that] would consider," among four other disability topics, "whether carriers should be required to provide accessible lavatories on certain new single-aisle aircraft." SA537. In short, although the Act imposes a duty to issue a *proposed* rule, it nowhere entitles petitioners to the relief they request here: a final rule.

A proposed rule is not a final rule. The Supreme Court has stressed that, because a "proposed rule [is] simply a proposal, its presence mean[s] that the Department [is] *considering* the matter; after that consideration the Department might choose to adopt the proposal or to withdraw it." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007); *see, e.g.*, *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 66 (2000) (addressing Transportation Department's "withdrawal of its proposed rule"). The Department could propose a rule governing single-aisle aircraft and then determine that no new regulation should issue, consistent with what has happened a number of times on this contentious topic. *E.g.*, 55 Fed. Reg. at 8,021 (deferring issue in 1990 ACAA Rule); 73 Fed. Reg. at 27,625 (deferring issue in 2008 AIR Act Rule). The Department could also propose that new single-aisle aircraft should *not* have accessible lavatories, with or without promulgating a final regulation. Any of those options would satisfy the 2016 FAA Reauthorization Act.

Petitioners contend (Pet. 25) that, in 2016, Congress was "evidently tired of [the Department's] endless delay in complying with its mandate" in the ACAA. But Congress nevertheless left the agency considerable discretion, as the 2016 FAA Reauthorization Act's plain language "quite clearly affords the [Department] with discretion to decide whether or not to" issue a final rule on lavatory access. *Wyoming v. U.S. Dep't of Interior*, 839 F.3d 938, 944 (10th Cir.

2016). The Act only requires the Secretary to publish a supplemental notice of proposed rulemaking—not a final rule—and there "is a heavy presumption that Congress meant what it said." *In re McGough*, 737 F.3d 1268, 1276 (10th Cir. 2013) (quotation omitted); *see* 5 U.S.C. § 553(b) (proposed rules), 553(d) (final rules). There is also no question that Congress understood how to require the Secretary to issue final rules rather than issue proposed rules, as demonstrated by Congress's successive mandates with respect to service animals. *Compare* 2016 FAA Reauthorization Act § 2108 (requiring "supplemental notice of proposed rulemaking"), *with* 2018 FAA Reauthorization Act § 437(c) (requiring "final rule"). Congress has simply chosen not to require a final rule here.

B. To The Extent That Petitioners Separately Invoke Mandamus Jurisdiction To Compel A Proposed Rule, Jurisdiction Is Unavailable In This Court

Because there is no statutory or regulatory duty to issue a final rule, this Court should deny the petition. The petition only invokes this Court's "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." Pet. 2 (emphasis added).[2] Indeed, in

[2] *See, e.g.*, Pet. 11 ("Congress has twice required the Department to issue rules[.]"), 24 ("The Secretary's unmet duty to issue the Lavatory Accessibility Rule[.]"), 27 ("The Secretary's failure to issue rules[.]"), 28 ("Twice, then, Congress has made clear that the Secretary must issue rules[.]"), 29 ("[T]he

requesting rehearing, petitioners clarified that this Court "has exclusive jurisdiction to hear a case challenging the Department's unlawful failure to issue *such a rule*." Reh'g Pet. 8 (emphasis added). As discussed above, such a petition fails.

In any event, a petition independently requesting review of whether the Secretary has unlawfully withheld or unlawfully delayed a *proposed* rule would fail for other reasons. This Court correctly concluded in its prior order that mandamus jurisdiction to compel the Secretary to issue a proposed rule—and not a final rule—rests exclusively in the district court (assuming petitioners may proceed at all). *See* Dec. 19, 2018 Order. As explained above, the All Writs Act provides courts with mandamus jurisdiction "*in aid of* their respective jurisdictions," 28 U.S.C. § 1651(a) (emphasis added), and this Court's mandamus jurisdiction is therefore limited to "protect[ing] its future jurisdiction" under 49 U.S.C. § 46110(a). *TRAC*, 750 F.2d at 76; *see Green v. Nottingham*, 90 F.3d 415, 417

Secretary has unlawfully failed to issue a rule[.]"), 29 ("[T]he Secretary has violated a mandatory statutory duty by failing to issue the Lavatory Accessibility Rule."), 35 ("statutory duty to issue such a rule"), 35 ("statutorily mandated duty to issue the Lavatory Accessibility Rule"). In the argument, only the final page contends (Pet. 37), in the alternative, that "the Department missed its statutory deadline to issue the Lavatory Accessibility Rule, or, at the very least, publish the [supplemental notice of proposed rulemaking] required by the FAA [Reauthorization] Act of 2016," but petitioner does not invoke the Court's jurisdiction on that basis. Absent a developed argument, "[s]cattered statements in the [petition] are not enough to preserve an issue." *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1134 n.4 (10th Cir. 2004).

(10th Cir. 1996). Petitioners' mandamus action in this Court is thus limited to compelling those agency actions that would be reviewable under Section 46110(a), which only covers certain *final* actions. *See Tulsa Airports*, 839 F.3d at 949.

Put another way, a mandamus action in the court of appeals is only available "to compel agency action unreasonably withheld or delayed if the putative agency action, once forthcoming, would be reviewable in this Court." *United Mine Workers of Am. v. U.S. Dep't of Labor,* 358 F.3d 40, 42 (D.C. Cir. 2004); *see Environmental Def. Fund*, 902 F.2d at 786-87 (providing mandamus jurisdiction over "petitions to compel final agency action which would only be reviewable in" this Court). Because it "is [the court of appeals'] interest in protecting its future jurisdiction that gives rise to jurisdiction," a mandamus action in this Court is unavailable where the requested agency action "is not reviewable in this Court." *Moms Against Mercury*, 483 F.3d at 827. The logic here is straightforward: just as petitioners could not challenge a proposed rule in this Court under 49 U.S.C. § 46110(a), petitioners likewise may not seek mandamus in this Court to compel a proposed rule.

In sum, mandamus jurisdiction may be available to prevent "an agency from interfering with appellate jurisdiction by unreasonably delaying a *final decision* or withdrawing *a rule* previously proposed," where those final actions

"would be reviewable in [the court of appeals]" under a direct-review statute. *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1288 (D.C. Cir. 2007) (Kavanaugh, J.) (emphases added). But an agency's failure to *propose* a rule "does not call on [the Court] to exercise that kind of authority" under the All Writs Act, because "declining to initiate the rulemaking . . . in no way interfere[s] with [the] jurisdiction" available under the proscribed direct-review statute. *Id.* Instead, parties attempting to compel such other statutory duties "have routinely gone first to district courts, and then taken appeals from final district court judgments." *Id.* This Court's prior order therefore recognized that, assuming petitioners may proceed at all, the "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the [petitioners]." 28 U.S.C. § 1361; *see* Dec. 19, 2018 Order.

C. In The Alternative, This Court Should Exercise Its Discretion To Deny Mandamus Relief

1. *This Court Should Provide The Secretary An Opportunity To Voluntarily Comply With The Statute By Issuing A Proposed Rule By December 2, 2019*

Even assuming this Court has jurisdiction to compel the issuance of a proposed rule, this Court should deny the petition because the Transportation Department has made substantial progress over the past year on that proposed rule. This Court has ample discretion in issuing a writ of mandamus, and in

dictating the content of the writ, because "the issuing court must be satisfied that the writ is appropriate." *Copar Pumice*, 714 F.3d at 1210. This Court thus "*may* issue all writs necessary or appropriate . . . and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). "The plain language of the All Writs Act establishes the permissive, non-mandatory, nature of the court's power to issue an injunction." *Bailey*, 414 F.3d at 1189. Mandamus relief is not appropriate here.

For almost a year, the Department has made substantial progress on a proposed rule, which is set to issue on December 2, 2019. Even before petitioners first sued, the Department had been engaged for months (since May 2018) with the Volpe Center in preparing the necessary economic assessments. SA9. Based on that timeline, the Secretary has continuously announced since November 2018 her intention to propose a rule no later than December 2019. SA815. That plan remains in place today. SA12-14, 936. The Department "has never decided to abandon the rulemaking effort." SA8.

When the government has "represented that the [Secretary] intends" to take action within a set timeframe, the Court should "give the [Secretary] a chance to meet that schedule." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 861 (D.C. Cir. 2008) (providing agency "six months" based on such representations despite "six years" of prior delay). This Court does not issue writs of mandamus that are

superfluous, as instances of voluntary agency compliance with a statute, on determinate schedules, are not among the "extraordinary circumstances" that warrant mandamus. *Copar Pumice*, 714 F.3d at 1210; *see United States v. Brooklier*, 685 F.2d 1162, 1173 (9th Cir. 1982) (denying mandamus where "issuance of a writ would be an empty gesture"). By December 2019, the Department expects to have voluntarily satisfied petitioners' request (Pet. 37) to "act in compliance with its statutory obligations." Mandamus relief by this Court is neither necessary nor appropriate where the agency is poised to act.

Petitioners, moreover, do not request that the Court dictate actions within a particular timeframe but rather broadly request (Pet. 30) that the Secretary "proceed expeditiously." *See* Fed. R. App. P. 21(a)(1)(B)(i) (stating that "the petition must state . . . the relief sought"); *e.g.*, *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999) (considering specific request for compliance in 30 days). Consistent with that indeterminate request for relief and with this Court's discretion, the Court should refrain from intervening until the Secretary has, at a minimum, an opportunity to act by December 2, 2019. The Court may do so either by denying the petition or by deferring a decision on the petition until that date. *See, e.g.*, *United States v. Bryan*, 393 F.2d 90, 91 (2d Cir. 1968) (per curiam).

Petitioners suggest (Pet. 28-31) that this Court has no discretion whatsoever and that "mandamus is warranted when an agency fails to comply

with a mandatory duty." This is mistaken. Petitioners conflate the question of whether the Secretary has a clear nondiscretionary duty with the question of whether this Court has discretion to issue the writ, and mandamus relief is premised on both requirements. *Copar Pumice*, 714 F.3d at 1210. The Supreme Court has thus made clear that "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances," which is its own inquiry. *Cheney*, 542 U.S. at 381.

Petitioners' only support (Pet. 29-31) for the proposition that this Court lacks discretion is the Court's decision in *Forest Guardians*, 174 F.3d 1178. But *Forest Guardians* relied on the Administrative Procedure Act's language that a "reviewing court *shall* . . . compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1) (emphasis added), which is distinct from the discretion afforded by the "plain language of the All Writs Act [that] establishes the permissive, non-mandatory, nature of the court's power to issue an injunction." *Bailey*, 414 F.3d at 1189. *Forest Guardians*, moreover, itself reaffirmed that "mandamus cases . . . inherently involve court discretion." 174 F.3d at 1187. And that decision, in any event, recognized that, even if "the Secretary must be ordered to comply with his statutory duty," an exercise of discretion is still warranted because "any order now to impose a new deadline for compliance must consider what work is necessary to [complete the duty] and

how quickly that can be accomplished." *Id.* Similar considerations counsel against relief here.

2. *Petitioners Have Not Established That Mandamus Relief Is A Proper Exercise Of This Court's Discretion*

Petitioners argue (Pet. 30-37) that, if this Court has discretion, then the Court should also consult the six factors set forth by the D.C. Circuit in *TRAC*. Under *TRAC*, this Court has discretion to control "the time agencies take to make decisions [under] a 'rule of reason'" (factor one), and the "statutory scheme may supply content for this rule of reason" (factor two). 750 F.2d at 80. As explained, it is reasonable for this Court to provide the Secretary an opportunity to voluntarily comply with the statute. *Core Commc'ns*, 531 F.3d at 861; *see In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (finding "no *per se* rule as to how long is too long"). Under the remaining four *TRAC* factors, this Court must also balance the interests of the Department with the interests of the public, and those interests also point in the same direction.

a. This Court must "consider the effect of expediting delayed action on agency activities of a higher or competing priority" (factor four) and whether there is "any impropriety lurking behind agency lassitude" (factor six). *TRAC*, 750 F.2d at 80. Here, legitimate governmental interests inform both those factors.

Notably, lavatory access was not Congress's singular focus in the 2016 FAA Reauthorization Act, which designated several other disability topics,

including service animals. The Department began with the issue of service animals—following another organization's December 2017 petition for rulemaking—by issuing a May 2018 advance notice of proposed rulemaking. *See* 83 Fed. Reg. 23,832. Consumer complaints regarding service animals were "the fourth largest disability complaint area" between 2016 and 2017, *id.* at 23,834-35, and airlines had "become increasingly concerned that untrained service animals pose[d] a risk to the health and safety of its crewmembers and passengers," 83 Fed. Reg. at 23,805. In 2016, for instance, there were 92 complaints regarding general aircraft accessibility but over 2,400 complaints regarding service animals. SA625.

Mandamus relief would not only require the Department to reorder its disability priorities, but it would also engraft priorities that contradict those that Congress imposed. Two years following the 2016 Act, Congress enacted Section 437 of the 2018 FAA Reauthorization Act, which expressly requires the Secretary to "issue a final rule" regarding service animals by April 2020 and to consider various substantive issues in doing so. By contrast, that subsequent 2018 Act did not require a final rule on lavatory access; it required only a Comptroller General report on aircraft lavatories. *See* 2018 FAA Reauthorization Act § 426. This Court may thus reject petitioners' "mandamus claims that would have . . . the effect of allowing [them] to jump the line, functionally solving their delay problem at the

expense of other similarly situated [persons]." *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192 (D.C. Cir. 2016). In particular, granting the mandamus here would improperly prioritize petitioners' lavatory-access concern over other clear congressional priorities. Although petitioners may believe (Pet. 35) that lavatories should be the "top priority" among the Department's "policy goal[s]," that is not how Congress saw the situation.

In addition, the Department's delays have benign explanations, as the Department "has always intended to issue" a proposed rule "and has never decided to abandon the rulemaking effort." SA8. After awaiting the ACCESS Committee's resolution and transitioning to a new Administration, the Department announced its intention to proceed with the lavatory issue at the first opportunity. SA720 (August 2017 Report). The further delay resulted from difficulties in coordinating the required economic analyses that must precede a proposed rule. SA815. As the ACCESS Committee well understood, the Department needed a "Regulatory Impact Analysis," SA597, and such analyses must be "conducted by economists and other experts," SA7. But because the Office handling the proposed rule did not have a staff economist, and was unable to recruit others at the Department, that Office "could not even begin the significant economic analysis that must precede issuance" of a proposed rule. SA9. The Department therefore entered into a contract and paid funds to the

Volpe Center in May 2018, and that analysis has been ongoing since July 2018. SA9. The Department also plans to proceed following that required analysis.

Petitioners respond (Pet. 37) that the "Department's manifest bad faith here is striking," because the Department allegedly removed the lavatory-access issue from the Fall 2018 Unified Agenda, "making clear its intention to simply ignore Congress's command." That is incorrect. The Fall 2018 Unified Agenda contains the issue. SA836. So do the Spring 2018 Unified Agenda, the Spring and Fall 2017 Unified Agendas, and the Department's monthly reports. SA13; *e.g.*, SA720, 815, 936. Petitioners relatedly contend (Pet. 9, 26) that the Department "has no plans to move forward on the rule anytime soon" because the issue is listed under the Department's "Long-Term Actions." SA836. But that "designation in no way indicates an intent to abandon the rulemaking," because "Long-Term Actions are *active* rulemakings for which an agency does not expect to take a regulatory action within the 12 months." SA13.

b. Nor does the public interest necessitate a faster schedule. This Court may consider whether "human health and welfare are at stake" (factor three) and "the nature and extent of the interests prejudiced by delay" (factor five). *TRAC*, 750 F.2d at 80. Those factors do not bolster petitioners' case.

Here, maintaining the status quo regarding single-aisle aircraft that has prevailed since the 1990 ACAA Rule—at least until any proposed changes in

December 2019—does not work a significant additional harm in light of the Department's preparations. That prior rule created options for accessing lavatories on all aircraft, and those options remain in place. *See* 14 C.F.R. §§ 382.63, 382.65 (2019). The government does not doubt petitioners' description (Pet. 32-33) of the difficulties that individuals with disabilities face under the current rule, but extraordinary intervention by this Court to alter the date of a proposed rule by a few months is not warranted.

Last, this Court should consider the broader harms to the public of expediting the process beyond the Secretary's current timeline. The Department is using the next several months to obtain a Volpe Center analysis that informs the public about potential costs and benefits, to consider the onboard-wheelchair issue that the ACCESS Committee thought should precede any rulemaking, and to prepare a well-considered proposed rule. Such careful consideration is in the public interest to ensure the soundest proposal possible. Mandamus relief requiring additional expedition would only undermine aspects of that process. And relief would further damage the public interest by diverting resources from other agency obligations. *E.g.*, SA2-3, 9-12. A writ of mandamus is not appropriate here.

CONCLUSION

The petition for a writ of mandamus to compel the Secretary to issue a final rule should be denied, and any petition to compel a proposed rule should be dismissed for lack of jurisdiction. In the alternative, the Court should deny relief or may wish to defer a decision on the petition pending the proposed rule's projected date of December 2, 2019.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The government believes that oral argument would be of assistance to this Court and respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 21(d)(1) because it contains 7,795 words. This brief 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 DIGITAL SUBMISSION

I hereby certify that (1) all required privacy redactions have been made; (2) any paper copies of this document submitted to the Court are exact copies of the version filed electronically; and (3) the electronic submission was scanned for viruses and found to be virus-free.

s/ Dennis Fan
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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